COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2084CV00450

ANTHONY AND MARGARET OATES, ET AL.

vs.

BLUEHUB CAPITAL, INC., ET AL.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In 2009, defendant BlueHub Capital, Inc. ("BH"), formerly known as Boston Community Capital, Inc, created the Stabilizing Urban Neighborhoods Initiative ("SUN Initiative" or "SUN Program"). BH is a Massachusetts nonprofit development organization and a holding entity that provides strategic and management direction to two nonprofit affiliates, defendants Aura Mortgage Advisors, LLC ("Aura") and NSP Residential, LLC ("NSP"). The SUN Initiative purports to assist individuals facing foreclosure. To provide such assistance, NSP buys a home at or after foreclosure, which fully releases the homeowner from the original mortgage. Thereafter, it sells the home back to the original owner in exchange for 25% above what NSP paid for the home – a markup described as a "loan loss reserve" ("LLR"). The homeowner uses a fixed-rate mortgage loan provided by Aura to pay the NSP sale price. If NPS's repurchase of the home results in the reduction of the principal balance on the original mortgage, the homeowner also executes a shared appreciation promissory note ("SA Note") secured by a corresponding secured appreciation mortgage ("SAM"), which is held by NSP. SAMs are second mortgages obligating SUN Initiative participants to pay a percentage of any future appreciation to NSP at the time of sale, refinancing, or other maturity event.[1]

Plaintiffs are individuals who, facing the loss of their homes through foreclosure and hoping to preserve them, participated in the SUN Initiative and granted a fixed rate mortgage to Aura and a SAM to NSP.[2] Among other things, Plaintiffs assert that the SAMs were unfair and inadequately disclosed at the time of the loan transaction in violation of the Massachusetts Consumer Credit Cost Disclosure Act ("MCCCDA"), G. L. c. 140D, and G. L. c. 93A; that Defendants failed to include the LLR in determining whether their loans were "high cost" loans under the Massachusetts Predatory Home Loan Practices Statute, G. L. c. 183C, and so violated that statute; and that Defendants otherwise engaged in tortious action. In their First Amended Complaint ("FAC"), Plaintiffs bring claims against BH, Aura, and NSP for injunctive and declaratory relief (Count I); violation of G. L. c. 93A, § 9 (Count II); violation of the MCCCDA (Count III); violation of G. L. c. 183C (Count IV); unconscionability (Count V); fraudulent and negligent misrepresentation (Count VI); breach of contract (Count VII); breach of the implied covenant of good faith and fair dealing (Count VIII); lack of consideration (Count IX); breach of fiduciary duty (Count X); and civil conspiracy (Count XI).

In a Counterclaim, Defendants seek a declaratory judgment under G. L. c. 231A, § 1 that the challenged activities of the SUN Initiative comply with applicable laws and regulations; that the agreements entered with Aura and NSP in connection with the SUN Program are lawful and fully enforceable; and that Plaintiffs are otherwise not entitled to the relief they seek.

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[1] As noted above, the SAM is involved only where a sale/buy-back transaction results in a reduction in principal. This action involves plaintiffs whose principal balances were reduced and therefore had SAMs.

[2] Some plaintiffs have since refinanced and/or sold their homes, and no longer have mortgages with Aura or NSP.

Both sides now seek summary judgment, at least in part. Plaintiffs move for partial summary judgment on liability on their claims for violation of Chapter 93A (Count II); violation of the MCCCDA (Count III); and violation of Chapter 183C (Count IV).[3] Plaintiffs also seek an injunction invalidating a confidentiality provision contained in the SA Note.[4]

For their part, Defendants seek summary judgment on all claims on a host of grounds, including that a 2024 amendment to G. L. c. 244, § 35C, see St. 2024, c. 238, § 269, retroactively applies to this case and eliminates liability under several of Plaintiffs' theories; that the Aura and NSP transactions complied with the MCCCDA and G. L. c. 183C and were otherwise lawful; and that the tort claims asserted by Plaintiffs Maureen and Robert Cormier and all claims asserted by Plaintiffs Ursula Humes, Nardella Thomas, Anthony and Margaret Oates, Carlos Perdomo and Rosa Ochoa,[5] and Cheryl and Dante Ortiz are time-barred.

As explained below, the Court concludes that the amendment to G. L. c. 244, § 35C does not operate retroactively. Further, on the merits, the Court agrees with Plaintiffs that their execution of the mortgage and promissory note with Aura and the SA Note and SAM with NSP should be viewed as a single transaction under the federal Truth in Lending Act ("TILA"), [6] and that therefore Defendants (1) failed to comply with their disclosure obligations under the MCCCDA; (2) affirmatively misrepresented to borrowers that the SUN Initiative had neither a balloon payment nor negative amortization terms; (3) provided "high cost" loans under Chapter 183C through use of the LLR, which resulted in a violation of that statute; and (4) engaged in

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[3] They specifically seek a ruling that all Defendants' loans are high-cost loans that violate the statute.
[4] Plaintiffs originally also moved for an injunction concerning allegedly false or misleading advertisements and public relations materials but in their reply brief they conceded that summary judgment was inappropriate on this point.
[5] For ease of reference, these plaintiffs are hereinafter referred to collectively as the "Perdomos."
[6] In so ruling, the Court rejects, among other arguments, that NSP engaged in a separate transaction from Aura and therefore is not a creditor under TILA such that the SAM is not subject to the statute.

unfair and/or deceptive practices. However, contrary to Plaintiffs' contentions, the Court also concludes that (1) if the SUN Initiative is viewed as involving a single transaction, there was no lack of consideration or breach of the implied covenant; (2) the transaction at issue was not unconscionable given the absence of procedural unconscionability; (3) with regard to Humes, Thomas, the Oateses, the Perdomos, and the Ortizes, only their breach of contract and breach of fiduciary duty claims can proceed; and (4) the Cormiers' fraudulent/negligent misrepresentation and conspiracy claims are time-barred.

Accordingly,

1. Plaintiffs' motion for summary judgment is **ALLOWED** as to liability with respect to their claims under G. L. c. 93A, § 9 to the extent it is grounded on violation of the MCCCDA or G. L. c. 183C (Count II); the MCCCDA (Count III); and G. L. c. 183C (Count IV), as brought by the Cormiers, Francis and Debra DeSimone, Ronald and Christine Dolat, Cheryl and Peter L'Ecuyer, and Larry and Marlene Meilleur;[7]
2. Plaintiffs' related request for an injunction is **DENIED**;
3. Defendants motion for summary judgment for a declaration is **ALLOWED IN PART** as to:
    a. Plaintiffs' claims for unconscionability (Count V), breach of the implied covenant of good faith and fair dealing (Count VIII), and lack of consideration (Count IX);

[7] In a footnote in connection with the Chapter 140D claim, Defendants suggest that Plaintiffs do not articulate a theory under which BH, not a party to the transactions, violated the statute. But Defendants failed to develop this argument, in connection with Chapter 140D or otherwise, and the facts as detailed below support the conclusion that BH acted in concert with Aura and NSP with respect to the transactions at issue and evidently made statements regarding the SUN Initiative that are central to Plaintiffs' claims. Accordingly, in the absence of further development of this argument, the Court does not address it further.

b. the claims brought by Humes, the Oateses, Thomas, the Perdomos, and the Ortizes on Counts II-IV, VI, and XI; and

c. the claims brought by the Cormiers on Counts VI and XI.

BACKGROUND

I. Facts Adduced by Plaintiffs in Support of Their Motion

A. Overview of the SUN Initiative

On January 27, 2006, the BH Board of Directors authorized the creation of a "mortgage brokerage business." Aura was formed as of August 29, 2006, under the name "BCC Mortgage LLC." NSP was formed as of October 30, 2008. Defendants created these two entities, at least in part, to legally separate the initiative's mortgage lending and acquisition functions.

Aura and NSP are both owned by BH. They have the same officers/directors and have the same Manager, Elyse Cherry, who is BH's CEO. NSP and Aura have the same address and telephone number. All SUN equipment, supplies, and vehicles are owned by BH. BH is the employer of all Aura and NSP employees and issues W-2 forms and pays social security and unemployment insurance for them. According to the SUN Customer Service Manager, all staff work in the same Boston office and consider themselves SUN staff; all communications concerning the SUN Initiative reference Aura; no employee introduces themselves as an employee of NSP; and no employee answers the telephone by referencing NSP (they instead answer the telephone referencing the SUN Initiative). Additionally, the manager has never seen any NSP letterhead, and he has answered the phone with the phrase "Aura Mortgage Advisors."

Aura is a licensed mortgage broker and the lender that provided first-mortgage loans to Plaintiffs. Aura is subject to routine audits by the Massachusetts Division of Banks.

NSP is a licensed real estate broker that buys and sells properties as part of the SUN Initiative. NSP is also a mortgage broker/mortgage originator, which refers borrowers to Aura. According to Aura's "Procedures Manual," the "majority of loans originated by AURA Mortgage will be the result of a referral from NSP." NSP is described as the entity that acquires the homes and sells them back to homeowners under the SUN Initiative.

Aura prequalifies applicants seeking assistance from the SUN Initiative, underwrites the loan applications, and takes applicants through the pre-approval and approval processes, which can take months or as long as two years. Each SUN applicant signs Aura's "Authorization To Release Information."

Once applicants are pre-approved, NSP negotiates to buy the applicants' home at or below its current distressed market value. If the homes have already been foreclosed upon, NSP negotiates directly with the current lender/servicer-owner. When NSP sells the home back to the SUN Initiative participant, it ordinarily marks-up the sale price it paid to acquire the property by 25%. This price adjustment is described as a loan loss reserve, or LLR. Assuming final loan approval, Aura makes 30-year fixed rate mortgage loans to SUN Initiative participants to re-purchase their homes back from NSP. If the repurchase results in the reduction of their prior mortgage loan principal balances, SUN Initiative participants also execute an SA Note with NSP secured by a corresponding SAM. Most, if not all, SUN Initiative participants, and all plaintiffs here, who have outstanding Aura mortgages also have or had a SAM with NSP.

Every SUN borrower signs a Uniform Residential Loan Application requesting a single "conventional" fixed rate mortgage loan. The application is typed by SUN staff and inmost if not all cases identifies the borrower as presently owning the home or having recently owned the home, and as applying for a "purchase loan." The application does not reference a loan with variable, balloon, or negative amortization features. In addition to the application, borrowers sign certifications that they have applied for a mortgage with Aura.

SAMs obligate SUN Initiative participants to pay a percentage of any future appreciation to NSP at the time of sale, refinancing, or other maturity event. SUN Initiative participants do not borrow any money in connection with the SAM, they do not make any periodic payments of either principal or interest on the SAMs, and they do not submit a written application or otherwise apply for a mortgage from NSP. For instance, the SAM granted to NSP by the Cormiers references the mortgage with Aura and the SUN Initiative, and states the borrower shall grant "the Lender," defined as NSP, an appreciation interest in the property by executing the SA Note. The SA Note likewise identifies NSP as a "Lender." The same is true for other plaintiffs, although some SAMs use different language; for the Humes, Oateses, Ortizes, Perdomos, and Thomas, the SAM identify NPS as the "Grantee." These documents are consistent with those signed by other participants in the SUN Initiative. Indeed, the SA Notes provided by Plaintiffs each identify NSP as a "Lender." All deeds from NSP to Plaintiffs contain "in full consideration" language, and at least through December 28, 2010, the date of Humes' deed, were executed under seal. All fixed rate notes from Plaintiffs to Aura and all SAMs from Plaintiffs to NPS were signed under seal.

The files from the earliest SUN borrowers (Malika Crichlow and Jesula Jules in July 2009) do not contain any disclosure form or description of the SAM. The earliest disclosure form was made available to Humes in 2010. This form was given to borrowers once, as part of the SUN application package. The two disclosures provided to the L'Ecuyers show that Defendants started using a new form in April 2013 and revised the form in February 2019.

Starting in April 2013, the disclosure forms were typically given to borrowers as part of the application package and as part of the closing package.

None of the TILA disclosures given by Defendants to SUN borrowers reference the SAM or the SA Note. References in the TILA documents to whether there was a "balloon payment," "pre-payment penalty," or "can your interest rate rise," "even if you make payments on time, can your loan balance rise," were answered in the negative by SUN staff.[8] The TILA disclosures relate *only* to the terms of the Aura loan, which does not contain a balloon payment or negative amortization. Defendants do not contend that the disclosures made in connection with the SA Note or SAM were made to comply with TILA, which the Defendants contend do not apply to either agreement.

