

MASSACHUSETTS SUPREME JUDICIAL COURT

SJC - 08647

STEPHEN BERISH, ANTHI TSAMTSOURIS, SIDNEY PARLOW,
IRVING LYON AND ANGELO MASSA, TRUSTEES OF THE TRUST OF
THE COTUIT BAY CONDOMINIUM,
Appellant/Cross-Appellee/Plaintiff
vs.
STUART BORNSTEIN, ET. AL.
Appellant/Cross-Appellee/Defendants

APPEAL FROM THE
BARNSTABLE SUPERIOR COURT
BEING HEARD ON DIRECT APPELLATE REVIEW

**BRIEF OF APPELLANT/CROSS-APPELLEE/PLAINTIFF
STEPHEN BERISH, ANTHI TSAMTSOURIS, SIDNEY PARLOW,
IRVING LYON AND ANGELO MASSA, TRUSTEES OF THE
TRUST OF THE COTUIT BAY CONDOMINIUM**

Stephen Schultz, Esq.
BBO # 447680
Engel & Schultz, P.C.
125 High Street, Suite 2601
Boston, MA 02110
(617) 951-9980 (Tel)
(617) 951-0048 (Fax)

Table of Contents

Statement of the Issues -1-

Statement of the Case: Nature of Case,
Course of Proceedings & Disposition Below
. -1-

Statement of Facts -8-

Summary of Argument -14-

Argument -17-

I. INTRODUCTION -17-

II. THERE IS AN IMPLIED WARRANTY OF HABITABILITY IN
THE SALE OF A COMPLETED DWELLING BY ITS BUILDER-
VENDOR. -18-

III. THE ECONOMIC LOSS RULE PROHIBITING THE BRINGING OF
A NEGLIGENCE CLAIM DOES NOT APPLY TO THIS CASE.
. -25-

A. The Economic Loss Rule Does Not Apply to this
Case Because Plaintiffs Suffered More than
Economic Loss.
. -25-

B. The Economic Loss Rule Does Not Apply as the
Parties Were Not in Contractual Privity.
. -28-

C. The Economic Loss Rule Does Not Apply As
Defendants Violated Clearly Established Legal
Duties Owed to the Plaintiffs. -30-

D. At a Minimum, the Economic Loss Rule Does Not
Apply to Plaintiffs' Claims of Defects Which
Potentially Affect the Safety of the
Homeowners.
. -32-

| | | |
|-----|---|------|
| IV. | THE COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S 93A CLAIMS ALLEGING MISREPRESENTATIONS AND FAILURES TO DISCLOSE RELATING TO THE COMMON AREAS OF THE CONDOMINIUMS. | -33- |
| V. | THE LOWER COURT ERRED IN AWARDING PLAINTIFFS ONLY \$104,022.70 IN DAMAGES FOR DEFENDANT STUART BORNSTEIN'S BREACH OF HIS FIDUCIARY DUTIES TO THE PLAINTIFF. | -38- |
| A. | <u>The Lower Court Improperly Narrowed The Fiduciary Duties Owed by The Defendants to The Plaintiffs.</u> | -38- |
| 1. | <u>The Court Improperly Limited Defendant's Fiduciary Duties to the Duty to Maintain, Repair and Replace Common Areas.</u> | -38- |
| 2. | <u>The Master Wrongfully Interpreted the Court Order as Limiting Recovery to Matters of Which Stuart Bornstein Had Actual Knowledge.</u> | -42- |
| B. | <u>The Master Understated The Fair And Reasonable Cost to Repair The Fastenings