The Aura mortgage and the NSP SAM were completed and executed by Plaintiffs during the same closing. Defendants were represented by the same counsel at the closing.

Defendants did not include the LLR in determining whether their loans were "high cost" loans under Chapter 183C.

B. Originating and Processing Promissory Notes and Mortgages

Aura manages the loan origination process. It takes the loan application; prepares the documents for application; conducts any loan application interview; processes the loan; makes the loan decisions; underwrites; and engages in pre-closing and closing activities, TILA disclosures, disclosure of the SAM, and loan servicing. With respect to quality control for the SAM and SA Note, Aura's Quality/Closing manager reviews the SAM and SA Note to ensure

[8] At some point between October 31, 2013, and June 20, 2016, Defendants changed the SAM by removing certain option language and adding a credit based on capital improvements against shared appreciation owed. The SA Note changed in the same time period to state that the SAM is due on refinancing.

accurate buyer names, dates, maturity dates, and accurate statement of buyer/lender share in appreciation is stated.

The SA Note and the SAM each have a cross-default clause that makes any default of the Aura mortgage loan a default of the SA Note and the SAM.

As described in more detail below, after closing, each of the Plaintiffs signed a number of documents. One of them, the Affiliated Business Relationship Disclosure, states that "NSP negotiates for and purchases properties for resale to homeowners and may act as a real estate agent to facilitate the transaction, while Aura provides mortgage loans." Another, the "How The Shared Appreciation Mortgage Works" disclosure, states that "[y]ou will be required to sign an additional Shared Appreciation Mortgage and Note mandating that any increase in value of your property at the time of a future sale or refinance is shared between you and NSP Residential, LLC ('NSP') which buys and sells properties for the SUN initiative."

C. Post-Loan Closing and Paying the SAM

Aura services the SAMs and sends letters informing borrowers paying off their Aura loan that they also have a SAM and to contact Aura Customer Relations to calculate the NSP's SAM payoff. When a SUN Initiative participant asks for a payoff statement for an Aura loan, Aura's customer relations department also generates a statement directing the participant to follow up with information to allow calculation of the NSP SAM payoff. The payoff notices to SUN borrowers instruct them to send the payoff funds to the account of "Aura Mortgage Advisors" at East Boston Savings Bank. There were no directions for any payment to be made to NSP.

All SAM collection letters go out on BH or Aura letterhead.

The SAM documents call for the SA Note to be paid upon a maturity event (as defined in the note), including events that would trigger repayment of the Aura mortgage. At the refinancing of an Aura mortgage and the payoff of the NSP SAM, amounts are wired to Aura, which then transfers the funds to NSP. In the event a borrower is in default of the Aura mortgage and Aura forecloses, NSP assigns the SAM to Aura.

SUN CFO Lisa Zappala testified that "[t]here aren't any formal terms between any of the related affiliates," i.e., NSP and Aura, to repay obligations between them.

D. The First SUN Loans

The first SUN closing occurred on February 10, 2009, with borrower Malika Crichlow. She sold her home to NSP on January 28, 2009 for $123,000 and purchased it back from NSP on February 10, 2009 for $153,750. Her loan application shows that she applied for a single loan from Aura in the amount of $161,930, with a fixed interest rate and a 30-year term. Crichlow granted a mortgage to Aura in connection with the fixed rate loan. The fixed rate loan note with Aura contained no reference to a balloon payment or negative amortization and stated that the borrower would make 637 bi-monthly payments of $511.76 and a final payment of $90.30 (i.e., a 30-year term). Crichlow also granted a SAM to Aura. The SA Note with Aura stated that "Lender's" share was 50%. Neither the Good Faith Estimate nor the Settlement Statement provided to Crichlow referenced the SAM.

Another closing occurred in July 2009 and involved Sackie Freeman and Jesula Jules. Aura again was granted both mortgages. The Good Faith Estimate and Closing Disclosures provided to them made no reference to the SAM.

There are no SUN or other borrower disclosures in the Crichlow or Freeman/Jules files that refer to shared appreciation.

Effective January 1, 2010, HUD published new mortgage disclosure rules and new disclosure forms. Documents from secondary sources compiled prior to the effective date in

Defendants' file indicate that Defendants were aware that the forms were intended to help consumers select the lowest cost loan and provide clear information regarding balloon payments and negative amortization.

E. <u>Soliciting Clients</u>

Defendants initially reached potential SUN borrowers through widely disseminated flyers and outreach with community activist groups. At least some of the flyers produced by Defendants omitted mention of the SAM and/or contained statements that "[t]here are never balloon payments," and "[y]ou don't have to pay anything on that second mortgage until you sell the house." The Cormiers, for example, received a 2016 SUN flyer that stated that the interest rates for the SUN Initiative are fixed for 30 years and there are never balloon payments, and that the borrower does not have to pay anything on the second mortgage until the house is sold. The flyer further provided that upon such sale: "SUN is entitled to a percentage of the profits equal to the reduction in the original mortgage amount. For example, if your original mortgage was $400,000 and your SUN mortgage is $200,000, your new mortgage represents 50% of your original mortgage. If you sell your house for $250,000, SUN is entitled to 50% of the proceeds over $200,000, or $25,000." The flyer did not discuss the 25% LLR.

F. <u>Acceptance Into the SUN Initiative and Negotiations with the Prior Lender</u>

Between February 10, 2009 and the present, Defendants have closed approximately 970 residential mortgage loans. Borrowers are only eligible for the SUN Initiative if they show a real hardship and can also demonstrate that they will be able to keep up with the prospective new mortgage payments. As explained in the flyer the Cormiers received, the SUN Initiative is "intended only for individuals whose homes are facing foreclosure because they can no longer make their monthly mortgage payments due to some hardship."

Included in the application package from Defendants is the initial Truth-In-Lending Good Faith Estimate Form disclosure, which purports to identify the actual expected cost of the loan. The Good Faith Estimate has never referenced or suggested the existence of the second mortgage, the 25% LLR, payment of shared appreciation, or any balloon payment or negative amortization terms. It only provides information related to the Aura loan.

Once a borrower has progressed through the application process and underwriting, the borrower enters the negotiation stage of the program. Defendants' goal is to buy the home at or below the distressed market value to avoid a new mortgage that is underwater once the 25% mark-up is applied and closing costs and any needed repairs are rolled in. Their staff "Negotiator" works directly with the borrower "client" to convince the prior lender to release its mortgage at a 25% discount from the home's distressed fair market value. The SUN Negotiator determines the offer and counter offer prices but stays in contact with the client throughout the negotiation process. The Negotiator also coordinates the closing for purchasing the property and oversees for the client all aspects of the negotiations and the closing.

G. <u>The Closing</u>

The SUN Initiative Operations Manuals from 2013, 2015, and 2017 state that "[a]ll loans made under the SUN program include the 30-year fixed rate first mortgage and a Shared Appreciation zero-interest second mortgage." Every purchase and sale agreement provides that the NSP/borrower purchase is contingent upon the borrower getting the Aura loan.

The closing documents included the SA Note. As reflected in Humes' SA Note from 2010 and the Dolats' SA Note from 2019, the promissory note provided to borrowers states that for value received, the borrower promises to pay NSP, the "Lender," the "Lender's Share of Appreciation," as defined in the note. The SA Note also states "Lender" has "the right, at its option, except as prohibited by law" to call the note. Between October 31, 2013, and June 29, 2016, the language of the SA Note changed, informing borrowers that the shared appreciation would be owed at refinancing.

The SA Note provided to Plaintiffs was the single document that identified the percentage of appreciation NPS could obtain. In Humes' and the Dolats' SA Notes, the "Lender's Share" was filled in (51.7% for Humes and 51% for the Dolats), and both Humes and the Dolats signed Shared Appreciation Disclosures that provided the formula by which the shared appreciation percentages would be calculated.

As reflected in the notes from Humes and the Dolats, directly above where the borrower signed, the SA Note provided to borrowers contains the following confidentiality provision:

> 12. Confidentiality. Borrower acknowledges and agrees that all of the terms of financing discussed by Holder and Borrower as well as the terms and provisions incorporated herein are strictly confidential, and Borrower agrees not to disclose such terms to any person or entity whatsoever other than (a) disclosure to Borrower's legal counsel and financial advisors, provided such person or persons agree to be bound by the foregoing confidentiality provision, (b) such information as is required to be disclosed by Borrower by legal process or by a governmental or quasi-governmental entity that requires such disclosure and is authorized to require such disclosure and (c) in any legal proceeding to which Lender and Borrower are parties. This confidentiality agreement shall survive the Maturity Date.

None of Defendants' various witnesses could explain the purpose for this provision, and Defendants stated in an interrogatory answer that they "are not aware of any purpose or rationale for the confidentiality term in the NSP shared appreciation note."

From February 10, 2009, SUN's first closing, until August 2009, when Aura stopped being the SAM lender, there was no SUN form disclosure. At some point between August 28, 2009, when NSP became the SAM Lender, until mid-April, 2013, Defendants provided borrowers with a form disclosure titled "Shared Appreciation Mortgage Disclosure Statement"

("Disclosure 1"), a two-page document which, among other things, stated that "[e]veryone who obtains a Mortgage Loan through AURA MORTGAGE ADVISERS, LLC which requires a SAM is required to acknowledge at the time of pre application that they have read this disclosure statement and understand the restrictions imposed on them during the time they own their home and in the event they decide to sell their home." The disclosure further stated that NSP is the entity that has the right to collect or demand payment of the SAM and added that Aura has a business relationship with NSP in that both are subsidiaries of BH. Disclosure 1 was provided to the borrower on a single occasion as part of the application package, together with approximately twenty other documents.

Besides the Good Faith Estimate, discussed below, this package also included a lengthy HUD pamphlet. It warned the borrower against loans that contained a balloon payment or negative amortization and also contained a form disclosure for a loan without balloon payment or negative amortization.[9] There was nothing stated in Disclosure 1 or anywhere else in the application package to suggest that the borrowers' transaction included either a balloon payment or negative amortization. The Uniform Residential Loan Application form prepared by Defendants checked off "conventional loan."

A new disclosure ("Disclosure 2") replaced Disclosure 1 around April 16, 2013. One version of Disclosure 2 was provided to the Cormiers. The disclosure explained how a SAM worked; made clear that participants in the SUN Initiative were required to sign a SAM and SA Note; and stated that these documents "mandat[e] that any increase in the value of your property at the time of a future sale or refinance is shared between you and NSP Residential, LLC

[9] BH's Rule 30(b)(6) witness testified that it was possible the SAM could result in negative amortization in that, as a home increases in value, the lender share of the SAM would increase over time, but contended the SAM was not a negative amortization loan because the SAM was separate from the Aura mortgage.

('NSP'), which buys and sells properties for the SUN Initiative" and that NSP's share would "be reinvested in the SUN program to help others." Although the disclosure referred to both NSP and Aura, they were not identified as independent actors and the disclosure framed both the Aura loan and the SAM as part of a single, unified program.

Another version of Disclosure 2 was provided to the DeSimones in 2015. In a section titled "How Our Program Works," it described the "SUN Initiative" as a single program with two parts, NSP, which "[b]uys and sells properties" and Aura, which "[p]rovides mortgage loans," and explained that *"[w]e* will attempt to purchase your home either from you through a short sale or from the bank that has foreclosed upon you. *We* will then sell the property back to you with a new, affordable mortgage." (Emphasis added). In a section titled, "Shared Appreciation Mortgage and Note," the disclosure further provided: "You will need to sign an additional mortgage and note at your closing called a 'Shared Appreciation Mortgage and Note.' These require that any increase in the value of your property at the time of your future sale or refinance is shared between you and *our program* based on how much *we* are able to lower your mortgage payment. *SUN's share* will be reinvested in the program to help others." (Emphasis added).

Disclosures 1 and 2 were not TILA forms and did not contain information required by TILA.

The TILA Good Faith Estimate provided to borrowers and in use through 2009 stated that the "type of loan" was "conventional" and that the total amount of the loan was a fixed amount. It did not state that there was a "Second Mortgage (Subordinate Financing)" or otherwise show that there would be a second mortgage. Defendants did not include or provide any information in the Good Faith Estimate in use through 2009 about the SA Note or the SAM.

The Good Faith Estimate in use from January 1, 2010 through October 2, 2015 likewise did not disclose the SAM and checked "no" on the boxes titled: "Can your interest rate rise?"; "Even if you make payments on time, can your loan balance rise?"; "Does your loan have a prepayment penalty?"; "Does your loan have a balloon payment?"

The Good Faith Estimate that in use beginning October 3, 2015 stated on the first page in bold, that the loan did not have a "Balloon Payment" or "Prepayment Penalty" and the mortgage was "Fixed Rate" rather than "Balloon Payment Fixed Rate," and checked the Balloon Payment box "no."

Borrowers would get at closing or before closing a HUD-1 Settlement Statement (effective through December 31, 2009), the federal Truth-In-Lending Disclosure Statement (effective through October 2, 2015), or the Closing Disclosure (effective October 3, 2015, to the present). The HUD-1 Settlement Statements purported to provide the total interest to be paid pursuant to the fixed rate loan, did not include the SAM payment, and did not show a Balloon Payment or Prepayment Penalty. The Closing Disclosures contained the cost and other terms of the fixed rate loan, but never included the SAM or the LLR as a fee or cost, and never stated that the SUN transaction had or could have a balloon payment or negative amortization.

Defendants provided all borrowers at closing with an amortization table showing 359 even payments and one final payment, which payments did not include the SAM. The annual percentage rate and finance charge did not include the SAM.

H. <u>Defendants' Compliance Program</u>

Defendants' compliance efforts as they related to the federal Truth-In-Lending Disclosure Statement, Good Faith Estimates, and other disclosures required by federal law and applicable state law, including the law concerning "predatory" or high cost loans, were limited to Aura's first-lien mortgage loans, not the SAMs.

I. SUN's Loan Loss Reserve

Aura maintains LLRs for its mortgages equal to 25% of the purchase price of its borrowers' homes. The SUN Operations Manuals explain that the LLR was created in response to investors "who required ... a loan loss reserve to mitigate the risk of the entire portfolio of [SUN] loans." The LLRs are maintained in a Loan Loss account.

In a speech from October 2009, BH's CEO, Elyse Cherry, described an LLR as a "reserve against future loan losses." Likewise Defendants' financial statements, which present the LLRs as a loss reserve, provide that the reserves are available as a source to repay financing obligations in the event of non-payment of loans receivable. Moreover, SUN documents repeatedly contained the following language: "25% note reserves to protect against loan losses and market downturns"; "loan loss reserve ... mitigate[s] the risk of the entire portfolio of loans"; "25% note reserves to protect against loan losses and market downturns"; "providing significant loan loss and borrowers' reserves to address future payment and/or default issues"; "Loan Loss Reserves (LLRs) are types of insurance and credit enhancement that help banks and lenders mitigate estimated losses on loans in the event of defaults or non-payments"; "equivalent to mortgage insurance"; "A 25% mark-up over our acquisition price, ... creates an individual loan loss reserve for each mortgage." Over time, the LLR is released into income if the loan is paid off. Defendants do not include the LLR in calculating whether their loans are high cost.

J. Defendants' Statements Regarding the SAM as a Balloon Payment

In March 2008, Patricia Hanratty and Joanne McClatchy outlined a proposed pilot program as including a second mortgage simultaneous with a first mortgage that would be a "[b]alloon payment triggered on a sliding scale based on the value at resale or refinance." Also in March 2008, Hanratty and Elise Cherry described the second mortgage as a balloon payment providing profit for the project. Another document from the same period stated that the program would "allow existing homeowners to retain their homes by splitting the homeowner's current mortgage debt into … 1st and 2nd mortgages" and that the second mortgage would have a balloon payment based on the value at resale or refinance. Consistent with these statements, in February 2009, the Aura Business Plan stated that SAM would be "retained for future upside profit potential."

In 2016-2017, three top executives of SUN, including Cherry and COO Sharon Shepard, recognized the SAM as a balloon payment that created difficulty for borrowers attempting to refinance. At one point, Shepard wrote: "We've had a number of borrowers ask us what happens to the SAM if they pay the mortgage in full over 30 year[s]. Our recommendation is to release the SAM at that time. If we don't, it effectively acts like a balloon payment creating all the challenges that come with that structure." The recommendations were not implemented.

Despite the above, Defendants affirmatively denied to borrowers that their program had either balloon payment or negative amortization terms. Nowhere in any disclosure or description of the SUN Initiative was there any indication that the loan transaction included a balloon payment or negative amortization. Defendants' underwriting of their loans made no reference to balloon payments or negative amortization. As stated above, Defendants never checked the balloon payment box or negative amortization box "yes" on any of the standard TILA forms. Every SUN borrower received an amortization schedule showing the 360 monthly payments that constituted the 30-year loan but did not include future appreciation of the SAM.

K. Defendants' Response to Plaintiffs' Chapter 93A Demand

Plaintiffs served their G. L. c. 93A, § 9 demand letter on Defendants on December 6, 2019. In response, Defendants proposed to release Plaintiffs from their loan obligations if Plaintiffs would convey their homes to Defendants "broom clean and unoccupied." In short, they proposed to take 100% of the appreciation plus the home.

II. Facts Adduced by Defendants in Support of Their Motion

A. The Cormiers

On October 7, 2015, the Cormiers submitted a Uniform Residential Loan Application to Aura. On that date, the Cormiers signed the "Massachusetts SUN Initiative Important Program Terms & Disclosures" form; "How the Shared Appreciation Mortgage Works" disclosure; the "Massachusetts Addendum to Uniform Residential Loan Application"; the "Affiliated Business Relationship Disclosure"; and a "Federal Truth-In-Lending Disclosure Statement."

On November 10, 2015, the SUN Initiative wrote to the Cormiers informing them that they were cleared for negotiations.

On November 18, 2015, the Cormiers and NSP entered into a Purchase and Sale Agreement whereby the Cormiers would sell their home to NSP, and then a second Purchase and Sale Agreement whereby NSP would sell the home back to the Cormiers. Parallel to the SUN Program process, the Cormiers were also considering a proposed loan modification from Fannie Mae.

On June 29, 2016, the Cormiers attended their closing at BH's offices. At the closing, the Cormiers reviewed and in many cases signed several documents, including another "How the Shared Appreciation Works" disclosure; a "Massachusetts SUN Initiative Important Program Terms & Disclosures" form; another "Federal Truth-In-Lending Disclosure Statement"; a "Good

Faith Estimate"; a Promissory Note and Mortgage with Aura; an SA Note and SAM with NSP; and a Massachusetts Quitclaim Deed transferring the home to NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to the Cormiers.

Ms. Cormier emailed the SUN Initiative shortly after the closing and wrote: "Thank you for everything you and your amazing group did for us."

Following the transaction, the Cormiers became delinquent on their Aura mortgage and in 2018 sought a modification. Aura and the Cormiers entered into a Loan Modification Agreement, which the Cormiers executed on October 15, 2019.

Ms. Cormier requested information about her SAM payoff in 2020. The Cormiers Shared Appreciation Payoff Notice for November 17, 2021 indicated the Cormiers would retain an estimated $78,960 of equity if the Cormiers refinanced with a home valuation of $282,000.

The Cormiers submitted a complaint to the Massachusetts Division of Banks about BH and Aura in or around 2020.

B. The DeSimones

In 2015, Mr. DeSimone filed for Chapter 13 bankruptcy. With the Bankruptcy Court's approval, Mr. DeSimone hired Bruce Boguslov from HSI Trust-HomeSavers Ltd. ("HSI"), a non-profit national consumer advocacy organization, to serve as a Negotiation Agent. The court-approved Chapter 13 bankruptcy plan reflected that the DeSimones were negotiating a short sale and buy back of their home with BH's predecessor. The plan further provided that, "[u]pon completion of the short sale, [Mr. DeSimone's] and his spouse['s] obligation to Bank of America NA, as Trustee, shall be deemed [in] satisfaction of their debt to Bank of America, as Trustee, in full."

Boguslov negotiated on behalf of the DeSimones with Bank of America's servicer and with BH. Mr. DeSimone understood that Boguslov was acting as his advocate; that BH was on the other side of the negotiation; that NSP was going to buy the house from him and his wife, and then sell it back to his wife; and that the sale price NSP would charge Ms. DeSimone would be 25% more than it paid to purchase the home, something he discussed with Boguslov.

On July 25, 2016, the SUN Initiative sent several forms and disclosures to HSI for the DeSimones. Two days later, on July 27, 2016, Ms. DeSimone signed the SUN Initiative's "How the Shared Appreciation Mortgage Works" disclosure; an "Affiliated Business Relationship Disclosure"; a Uniform Residential Loan Application; a Federal Truth-in-Lending Disclosure Statement; a "Massachusetts SUN Initiative Important Program Terms & Disclosures" form; and a Massachusetts Addendum to Uniform Residential Loan Application. Before his wife signed any papers, Mr. DeSimone discussed with Boguslov how the shared appreciation mortgage functioned.

In September 2016, the DeSimones entered into a Purchase and Sale Agreement to sell the property to NSP, and a Purchase and Sale Agreement for Ms. DeSimone to repurchase the property from NSP.

On January 4, 2017, the closing took place. Mr. DeSimone (as power of attorney for Ms. DeSimone) signed a Closing Disclosure; a Uniform Residential Loan Application; another "How the Shared Appreciation Mortgage Works" disclosure; a Promissory Note and Mortgage with Aura; an SA Note and SAM with NSP; and a Massachusetts Quitclaim Deed transferring the home to NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to Ms. DeSimone.

On July 26, 2017, the Bankruptcy Court issued a discharge to Mr. DeSimone such that the debt to their prior mortgagee was satisfied.

In July 2020, Ms. DeSimone refinanced and obtained a discharge of the Aura mortgage. The amount that Ms. DeSimone owed and paid pursuant to the SA Note was $5,180, which was paid to Aura.

C. <u>The Dolats</u>

A foreclosure sale of the Dolats' home was scheduled for July 12, 2018. Mr. Dolat contacted the Department of Housing and Urban Development, which referred him to the Community Development Corporation ("CDC") in the Worcester area. The CDC subsequently referred Mr. Dolat to the SUN Initiative. In July 2018, the Dolats applied to the SUN Initiative.

On July 16, 2018, the Dolats signed a "Massachusetts SUN Initiative Important Terms & Disclosures" form; a Uniform Residential Loan Application; a Massachusetts Addendum to Uniform Residential Loan Application; an "Affiliated Business Relationship Disclosure;" and a "How the Shared Appreciation Mortgage Works" disclosure. Mr. Dolat understood that he would have to share appreciation with NSP.

On September 18, 2018, the Dolats entered a Purchase and Sale Agreement with NSP, whereby NSP would purchase their home, and a second Purchase and Sale Agreement with NSP, whereby NSP would sell their home back to the Dolats.

The Dolats received a HUD-1 Settlement Statement and closed on February 7, 2019. As part of the closing, they signed another Uniform Residential Loan Application; another Massachusetts Addendum to Uniform Residential Loan Application; a Closing Disclosure; another "How the Shared Appreciation Mortgage Works" disclosure; a Promissory Note and Mortgage with Aura; a SA Note and SAM with NSP; and a Massachusetts Quitclaim Deed transferring their home to NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to the Dolats.

The SUN Initiative transaction resolved all claims against the Dolats by Select Portfolio Servicing, Inc. Since the SUN Initiative closing, the Dolats have not sought to refinance.

D. The L'Ecuyers

In 2018, the L'Ecuyers' mortgagee, Wells Fargo, initiated foreclosure proceedings and the L'Ecuyers became involved with the SUN Initiative. When applying for relief through the Initiative, the L'Ecuyers submitted a Uniform Residential Loan Application. At the time, they consulted with a lawyer who reviewed their SUN Initiative application.

On November 20, 2018, Ms. L'Ecuyers signed an "How the Shared Appreciation Mortgage Works" disclosure; an "Affiliated Business Relationship Disclosure"; and a "Massachusetts BlueHub SUN Important Terms & Disclosures" form.

In this litigation, the L'Ecuyers alleged that they have no memory of learning about shared appreciation, that their home would be sold back to them at a higher price than paid, or that they would be charged an interest rate above prevailing market rates. But at her deposition, Ms. L'Ecuyer admitted that neither she nor her husband read the documents she received, including the Shared Appreciation Mortgage disclosure statement, which she had signed. Her signature certified that she had read the document.

After signing the initial paperwork with the SUN Initiative, Ms. L'Ecuyer remained "very nervous" about a foreclosure by Wells Fargo, and in February 2019, Ms. L'Ecuyer "thought that the foreclosure sale could be imminent" and "understood that the SUN Program was undertaking efforts to prevent foreclosure of the Wells Fargo mortgage."

In Spring 2019, the L'Ecuyers entered a Purchase and Sale Agreement in which they agreed to sell their home to NSP, and entered another Purchase and Sale Agreement in December 2018 to buy their home back from NSP.

The SUN Initiative closing took place on July 31, 2019. The L'Ecuyers executed a second Uniform Residential Loan Application; a Massachusetts Addendum to Uniform Residential Loan Application, which informed them that they (as the mortgagee) could obtain legal counsel of their own; another "How the Shared Appreciation Mortgage Works" disclosure; a Promissory Note and Mortgage with Aura; an SA Note and SAM with NSP; a Closing Disclosure; and a Massachusetts Quitclaim Deed whereby the L'Ecuyers transferred their home to NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to the L'Ecuyers.

At the closing, the L'Ecuyers did not read the SAM disclosure, the SAM, the SA Note, or ask any questions about them. The L'Ecuyers understood that they could engage their own attorney for the closing but did not do so.

The L'Ecuyers have not sought to refinance their Aura mortgage and pay off their SAM.

E. <u>The Meilleurs</u>

Foreclosure proceedings on the Meilleurs' home began in March 2011. As of August 5, 2011, the Meilleurs had lost title to the home by virtue of the lender's foreclosure deed to Freddie Mac. The Meilleurs became tenants at the property and failed to pay for use and occupancy which led Freddie Mac to file an eviction action in Hampden Housing Court. Freddie Mac obtained a Housing Court judgment for possession and for money damages against the Meilleurs; the Meilleurs then appealed. The Meilleurs learned of the SUN Initiative during their eviction process.

On March 26, 2016, the Meilleurs signed a "Massachusetts SUN Initiative Important Program Terms & Disclosures" form; an "Affiliated Business Relationship Disclosure"; a Massachusetts Addendum to Uniform Residential Loan Application; a "How the Shared Appreciation Mortgage Works" disclosure; and a Federal Truth-in-Lending Disclosure Statement.

On June 24, 2016, the SUN Initiative sent the Meilleurs a letter indicating they were cleared for negotiation, meaning NSP would attempt to purchase their home from their prior lender, Freddie Mac. Included with the letter was a document entitled "Important Reminders About Our Program."

On January 18, 2017, the SUN Initiative sent the Meilleurs information about the closing process, which included the same "Important Reminders About Our Program" document.

On March 8, 2017, the SUN Initiative emailed the Meilleurs' attorney the SA Note and SAM. These documents were sent because Mr. Meilleur wanted his attorney to review the documents.

NSP ultimately negotiated with Freddie Mac, which accepted an offer from NSP to purchase the property.

The SUN closing took place on March 9, 2017. The Meilleurs signed several documents, some of which Mr. Meilleur didn't read. The signed documents included a Closing Disclosure; a Uniform Residential Loan Application; a "How the Shared Appreciation Mortgage Works" disclosure; a Promissory Note and Mortgage with Aura; and an SA Note and SAM with NSP. NSP executed a Massachusetts Quitclaim Deed whereby NSP transferred the home to the Meilleurs. By virtue of the SUN Initiative closing, the Meilleur's regained ownership of their home.

Within a year after the SUN Initiative closing, on February 21, 2018, the Meilleurs refinanced their property with a new lender. They satisfied and discharged both the Aura mortgage and the SAM, and were able to take cash out of the transaction. Defendants determined that the Meilleurs' share of the appreciation was $44,765 and NSP's share was $19,185.

F. <u>Humes</u>

In May 2009, Humes' home was subject to a foreclosure sale and Humes became a tenant paying rent to Wells Fargo. Humes was referred to the SUN Initiative.

On November 15, 2010, Humes signed a Uniform Residential Loan Application; a "Shared Appreciation Mortgage Disclosure Statement"; a "Notice to Massachusetts Property Applicants"; and a Good Faith Estimate. Humes did not read the SAM disclosure or any other document.

Prior to closing, Humes signed a letter from closing attorney Nancy Weissman which stated that Weissman represented only Aura and not Humes regarding the mortgage loan.

The SUN closing took place on December 28, 2010. Humes executed a Purchase and Sale Agreement with NSP through which NSP agreed to sell the home to her; a Federal Truth-in-Lending Disclosure Statement; a HUD-1 Settlement Statement; a Promissory Note and Mortgage with Aura; and an SA Note and SAM with NSP. HSBC Bank executed a Massachusetts Quitclaim Deed whereby it transferred the home to NSP, and NSP executed a Massachusetts Quitclaim Deed whereby NSP transferred the home to Humes.

In 2013, Aura agreed to a Trial Modification Agreement at the request of Humes.

In May of 2016, Humes communicated with the SUN Initiative and was provided information about the refinancing process, which mentioned NSP's 51% share of equity per the SAM.

G. The Oateses

After falling behind on their mortgage and facing foreclosure, the Oateses wrote a letter in February 2010 to the attorneys representing Beneficial Massachusetts, Inc. ("Beneficial"), the Oateses' mortgagee. They wrote that they were "facing homelessness" and that they were willing to accept a deed restriction that prevented them from profiting from a significant appreciation in home value if the lender would modify their loan. Despite the letter, on May 21, 2010, Beneficial initiated foreclosure proceedings in the Land Court.

In January 2011, the Oateses lost title to their home when Beneficial purchased the property at foreclosure. Following the foreclosure, the Oateses filed for bankruptcy in or about April 2011 and alleged the foreclosure sale was invalid. The Oateses continued to live at the property.

The Oateses found out about the SUN Initiative from City Life Urbana and applied for relief. On December 28, 2011, the Oateses signed a Uniform Residential Loan Application; a "Shared Appreciation Mortgage Disclosure Statement"; and a "Boston Community Capital/SUN Initiative Important Program Terms and Disclosures" form.

At some point, Beneficial sought to evict the Oateses. The Oateses were represented by Attorney Roger Bertling and his staff at the Harvard Legal Aid Center in the eviction matter.

On February 6, 2012, Ms. Oates emailed the SUN Initiative asking for a letter explaining that the Oateses were pursuing buying their home back. She asked that the letter be provided to the WilmerHale Legal Services Center for use in negotiating against eviction.

On February 21, 2012, the Oateses executed a Purchase and Sale Agreement whereby the Oates would purchase their home from NSP.

NSP negotiated to buy the Oateses' home and executed a Purchase and Sale Agreement with Beneficial on April 20, 2012. The same day, the Oateses signed an Addendum to their Purchase and Sale Agreement, changing their purchase price from $200,000 to $192,000. On May 2, 2012, Beneficial executed a Massachusetts Quitclaim Deed whereby Beneficial transferred the home to NSP

The SUN closing took place on May 4, 2012 at which the Oateses executed a second Uniform Residential Loan Application; a Federal Truth-in-Lending Disclosure Statement; a HUD-1 Settlement Statement; a Promissory Note and Mortgage with Aura; and an SA Note and SAM with NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to the Oateses.

H. The Ortizes

In June or July 2012, the Ortizes learned about the SUN Initiative. Ms. Ortitz first contacted the SUN Initiative in January 2013. Ms. Ortiz contacted them again a few weeks later, noting that the interest rate on the mortgage loan from the SUN Initiative would be "on the higher side."

In July 2013, the Ortizes applied to the SUN Initiative. On July 19, 2013, the Ortizes signed a Uniform Residential Loan Application; a "Shared Appreciation Mortgage Disclosure"; an "Affiliated Business Relationship Disclosure"; a "Boston Community Capital/SUN Initiative Important Program Terms and Disclosures" form; and a form that included, among other things, a notice that the mortgagor could engage their own attorney at their expense. Ms. Ortiz understood that their home would be purchased and then resold back to them for an amount higher than the initial acquisition price.

On August 21, 2013, the Ortizes entered into a Purchase and Sale Agreement to sell their property to NSP. Thereafter, on September 9, 2013, the Ortizes entered into a Purchase and Sale Agreement to buy their property back from NSP.

The SUN Initiative closing took place on October 31, 2013. Ms. Ortiz chose not to read certain documents at the closing. Ms. Ortiz remembers receiving a Good Faith Estimate and understood that NSP would purchase her home and sell it back to the Ortizes for an additional 25% plus settlement costs. At the closing, the Ortizes signed an Addendum to the Purchase and Sale Agreement; a HUD-1 Settlement Statement; a Uniform Residential Loan Application; a Federal Truth-in-Lending Disclosure Statement; a "How the Shared Appreciation Mortgage Works" disclosure; a Promissory Note and Mortgage with Aura; an SA Note and SAM with NSP; and a Massachusetts Quitclaim Deed transferring their home to NSP. NSP executed a Massachusetts Quitclaim Deed transferring the home back to the Ortizes.

After the closing, Ms. Ortiz noted the SUN Initiative's benefits to a reporter from the Worcester Telegram, telling him that she had received a "34 percent reduction" in their monthly payments, that the program had "worked out for them," and that "the foreclosure shadow has lifted."

Ms. Ortiz repeated those sentiments a year later in a 2015 PBS broadcast about the SUN Initiative. Ms. Ortiz said: "We have a good place to live. My kids have their friends. And, you know, we hope that, little by little, things turn around, but at least I can say I'm not afraid for tomorrow, because, you know, we can make—right now, we're making it. We're doing well."

Ms. Ortiz claims that she had been told at the closing that she could refinance within year, and she attempted to refinance within a year of October 31, 2013. The lender with whom she was trying to refinance told Ms. Ortiz that she would not be able to refinance for "three to four years" because a short-sale was "comparable to a foreclosure."

On April 26, 2018, the Ortizes refinanced their mortgage loan. The Shared Appreciation Payoff Notice dated on April 30, 2018 provided to the Ortizes indicated that their share of appreciation would be $34,597.

I. The Perdomos

In 2010, after the Perdomos had difficulties paying their mortgage, the assignee of the Perdomos' mortgage, Mid-First Bank, filed a complaint for authority to foreclose in the Land Court. On October 14, 2010, Judgment for Entry and Sale entered against the Perdomos. Thereafter, in 2011 and 2012, the Perdomos unsuccessfully sought to prevent the foreclosure through actions in the bankruptcy court and before this Court.

On June 28, 2012, the Perdomos signed a Uniform Residential Loan Application; a form advising them, among other things, of their right (as mortgagors) to engage an attorney at their expense to represent them in the transaction; a "Boston Community Capital/SUN Initiative, Important Program Terms and Disclosures" form; and a "Shared Appreciation Mortgage Disclosure Statement." Two days later, the Perdomos sent Defendants copies of the Good Faith Estimate, Federal Truth-In-Lending Disclosure Statement, and Mortgage Preapproval.

On August 10, 2012, six days before a foreclosure sale was scheduled for the Perdomos' home, the Perdomos entered into a Purchase and Sale Agreement with NSP to buy back their home. Mr. Perdomo understood he was buying back his home. He now claims he "didn't understand the numbers," but also acknowledges that neither he nor his wife asked any questions and did not tell anyone that they did not understand what they were signing.

The closing took place on November 30, 2012. Mr. Perdomo does not remember details from the closing, but concedes he did not read anything and did not tell anyone that he did not understand the documents. At the closing, the Perdomos executed a Promissory Note and Mortgage with Aura, and an SA Note and SAM with NSP. The record also indicates that on the same date the Perdomos signed a Massachusetts Quitclaim Deed transferring their home to NSP, and that NSP signed a Massachusetts Quitclaim Deed transferring the home back to the Perdomos. Both deeds were recorded on December 3, 2012.

In the summer of 2019, the Perdomos sold their house. The Perdomos and NSP split 50-50 the $629,000 in appreciation.

J. Thomas

In 2010, with Thomas in default on her first and second mortgage, Wells Fargo foreclosed on her home. HSBC Bank USA, as Trustee for Wells Fargo, sold the home to itself in or about 2011. Thomas had submitted several loan modification applications to Wells Fargo to no avail. After the foreclosure sale, Thomas moved out of her home.

On November 3, 2010 and on September 30, 2011, Thomas contacted the SUN Initiative seeking its help.

In or about November 2011, Thomas moved back into her home, which was vacant. Wells Fargo thereafter sought to evict Thomas.

On November 9, 2011, Thomas signed a Uniform Residential Loan Application; a "Shared Appreciation Mortgage Disclosure Statement"; a "Boston Community Capital/SUN Initiative Important Program Terms and Disclosures" form; and a notice which, among other things, informed her that Aura's attorney would represent Aura and that the mortgagor may, at his/her own expense, engage an attorney of his/her own selection to represent his/her own interest in the transaction.

Thomas did not recall any conversation at any time about shared appreciation in 2011 or in 2012 (when the transaction ultimately closed).

After Thomas applied to the SUN Initiative, her attorney at Harvard Legal Aid communicated with the Initiative about documents needed for underwriting as well as money Thomas needed to bring to the signing of the purchase and sale agreement.

In February 2012, the SUN Initiative conducted negotiations with Wells Fargo for the purchase of Thomas' home, and Thomas executed a Purchase and Sale Agreement with NSP for the repurchase of her home. Wells Fargo accepted NSP's offer to purchase the home on April 4, 2012. The record reflects that HSBC Bank USA (as Trustee for Wells Fargo) executed a Massachusetts Quit Claim Deed transferring the home to NSP on June 12, 2012, which was recorded on June 25, 2012.

The SUN Initiative worked to obtain a Massachusetts Attorney General's Office grant for Thomas to apply to the purchase price. Thomas ultimately received a $7,000 grant.

Thomas received a Good Faith Estimate on or about June 18, 2012. The SUN closing took place four days later. Thomas signed a Federal Truth-In-Lending Statement; a Promissory Note and Mortgage with Aura; and an SA Note and SAM with NSP. The SAM provided for a $155,100 base value of the property against which future appreciation would be measured, and for 42% of any calculated appreciation to be shared with NSP when the mortgage was satisfied. The record reflects that on the same day as the closing, NSP executed a Massachusetts Quit Claim Deed transferring the property to Thomas, which was recorded on June 25, 2012.

After the closing, Thomas was interviewed for a "Boston Community Capital Story Bank Form." In response to the question, "How has BCC changed your life?", she explained:

> I guess it just validated that if you press hard enough there's a door that's going to open and stay open. That helped me. I may not be of great financial means or education, but there are organizations like yourself that don't close the door on people like myself. Made me feel good as a person and it's so major in my life.
>
> People assume you feel [sic] into the hole of not paying your income that it's something you did, but life circumstances can happen to everyone. It was a lonely process. I don't think that anyone who fought this could say I want a handout. It's so much more.

In October 2018, Thomas sought to refinance. Ultimately, even though she was qualified to refinance and could have paid off the Aura mortgage, the SAM, and another loan, Thomas elected not to refinance because she could not take out as much cash as she wanted. In her view, the $49,000 in shared appreciation she had to pay NSP "negated the cash out option."

DISCUSSION

I. Standard of Review

A party is entitled to summary judgment pursuant to Mass. R. Civ. P. 56 (c) if there is no genuine dispute of material fact and the party is entitled to judgment as a matter of law. See Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 237 (2018). The moving party bears "the burden of initially showing that there is an absence of evidence to support the case of the nonmoving party shouldering the burden of proof at trial." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714 (1991). The moving party can meet this burden by "demonstrat[ing], by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Id. at 716. If the moving party meets its initial burden, the burden shifts to the non-moving party to provide specific facts to demonstrate that there is a genuine issue of material fact. See Drakopoulos v. U.S. Bank Nat. Ass'n, 465 Mass. 775, 777-778 (2013). A court reviewing a motion for summary judgment must "draw all reasonable inferences in the light most favorable to the nonmoving party." Id. at 777, quoting Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 475 (2013).

II. Retroactivity of G. L. c. 244, § 35C(i)

On November 20, 2024, the Governor signed an amendment to G. L. c. 244, § 35C which added subsection (i) to the statute. See St. 2024, c. 238, § 269. The new provision became effective immediately and provides in relevant part:

> (1) For purposes of this subsection, the following words shall have the following meanings unless the context clearly requires otherwise:
>
> "Entity", an entity with a tax-exempt filing status under section 501(c)(3) of the Internal Revenue Code or an entity controlled by an entity with such tax-exempt filing status.
>
> "Shared appreciation mortgage", a mortgage or security instrument that is a second lien on the residential property for the percentage of shared appreciation required to be paid under the accompanying shared appreciation promissory note and secured by such shared appreciation mortgage.
>
> "Shared appreciation", the percentage share of the appreciation in the value of a residential property as defined in a shared appreciation mortgage and shared appreciation promissory note.
>
> (2) If an entity obtains from a person acquiring or re-acquiring a residential property a shared appreciation mortgage encumbering such residential property that secures the contingent right of the entity to receive a percentage share of the appreciation in value of such residential property upon: (i) the sale, conveyance, assignment or other transfer thereof; (ii) refinancing or other payoff or satisfaction of the new first priority mortgage loan encumbering such residential property; or (iii) the occurrence of other events specified in such shared appreciation mortgage or such shared appreciation promissory note, including reaching a defined maturity date, then the entity and the maker, lender, grantor or holder of the new first priority mortgage loan shall not be liable for monetary relief, injunctive relief or other equitable relief at common law or by statute, including chapter 93A, chapter 140D, chapter 183C and section 49 of chapter 271 for the use of or the terms of said shared appreciation mortgage or shared appreciation promissory note, so long as such person receives a full disclosure, in writing as required herein and in advance of the closing of such person's acquisition or re-acquisition of such residential property, stating that such person will be required to enter into a shared appreciation mortgage and shared appreciation promissory note to such entity at said closing and upon such person's entering into a new first priority mortgage loan. A shared appreciation mortgage and shared appreciation promissory note offered under this subsection shall be permitted only if a person has received notice or is otherwise shown to be not less than 90

> days delinquent on their prior mortgage loan. An offer for a shared appreciation mortgage shall be invalid if there is no reduction of the prior delinquent mortgage loan principal the person owes or owed when the person acquires or re-acquires such residential property and enters into a new first priority mortgage loan. . . . .

G. L. c. 244, § 35C(i).

As a preliminary matter, the Court must address whether, as Defendants contend, G. L. c. 244, § 35C(i) retroactively applies to this case. Retroactive application would eliminate liability under several of Plaintiffs' theories. As explained below, the Court concludes that the statute does not have retroactive application.

The test the Court must apply to determine retroactivity is well-established:

> Whether a statute applies to events occurring prior to the date on which the statute takes effect is in the first instance a question of legislative intent. If the language of a statute is plain and unambiguous, it is conclusive as to legislative intent. Where there is no express legislative directive, this court generally applies the rule of interpretation that statutes operate prospectively. Nevertheless, a statute will be applied retroactively if it appears by necessary implication from the words, context or objects of the amendments that the Legislature intended them to be retroactive in operation and the retroactive intention is unequivocally clear.

<u>Sliney v. Previte</u>, 473 Mass. 283, 288 (2015) (internal citations, quotations, and alterations omitted).

In this case, G. L. c. 244, § 35C(i) does not plainly and unambiguously prohibit retroactive application. However, neither the terms, context, nor object of the amendment make it unequivocally clear that the Legislature intended the statute to be retroactive. The use of the present tense in the statute suggests prospective, not retroactive application. <u>See</u> G. L. c. 244, § 35C(i)(2) (stating that "[i]If tax exempt entity ***obtains*** ..." and that "[i]f person acquiring property ***receives*** a full disclosure ...") (emphasis added). Further, the statute does not contain language the Legislature has used in past instances to signal its intent that a statute be applied retroactively. <u>See</u> <u>Boston Edison Co. v. Massachusetts Water Res. Auth.</u>, 459 Mass. 724, 743 (2011) (noting that Legislature made its intent clear by stating that amended statute "shall apply to those pending cases in which no final judgment has entered as of the effective date of this act"). More pointedly, the Legislature declined to pass a prior version of the statute that included a retroactivity provision, and BH's CEO, Elyse Cherry, ***expressly testified*** before the Legislature that the statute ***would not apply retroactively*** to the pending litigation. Under these circumstances, there can be no retroactive application.

Defendants' arguments do not change this analysis. First, Defendants contend that the statute should apply retroactively because it merely clarifies rather than changes existing law. See Figueroa v. Director of the Dep't of Labor & Workforce Dev., 54 Mass. App. Ct. 64, 70 (2002). This is far from the case. It fundamentally changes to the law – hence Defendants advocacy in support of it. Board of Health of Northbridge v. Couture, 95 Mass. App. Ct. 296, 299 (2019) ("while curative or remedial changes intended to provide clarification may be applied retroactively, regulatory changes of substance apply only to events that occur after the change's effective date") (internal quotations and alteration omitted).

Defendants next argue that because Plaintiffs' request injunctive/equitable relief is "forward looking," retroactive application of the statute is appropriate. This contention is likewise unpersuasive. The relevant question is not the relief the Plaintiffs seek, but whether the law applies to events occurring prior to the date in which it took effect. See Sliney, 473 Mass. at 288. As explained by the SJC:

> [T]he United States Supreme Court has declared that a statute is retroactive in effect where the new provision attaches new legal consequences to events completed before its enactment [, a test] … [w]e have adopted[.] …. [But even where] amendments are retroactive in operation, the next question we must address is whether the Legislature intended them to be retroactive.

Moe v. Sex Offender Registry Bd., 467 Mass. 598, 607–609 (2014) (internal quotations omitted). Here, the conduct in dispute occurred years before the amendment. Applying the bar of the new statute would thus change the legal consequence of the events occurring prior to the date in which the statute took effect and would constitute disfavored retroactive application. Moreover, the ultimate test is the legislative intent, which as noted above, clearly points in the direction of the statute having no retroactive application.

III. Cross-Motions on Liability for Violation of MCCCDA (Count III), G. L. 93A, c. § 9 (Count II), and Chapter 183C (Count IV)

Leaving aside Defendants' arguments about the statutes of limitations, which are addressed below and show that several (but not all) of Plaintiffs' claims are untimely,[10] the question is whether Plaintiffs' theories under the MCCCDA, Chapter 93A, and Chapter 183C are viable on this record as a matter of law. As explained below, those Plaintiffs with timely claims are entitled to judgment on liability on these three theories.

A. The MCCCDA, Chapter 140D

The MCCCDA is Massachusetts' corollary to TILA and is construed consistent with it. See Cromwell v. Countryside Home Loans, Inc., 483 B.R. 36, 40 (D. Mass 2012). It is also to be liberally construed to protect consumers. Id. A central purpose of the MCCCDA, like TILA, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." In re Fidler, 226 B.R. 734, 736 (Bankr. D. Mass. 1998), quoting 15 U.S.C. § 1601(a). Lenders are required to make MCCCDA disclosures in conformity "with the model forms in Appendix H of Regulation Z, as appropriate, or a substantially similar notice." Cromwell, 483 B.R. at 41, quoting 209 Code Mass. Regs. § 32.23(2)(b).[11] Once a plaintiff makes a threshold showing of

[10] Defendants' statute of limitations argument is directed at only some of the Plaintiffs. As the statute of limitations analysis is influenced by the substance of the claims asserted, the Court proceeds to address the substance of the claims, and leaves the statute of limitations analysis to later in the discussion.

[11] Regulation Z, which was originally promulgated by the Federal Reserve Board and implements TILA, was codified at 12 C.F.R. part 226. However, in 2011, the Consumer Financial Protection Bureau took over rulemaking and as such, Regulation Z is now contained at 12 C.F.R. part 1026.

non-compliance with TILA, the burden shifts to the defendant to demonstrate compliance. Gardner v. Montgomery Cnty. Tchrs. Fed. Credit Union, 864 F. Supp. 2d 410, 415 (D. Md. 2012) ("There is … extensive case law standing for the ... proposition that once a debtor makes a threshold showing that a TILA violation has occurred, then the burden shifts to the creditor to prove its compliance."); In re Maxwell, 281 B.R. 101, 126 (Bankr. D. Mass. 2002) ("upon the submission of evidence that [TILA] disclosures were not made, the burden shifts to the lender to produce evidence that it or its predecessor provided the requisite disclosures").

It is undisputed that the TILA disclosures provided to borrowers by Defendants include only the terms of the 30-year fixed rate Aura loan. Fundamentally, Plaintiffs' theory of liability is that Defendants improperly treat the Aura mortgage separately from the NSP SAM (i.e., as the product of two separate transaction), and therefore violate TILA by omitting the SAM from their TILA disclosures and affirmatively misrepresenting that the SUN Initiative does not involve a risk of either a ballon payment or negative amortization.[12] Defendants argue, in turn, that the SUN Initiative is appropriately viewed as involving two distinct transactions – "(i) a sale transaction (NSP's purchase of Plaintiffs' homes; discharge of their mortgage obligations to their prior lender . . .; and resale of the residences at then current fair market value to *Plaintiffs with the NSP SAM*) and (ii) a finance transaction (Aura's loan . . .)." Defendants' Opposition at 19 (emphasis added). Relying on this theory of transactional separateness, Defendants specifically contend that: (1) NPS is not a "creditor" under TILA[13] and thus not subject to the statute's

[12] A "balloon payment" is defined under Regulation Z as a "payment that is more than two times a regular periodic payment" including "the payment or payments under a transaction that requires only one or two payments during the loan term." 12 C.F.R. § 1026.37(b)(5). Negative amortization is a loan feature that "increases the outstanding principal balance [and] reduces the consumer's equity in the home." 15 U.S.C. § 1639c(f)(1)(C)-(D). See 12 C.F.R. § 1026.37(a)(10)(ii)(A) (loan has a negative amortization feature when "the principal balance may increase due to the addition of accrued interest to the principal balance").
[13] See 12 C.F.R. § 1026.2(a)(17) and G. L. c. 140D, § 1, both of which define "creditor."

disclosure requirements (only Aura is a creditor under TILA); and (2) the SAM cannot be viewed as presenting a risk of balloon payment or negative amortization.

On the undisputed facts, Plaintiffs' position is correct; contrary to Defendants contention otherwise, Defendants and Plaintiffs participated in a single transaction – a loan with a fixed rate component and a shared appreciation component.

1. Loan Splitting

Where a lender splits a loan into two parts, it may constitute a violation of TILA. "Loan splitting may be defined 'as the situation where the debtor wanted, requested and expected to receive a single loan, consummated in one transaction, but the lender documented and made disclosure for the loan as if it were two separate transactions.'" Rendler v. Corus Bank, 272 F.3d 992, 999 (7th Cir. 2001), quoting In re Buckles, 189 B.R. 752, 760 (Bankr. D. Minn. 1995). "[L]oan splitting violates [ ] TILA because the Act mandates that the lender provide a single, comprehensible disclosure of the cost of credit." Id. See id. 999 n.10, citing Harris v. Illinois Vehicle Premium Fin. Co., 2000 WL 1307513, at *2 (N.D. Ill. Sept.12, 2000) (loan splitting violates TILA due to the need for a single comprehensive disclosure for a single loan transaction) and Hemauer v. ITT Fin. Servs., 751 F. Supp. 1241, 1243-1244 (W.D. Ky. 1990) (lender violated TILA by splitting the charges surrounding one loan into two loans executed on the same day where the consumer only sought one loan).

The Rendler court and the parties here cite In re Buckles, which explains how to determine when loan splitting exists:

> [T]he threshold factual inquiry for the loan-splitting analysis [is]: what was the parties' original agreement as to the nature, number, and purpose of the contemplated extension(s) of credit?
>
> The circumstances surrounding the transactions in question will dictate the answer. Specific factors relevant to the analysis include the following:

> 1. the debtor's purposes in applying for credit, and the needs he was seeking to meet by obtaining financing;
>
> 2. the debtor's expectation as to the number and sequence of financial commitments he would make in order to obtain the funds he sought to borrow;
>
> 3. the means, length, and clarity of the creditor's communications to the debtor about its proposals for loan terms;
>
> 4. the creditor's internal policies and controls for structuring extensions of credit, particularly with reference to initial "enabling" loans to finance the costs of application for a larger loan;
>
> 5. the extent to which the creditor's employee articulates such policies to the debtor as a justification for structuring a loan in a particular way;
>
> 6. the nature and results of any bargaining or negotiation on loan amount(s) and terms that went on between the parties.
>
> The most important consideration will be the debtor's awareness and intent, both as they were before the creditor made its commitment and as they were when the debtor assented, tacitly or explicitly, to the way in which the creditor structured the loan.

In re Buckles, 189 B.R. at 760–761 (internal citations omitted). See also Kane v. Equity One, Inc., No. 03-3931, 2003 WL 22939377 at *2 (E.D. Pa. Nov. 21, 2003), quoting Harris , 2000 WL 1307513 at *2 (loan splitting in violation of TILA occurs "where the debtor wants, requests and expects to get a single loan consummated in a single transaction, but the lender instead documents and makes disclosures for the loan as if it were two separate transactions").[14]

Taken together, several facts in the record demonstrate that Defendants and Plaintiffs participated in a single transaction involving the SAM and Aura mortgage and that therefore Defendants have engaged in loan splitting. First, the record shows that Plaintiffs sought to participate in a single program, called the "SUN Initiative," to save their homes.[15] Second, as

[14] To the extent Plaintiffs argue that they did not read the documents they signed at the SUN closing and that therefore their expectations control regardless of what's contained in those documents, that argument is meritless. See, e.g., Good v. Uber Techs., Inc., 494 Mass. 116, 142 n.36 (2024) ("[I]t is a general and well established principle of contract law that one who is ignorant of the language in which a document is written, or who is illiterate, may be bound to a contract by negligently failing to learn its contents ... There is a duty to read things that look like contracts -- one cannot sign or accept the benefits of a document that looks like a contract and later claim that its terms are not binding because the party signing it did not read it[.]") (internal quotations and citations omitted).

[15] The disclosure provided to the DeSimones, for instance, describes the "SUN Initiative" as a single Initiative in which NSP "[b]uys and sells properties" and Aura "[p]rovides mortgage loans," and explains that *"[w]e* will attempt

reflected in the SUN Initiative Operations Manuals and as disclosed to Plaintiffs, participation in the SUN Initiative required the simultaneous execution of the Aura note, the Aura mortgage, the SA Note, and the SAM. See 2013, 2015, and 2017 SUN Initiative Operations Manuals ("[a]ll loans made under the SUN program include the 30-year fixed rate first mortgage and a Shared Appreciation zero-interest second mortgage"). Third, every purchase and sale agreement with NSP provided that the purchase was contingent upon the buyer getting the Aura loan and referenced the SAM requirement. Fourth, the closing for both the Aura and NSP transactions occurred at the same time and was handled by the same lawyer on behalf of the Defendants.[16] Fourth, the SA Note, and occasionally the SAM, described NSP as a "Lender," despite Defendants' strident argument that NSP itself extended no credit. The description and treatment of NSP as a lender conveyed to consumers that NSP and Aura were engaged in a single, SUN Initiative transaction. Lastly, and perhaps most significantly, every SAM contained a cross-default provision whereby any default of the fixed rate note and mortgage with Aura was also a default of the SAM, making express the interlocked relationship among these instruments.[17] The loans here are thus distinguishable from those in Rendler where the loans at issue were structured

to purchase your home either from you through a short sale or from the bank that has foreclosed upon you. *We* will then sell the property back to you with a new, affordable mortgage. .... You will need to sign an additional mortgage and note at your closing called a 'Shared Appreciation Mortgage and Note.' These require that any increase in the value of your property at the time of your future sale or refinance is shared between you and *our program* based on how much *we* are able to lower your mortgage payment. *SUN's share* will be reinvested in the program to help others." (Emphasis added).

[16] The fact that NSP and Aura had the same address and telephone number, the same employees, and worked in the same Boston office supports the view that there was a single transaction. However, the Court does not agree with Plaintiffs that NSP and Aura are "essentially the same entity." Plaintiffs neither expressly argue, nor satisfy the requirements, for piercing the corporate veil. See Attorney Gen. v. M.C.K., Inc., 432 Mass. 546, 555 (2000) ("The doctrine of corporate disregard is an equitable tool that authorizes courts, in rare situations, to ignore corporate formalities, where such disregard is necessary to provide a meaningful remedy for injuries and to avoid injustice."); Jinks v. Credico (USA) LLC, 488 Mass. 691, 697–698 (2021) (listing the twelve factors analyzed to determine veil piercing). In this case, Plaintiffs have not, for instance, shown non-observance of corporate formalities, absence of corporate records, insolvency, or misuse of corporate funds.

[17] For this reason, it is unsurprising that none of the documents involving the transaction with NSP – the purchase and sale agreement, the SA Note, and the SAM – identify separate consideration. There was no separate consideration, but consolidated consideration exchanged between the parties in a single transaction.

to create an initial enabling loan to finance a larger loan. See Rendler, 272 F.3d at 996–999 (concluding that under TILA there were two transactions at one closing where a consumer received two separate loans – an adjustable rate note secured by a first mortgage and a home equity line of credit secured by a second mortgage – where the line of credit financed the down payment).

The Court's conclusion is strongly supported by internal documents that reflect that the SUN Initiative's creators knew they were splitting borrowers' original mortgage into two pieces. As noted above, in internal documents from 2008 and 2009, the architects of the SUN Initiative expressly recognized that the program was designed to be a loan split – it would allow existing homeowners to retain their homes by splitting their current mortgage debt into first and second mortgages, the second of which would result in a balloon payment triggered on a sliding scale based on the value at resale or refinance and would provide future upside profit potential to Defendants.

Accordingly, Defendants' exclusion of the SA Note and SAM from disclosures made to consumers under TILA constituted unlawful loan splitting in violation of TILA and therefore also violated the MCCCDA. Plaintiffs wanted, requested and expected to receive a single loan, consummated in one transaction, but Defendants documented and made disclosure for the loan as if it were two separate transactions.

2. Additional TILA Violations Resulting from Loan Splitting

Given the Court's determination that the SAM and Aura mortgage were part of a single credit transaction and that therefore the SAM obligation had to be treated as part of the overall credit terms, Plaintiffs are correct that Defendants violated TILA in other respects. First, Defendants were required, and failed, to identify the SAM as a form of variable interest loan.

The Official Staff Comments to Regulation Z recognize shared-appreciation mortgages are considered variable rate mortgages within the scope of TILA. They explain that:

> [I]n a variable rate transaction with either the seller buydown that is reflected in the credit contract or a consumer buydown, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the lower rate for the buydown period and the rate that is the basis of the variable rate feature for the remainder of the term. …
>
> The following transactions constitute variable rate transactions: ….
>
> "Shared equity" or "shared appreciation" mortgages that have a fixed rate of interest and an appreciation share based on the consumer's equity in the mortgaged property. The appreciation share is payable in a lump sum at a specified time. Disclosures must be based on the fixed interest rate. The shared appreciation feature, including the conditions for its imposition, the time at which it would be collected, and the limitation on the creditor's share, must be described under § 226.18(f). (As discussed in § 226.2, other types of shared-equity arrangements are not considered "credit" and are not subject to Regulation Z.)

Truth in Lending; Official Staff Commentary, 46 FR 50288-01 ¶ 18(f). In these cases, the creditor must disclose both the fixed interest rate and the shared appreciation component of the loan transaction. The disclosures must include the method by which the appreciation share will be determined, the conditions under which it becomes due, the timing of the payment, and any applicable limitations or caps on the creditor's share. See Truth in Lending; Official Staff Commentary, 46 Fed. Reg. 50288-01, ¶ 18(f); see also 1 Fed. Reg. Real Estate & Mortgage Lending § 10:21 (4th ed.).

Second, Defendants were required, and failed, to disclose that the SAM included a potential balloon payment. See 12 C.F.R. § 1026.37(a)(10)(ii)(D) ("If the terms of the legal obligation include a 'balloon payment,' as that term is defined in paragraph (b)(5) of this section, the creditor shall disclose that the loan has a 'Balloon Payment' feature."); FRB Official Staff Commentary ("In programs where the occurrence of a balloon payment is possible, the creditor must disclose the possibility of a balloon payment even if such a payment is uncertain or unlikely."). Indeed, rather than make full disclosure, Aura affirmatively disclaimed that the loan involved a balloon payment based on the Defendants' erroneous belief that the Aura mortgage was distinct from the SAM.[18]

Lastly, Defendants were required, and failed, to disclose that the SAM also posed at least a substantial risk of creating negative amortization. Under TILA, a creditor may not extend credit that "may, at any time ... result in negative amortization unless, before such transaction is consummated," the creditor provides the consumer with a statement that the transaction "will or may ... result in negative amortization," with a further statement that "negative amortization increases the outstanding principal balance ... [and] reduces the consumer's equity in the [home]." 15 U.S.C. §1639c(f)(1)(A)-(D). Instead, Aura disclaimed that there was a risk of negative amortization.[19]

Accordingly, Defendants failure to include the SAM and SA Note within the scope of their TILA disclosures violated the MCCCDA. Plaintiffs are entitled to judgment on liability on Count III to the extent the claims are timely.[20]

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[18] While Defendants are correct that the exact magnitude of any shared appreciation balloon payment could not be specified with certainty in dollar terms at the closing, they were nonetheless obligated to fully disclose this risk to Plaintiffs. See 12 C.F.R. § 1026.17(c)(2)(i) (when, as with variable rate mortgages, the full finance charge will not be known at closing, or in any case where "information necessary for an accurate disclosure is unknown ... the creditor shall make the disclosure based on the best information reasonably available at the time ... and shall state clearly that the disclosure is an estimate.").

[19] Defendants argue that irrespective of whether a single transaction occurred, the SAM does not result in negative amortization. See Defendants' Opposition at 18-19. The Court is not persuaded. As discussed above, when the SUN Initiative is viewed as a single transaction, there was clearly a recognized risk of negative amortization.

[20] Defendants' arguments that their SAM disclosures rendered these failures a mere technical violation and that recission is not available as a remedy to Plaintiffs are unavailing on the issue of liability. The Court is also unpersuaded by the contention that the disclosures Defendants provided regarding the SAM satisfied TILA.

B. Chapter 93A

1. *Liability*

In connection with Plaintiffs' G. L. c. 93A claim, Defendants first argue that the claim fails because there is no evidence that they "should have recognized at the outset that the plaintiffs were unlikely to be able to repay the loan." Drakopoulos v. U.S. Bank Nat. Ass'n, 465 Mass. 775, 786 (2013). This argument is too narrow in focus. Plaintiffs ground their Chapter 93A claim, in part, on the violation of the MCCCDA and G. L. c. 183C. See FAC, ¶ 214; G. L. c. 140D, § 34 ("A violation of this chapter, or any rule or regulation issued hereunder, shall constitute a violation of chapter ninety-three A."). See also May v. SunTrust Mortg., Inc., 467 Mass. 756, 767 (2014) (where the MCCCDA is violated, "borrowers can assert a claim for unfair or deceptive acts or practices in violation of G. L. c. 93A against the creditor, so long as the alleged c. 93A violation is connected to the underlying credit transaction"). Since Plaintiff have shown a violation of the MCCCDA and G.L. c. 183C (discussed below), they have also shown a violation of Chapter 93A as a matter of law.

Defendants next contend that the claim fails because Plaintiffs have failed to satisfy the statute's injury requirement. In support of this contention, they rely on Shaulis v. Nordstrom, Inc., 865 F.3d 1, 10 (1st Cir. 2017), which explained:

> To state a viable claim [under Chapter 93A], the plaintiff must allege that she has suffered an identifiable harm caused by the unfair or deceptive act that is separate from the violation itself. Put another way, a plaintiff must show real economic damages, as opposed to some speculative harm. Accordingly, a claim that alleges only a per se injury—that is, a claim resting only on a deceptive practice, regulatory noncompliance, or the impairment of an abstract right without economic loss—is insufficient to state a Chapter 93A claim. It is thus not enough to claim that the defendant's improper conduct created a risk of real economic damages. Speculation concerning still inchoate harm does not establish the distinct injury that is an essential predicate for recovery under Chapter 93A. Instead, legally cognizable injuries under Chapter 93A must involve objective,

identifiable harm that goes beyond the deception itself.

(internal quotations and citations omitted). In essence, Defendants argue that like the plaintiff in Shaulis, Plaintiffs received what they bargained for – the preservation of their homes from foreclosure – and are not worse off than they would have been had they not participated in the SUN Initiative. This argument is meritless. Contrary to Defendants' argument, the fact that the Plaintiffs did not suffer a greater loss – the loss of their homes – does not preclude them from showing that the loans entered with Defendants caused other forms of loss. Plaintiffs allege that each of them suffered other losses as the result of their entering into the subject transactions. See Joint Appendix for Defendants' Motion at 2436; Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment ("SOF"), ¶ 116.[21]

Lastly, Defendants argue that as nonprofit entities, they are entitled to charitable immunity under Chapter 93A. In substance, Defendants contend that even though they are engaging in purely commercial conduct, they are insulated from liability because they purport to be pursuing an end consistent with their core charitable mission. Defendants' argument well overstates the scope of charitable immunity under Chapter 93A.

"In order for a defendant to be liable under the statute for damages from unfair or deceptive practices, the transaction at issue must have occurred in the conduct of any trade or commerce . . . [T]he proscription in Mass. Gen. Laws ch. 93A § 2 of unfair or deceptive acts or practices in the conduct of any trade or commerce must be read to apply to those acts or practices which are perpetrated in a business context." Kunelius v. Town of Stow, 588 F.3d 1, 16 (1st Cir. 2009) (internal quotations and alteration omitted). "In most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance

[21] Plaintiffs do not seek summary judgment on damages.

of its core mission. But when … an institution's business motivations, in combination with the nature of the transaction and the activities of the parties, establish a 'business context' … G. L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play." Linkage Corp. v. Trustees of Bos. Univ., 425 Mass. 1, 26–27 (1997). The analysis is fact-driven, and focuses upon the nature of the transaction, the character of the parties involved, the activities engaged in by the parties, whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons, and whether the defendant played an active part in the transaction. Id. at 24. "An entity's status as a charitable corporation is not, in and of itself, dispositive of the issue whether c. 93A applies." Id. at 23 (internal quotations omitted).

Linkage is instructive. In that case, Linkage Corp. ("Linkage") and Boston University ("BU"), a nonprofit institution, entered into an agreement under which Linkage was to create and provide educational training and other programs at a satellite facility owned by BU. 425 Mass. at 2, 5. After BU terminated the agreement, Linkage asserted a G. L. c. 93A, § 11 claim against BU. Id. at 2-3. In concluding that BU was subject to suit, the Supreme Judicial Court ("SJC") analyzed whether the parties were engaged in "trade or commerce," and therefore acting in a "business context." Id. at 22-26.

The SJC found that BU's conduct, which included negotiating terms, charging fees for services, actively managing operations, and cutting Linkage out to increase its own revenue, showed engagement in commerce. Id. at 25-26. The SJC further found that the school's relationship with Linkage was not incidental to the university's educational mission, as might be the case where a contract was entered for services or equipment, and distinguished All Seasons Servs., Inc. v. Commissioner of Health & Hosps. of Boston, 416 Mass. 269, 271 (1993), where a hospital was found to have not acted in the business context because it did not seek to profit from a transaction with a service provider and the transaction was incidental to the hospital's primary function of providing medical services. Id. Critically, *even though BU intended to use any resulting profits to further its educational mission, this did not shield them from liability*. Id. BU engaged in a business deal to further its institutional interests, and it used leverage and negotiation to improve its position, just like a for-profit enterprise would, and therefore could be treated as a "person engaged in trade or commerce" under c. 93A. Id.

Linkage indicates that Defendants are not entitled to immunity. Just as BU sought to "add value" and increase revenues by entering and ultimately controlling a business arrangement; Defendants engaged in transactions designed to generate financial returns. Moreover, like BU, the agreements between Defendants and Plaintiffs were not incidental to Defendants' core mission but were a business means chosen by Defendants to achieve it. Indeed, Defendants arguably have an even weaker argument than BU did in Linkage. Unlike BU, Defendants' core activity is not charitable, but purely commercial. Defendants engage in *no charitable endeavors at all*; they purport to serve a charitable goal, keeping consumers like Plaintiffs in their homes, by undertaking inherently commercial transactions and structuring them in a manner that generates profits. They markup the resale price of the homes by 25% and collect a percentage of any future appreciation. Regardless of their motivation, Defendants engaged in profit-seeking business activity, which took them outside the realm of purely charitable conduct and subjects them to c. 93A.[22]

[22] While not dispositive, the terms of the amendment to G. L. c. 244, § 35C supports this conclusion. That amendment exempted transactions involving shared appreciation mortgages from the reach of Chapter 93A if certain conditions were met, at least suggesting that otherwise, such transactions take place in a business context within the scope of the statue.

In support of their position, Defendants rely on a First Circuit case, Kunelius v. Town of Stow, 588 F.3d 1 (1st Cir. 2009). Defendants overread Kunelius. Citing Linkage and All Seasons Servs., Inc., the court concluded that a nonprofit real estate trust, whose goal it was "to promote its core charitable mission of land conservation," was exempt from Chapter 93A because it engaged in a single transaction to buy and resell land owned by plaintiff subject to conservation covenants, which furthered its core mission. 588 F.3d at 18. Here, in contrast, Defendants were not engaged in a single transaction in order to further a charitable mission but rather inserted themselves wholesale into the real estate market, conducting over 900 real estate transactions. The fact that Defendants may have intended to use the profits from those transactions to further support its charitable mission does not change the nature of this analysis; the SJC rejected exactly that argument in Linkage. This case is thus more akin to Linkage.[23]

Accordingly, to the extent their claims are timely, Plaintiffs are entitled to judgment on liability under Count II insofar as the claim is based on the violation of the MCCCDA and Chapter 183C.

2. Plaintiffs' Request for Injunctive Relief

Plaintiffs' summary judgment motion seeks an injunction against the continued use of a confidentiality provision in the SA Note. They argue that the provision violates 940 Code Mass.

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[23] Furthermore, Poznik v. Massachusetts Med. Prof'l Ins. Ass'n, 417 Mass. 48 (1994), is similarly distinguishable. In Poznik, the plaintiff sued the Massachusetts Medical Professional Insurance Association ("MMPIA") under G. L. c. 93A for its handling of his medical malpractice claim. MMPIA was established by the Legislature as a nonprofit entity to guarantee the continued availability of medical malpractice insurance. Id. at 50. The SJC held that MMPIA was not engaged in "trade or commerce" because its actions were not motivated by business or personal reasons, but instead by its statutory mission. Id. at 52. The court also noted that the Legislature granted the MMPIA only limited powers and mandated that it operate on a self-sustaining basis and that the MMPIA did not operate in the general marketplace. Id. at 53. BH, by contrast, did not operate under a similar legislative mandate and the structure of the SUN Program was a deliberate choice made to maximize profit – Defendants profited from their transactions when they marked-up the resale price of the homes by 25% and collected a percentage of any future appreciation. By designing their program in this way, Defendants were engaged in commercial activity within the general marketplace and utilized the full extent of their corporate powers. Importantly, Defendants could have pursued their stated mission of assisting homeowners facing foreclosure through different nonprofit avenues. Instead, they chose a business model that relied on market-based transactions.

Regs. § 8.06(6), which invalidates acts or practices of a mortgage broker or lender that significantly deviate from industry wide standards or are otherwise unconscionable. As discussed below, the Court does not find unconscionability. Moreover, Defendants contest whether the confidentiality provision is a significant deviation from industry-wide standards. As such, Plaintiffs have not shown entitlement to an injunction as a matter of law invalidating the confidentiality provision.[24]

C. Chapter 183C

Chapter 183C imposes a variety of restrictions on creditors that make "high-cost home mortgage loans." Plaintiffs claim that the SUN Initiative resulted in high-cost home mortgage loans and that Defendants failed to comply with these restrictions in violation of Chapter 183C. For similar reasons as discussed above, Plaintiffs are entitled to judgment on liability under their Chapter 183C claim.

A "high-cost home mortgage loan" is defined to include any consumer credit transaction secured by the borrower's principal dwelling that imposes total "points and fees" exceeding the greater of 5% of the loan amount or $400 (adjusted annually). G. L. c. 183C, § 2.[25] "Points and fees" include the "items required to be disclosed pursuant to" the definition of "finance charge" in 12 C.F.R. §1026.4(a) and (b).[26] Id. Under 12 C.F.R. §1026.4(a), finance charge is defined as "the cost of consumer credit as a dollar amount [,] . . .includ[ing] any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or

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[24] To the extent Defendants seek summary judgment on the requests for injunctive relief, the Court concludes summary judgment is inappropriate.

[25] Section 2 provides a separate APR threshold in addition to the points and fees threshold mentioned above. Plaintiffs are not relying on the APR threshold.

[26] The statute was amended in 2015. Prior to the amendment, the statute referenced 12 C.F.R. § 226.4(a) and (b). The language therein is not different from that in 12 C.F.R. § 1026.4(a) and (b). As noted above, Regulation Z was originally promulgated by the Federal Reserve Board and codified at 12 C.F.R. part 226. However, in 2011, the Consumer Financial Protection Bureau took over rulemaking and as such, Regulation Z is now contained at 12 C.F.R. part 1026.

a condition of the extension of credit." Under 12 C.F.R. § 1026.4(b)(5), premiums or charges for default insurance or credit loss protection are considered "finance charges" and are therefore counted toward the "points and fees" calculation under Chapter 183.

Viewing the Sun Initiative as involving a single transaction, Plaintiffs are correct that they incurred debt that exceeded the "points and fees" limit due to the SUN Initiative's LLR, the 25% "upcharge" upon home repurchase. The LLR is a finance charge under 12 C.F.R. §1026.4. It is designated as a "loan loss reserve" premium intended to protect against borrower default, and the SUN Operations Manuals explain that the upcharge was required by SUN's funders in order "to mitigate the risk of the entire portfolio of [SUN] loans." SOF ¶ 85. Moreover, Defendants' financial statements, which present the LLRs as a loss reserve, describe them as " a source to repay financing obligations in the event of a non-payment of loans receivable." SOF ¶ 89. Borrower-facing documents likewise describe the LLR in these terms. SOF ¶ 88.

Defendants argue that the LLR is not a finance charge consistent with the definition in 12 C.F.R. § 1026.4 because it is not part of or incident to the extension of credit, i.e., the LLR is merely a component of the resale price negotiated by NSP and is "entirely separate" from Aura's loan. But as noted above, the SUN Initiative involves a single transaction. Indeed, although NPS imposes the charge, Aura's extension of credit is contingent on the inclusion of the LLR in the transaction, the funds are deposited into Aura-controlled accounts, and the charge is only released when the risk of default on the Aura loan is resolved or the loan is repaid. Thus, the LLR is imposed "directly or indirectly" by the creditor and paid "directly or indirectly" by the consumer as a condition of receiving credit, meeting the definition of a finance charge. 12 C.F.R. § 1026.4(a).

Accordingly, because the loan includes a finance charge significantly exceeding 5% of the total loan amount, it satisfies the statutory threshold identified above and qualifies as a high-cost home mortgage loan under Chapter 183C. Accordingly, Plaintiffs are entitled to judgment on liability on Count IV to the extent their claims are timely.

D. Application of the Statute of Limitations to these Claims

The original complaint in this action was filed on February 14, 2020. Claims brought under G. L. c. 93A, § 9 are governed by a four-year statute of limitations pursuant to G. L. c. 260, § 5A. Claims under the MCCCDA are subject to a four-year statute of limitations under G. L. c. 140D, § 10(f). And claims under G. L. c. 183C are subject to a five-year statute of limitations, as provided in G. L. c. 183C, § 15, which begins on the closing date of the high-cost mortgage loan.

The Closings for the following plaintiffs took place on these dates: Humes – December 28, 2010; Thomas – June 22, 2012; the Oateses – May 4, 2012; the Perdomos – November 30, 2012; and the Ortizes – October 31, 2013. Under these facts, the claims brought by Humes, Thomas, the Oateses, the Perdomos, and the Ortizes are barred by the applicable four-year statute of limitations for Count II and Count III, as well as the applicable five-year statute of limitations for Count IV, as more than the statutory period had elapsed from the date of closing to the date of filing.[27]

The closings for the remaining plaintiffs occurred as follows: the Cormiers – June 29, 2016; the DeSimones – January 4, 2017; the Dolats – February 7, 2019; the L' Ecuyers – July 31,

[27] In their opposition to Defendants' motion for summary judgment Plaintiffs make a series of arguments regarding timeliness, some of which are confusing, that are intended to apply to their claims as a whole. See Plaintiffs' Opposition at 23-29. For example, they argue that the various statutes of limitations are tolled because they allege a "continuing conspiracy" and because the SA Notes contain a confidentiality provision. To the extent any one of the arguments is intended to apply to these claims, the Court concludes they are unavailing.

2019; and the Meilleurs – March 9, 2017. Accordingly, these plaintiffs have timely claims under Counts II, III and IV.

IV. Defendants' Motion for Summary Judgment on Plaintiffs' Remaining Claims[28]

A. Contract Counts (Breach of Contract, Count VII; Breach of the Implied Covenant, Count VIII; and Lack of Consideration, Count IX)

Based on the analysis above, there is no genuine dispute as to whether the Aura mortgage, SA Note, and SAM are valid contracts, as they are supported by consideration if viewed as a part of a single transaction.[29] Thus, Defendants are entitled to summary judgment on Plaintiffs' lack of consideration claim.

Defendants are also entitled to summary judgment on the implied covenant claim. There is no evidence of any action by Defendants to deny Plaintiffs the benefits of the Aura mortgage, SA Note, or SAM. See Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991), quoting Drucker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976) (implied covenant requires "that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); Vacca v. Brigham & Women's Hosp., Inc., 98 Mass. App. Ct. 463, 470 (2020) ("Because the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties, it may not be invoked to create rights and duties not otherwise provided for in the existing contractual relationship.") (internal quotations omitted).

Defendants, however, are not entitled to summary judgment on the breach of contract claim, as Plaintiffs have shown there is a genuine dispute regarding whether Defendants

[28] As noted above, Plaintiffs are not seeking summary judgment on all their claims.
[29] Defendants' argument that there was separate consideration for the SA Note and SAM – that the borrower agreed to provide the SAM as part of the consideration for NSP's purchase and sale of the property, which is somehow severable from the Aura mortgage – fails to acknowledge how Defendants structured and marketed the transaction.

miscalculated their appreciation share. Moreover, the Court is unpersuaded by Defendants' contention that the claim is time-barred. The SAM is a sealed contract subject to a 20-year statute of limitation and therefore the claim is timely. See G. L. c. 260, § 1; In re Leary, 241 B.R. 266, 271–272 (Bankr. D. Mass. 1999) (in considering "whether the execution of a document under seal that is but one part of the entire agreement of the parties can serve to lever the entire transaction into one to which the twenty year statute of limitations applies," explaining that "where two or more contracts are part of a single transaction and appear in combination to constitute the entire understanding of the parties, the contracts are customarily read together as one, integrated agreement. ... [F]actors [considered include] ... simultaneity of execution, identity of subject matter and parties, cross referencing, and interdependency of provisions.") (internal quotations and alteration omitted).

B. Unconscionability

"Unconscionability ... is an affirmative defense to the enforcement of a contract." Good v. Uber Techs., Inc., 494 Mass. 116, 144 n.43(2024). See Kenney v. U.S. Bank, N.A., No. CV 17-11427-FDS, 2017 WL 5196386, at *4 (D. Mass. Nov. 9, 2017) ("unconscionability is an affirmative defense to enforcement of a contract and not a stand-alone cause of action.") (internal quotations and alteration omitted); Brown v. Nationstar Mortg. LLC, No. CV 18-11407-PBS, 2019 WL 2387632, at *5 (D. Mass. Feb. 4, 2019) (same). "Under Massachusetts law, to prove that the terms of a contract are unconscionable, a plaintiff must show both substantive unconscionability (that the terms are oppressive to one party) and procedural unconscionability (that the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise)." Machado v. System4 LLC, 471 Mass. 204, 218 (2015) (internal quotations and alteration omitted). "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Because there is no clear, all-purpose definition of 'unconscionable,' nor could there be, unconscionability must be determined on a case by case basis, giving particular attention to whether, *at the time of the execution of the agreement,* the contract provision could result in unfair surprise and was oppressive to the allegedly disadvantaged party." Miller v. Cotter, 448 Mass. 671, 679-680 (2007) (emphasis in original, internal quotations and citations omitted).

"Procedural unconscionability has to do with lack of fairness in the formation of the contract, such as the use of high pressure sales tactics and long printed forms with important provisions buried in fine print." 35 Mass. Prac., Consumer Law § 5:3 (4th ed.). "[W]here the consumer does have an opportunity to read or become familiar with the contract terms, the element of surprise is not present and cannot be the basis for a finding of unconscionability." 35 Mass. Prac., Consumer Law § 5:21 (4th ed.). See also, e.g., Rivera v. Stetson, 103 Mass. App. Ct. 187, 192, review denied sub nom. Lopez Rivera v. Stetson, 493 Mass. 1103 (2023) (agreement to arbitrate not unconscionable; "[p]resenting a patient with a 'stack of multiple forms' to review and sign before a medical procedure does not alone render a contract contained therein unconscionable. ... [W]e discern neither unfair surprise nor oppressive terms. In addition to the ample notice provided by the terms of the arbitration agreement ..., the process used by Stetson minimized any risk of unfair surprise. On the day of the surgery, Lopez had the opportunity to raise any questions about the packet [and] discuss questions ..."); Cahalane v. Skydive Cape Cod, Inc., No. 13-CV-0207-H, 2016 WL 4060941, at *4 (Mass. Super. July 26, 2016), judgment entered sub nom. Cahalane v. Skydive Cape Cod, Inc. (Mass. Super. 2017) (no unconscionability where plaintiffs conceded they did not read the disclosures made to them, and no action taken by the defendants suggested they were defrauded into signing the agreements).

Setting aside that unconscionability is an affirmative defense rather than a stand-alone cause of action, Plaintiffs cannot show procedural unconscionability because the record reflects that they had ample time to read the SA Note and SAM prior to signing them at the closing. As such, the claim fails. Since the claim does not survive on the merits, the Court does not address whether, as Defendants appear to contend, the claim is time-barred.

C. Tort Claims (Fraudulent and Negligent Misrepresentation, Count VI; Breach of Fiduciary Duty, Count X; and Civil Conspiracy, Count XI)

Defendants argue that the tort claims brought by Humes, the Oateses, Thomas, the Perdomos, the Ortizes, and the Cormiers are barred by the applicable three-year statutes of limitations. Under the facts here, the Court agrees that the fraudulent/negligent misrepresentation and civil conspiracy claims asserted by these plaintiffs are time-barred. Plaintiffs have offered no coherent reason in response to Defendants' contention that the limitations should not apply.[30] Thus, Defendants are entitled to summary judgment on these claims based on the statute of limitations.

The same is not true, however, with regard to these plaintiffs' breach of fiduciary duty claim. In response to Plaintiffs' contention that the claim is timely, Defendants simply respond that no fiduciary duty was assumed. As discussed below, there is a genuine dispute as to whether that was the case.

Turning to the fraudulent/negligent misrepresentation and conspiracy claims asserted by the DeSimones, the Dolats, the L' Ecuyers, and the Meilleurs, which are timely, the Court is unpersuaded that the record permits summary judgment in Defendants' favor. There is at the very least a genuine dispute as to whether the failure to include the disclosures required by

[30] As noted above, in their opposition to Defendants' motion for summary judgment Plaintiffs make a scattershot series of arguments regarding timeliness that are intended to apply to their claims as a group. See Opposition at 23-29.

federal and state law resulted in a misrepresentation that these plaintiffs relied upon to their detriment. The Court is likewise not persuaded that Defendants are entitled to summary judgment on the conspiracy claim asserted by these plaintiffs. Defendants provide no analysis as to why the civil conspiracy claim fails as a matter of law other than to argue that the other claims failed on their merits.

As for the merits of the breach of fiduciary duty claim asserted by Plaintiffs, there is a triable case as to whether NSP acted in a fiduciary capacity toward them; as discussed above, at one point in the SUN process, NSP negotiated on behalf of Plaintiffs, acting as their agent and representative. While a closer question, there is also a triable case that Aura, as a mortgage broker in this circumstance, held a fiduciary position with respect to Plaintiffs. As such, Defendants are not entitled to summary judgment on this claim. See Cahaly v. Benistar Prop. Exch. Tr. Co., 68 Mass. App. Ct. 668, 680 (2007), aff'd, 451 Mass. 343 (2008) ("Where a plaintiff reposes trust and confidence in the defendant, and the defendant knows of the plaintiff's reliance on him, a fiduciary duty may be created."); Doe v. Harbor Sch., Inc., 446 Mass. 245, 252 (2006) (although the existence of a fiduciary relationship can sometimes be resolved on summary judgment, generally "[w]here the fiduciary relationship is not one created by law, the existence of the relationship ordinarily is a mixed question of law and fact").[31]

ORDER

For the foregoing reasons:

1. Plaintiffs' motion for summary judgment is **ALLOWED** as to liability with respect to their claims under G. L. c. 93A, § 9 to the extent it is grounded on violation of the MCCCDA or G. L. c. 183C (Count II); the MCCCDA (Count

[31] The Court is not persuaded by Defendants' cursory argument that there was no breach even if a fiduciary duty existed.

III); and G. L. c. 183C (Count IV), as brought by the Cormiers, Francis and Debra DeSimone, Ronald and Christine Dolat, Cheryl and Peter L'Ecuyer, and Larry and Marlene Meilleur;

2. Plaintiffs' related request for an injunction is **DENIED**;
3. Defendants motion for summary judgment for a declaration is **ALLOWED IN PART** as to:
   a. Plaintiffs' claims for unconscionability (Count V); breach of the implied covenant of good faith and fair dealing (Count VIII), and lack of consideration (Count IX);
   b. the claims brought by Humes, the Oateses, Thomas, the Perdomos, and the Ortizes on Counts II-IV, VI, and XI; and
   c. the claims brought by the Cormiers on Counts VI and XI.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Chief Justice of the Superior Court

Dated: August 22, 2025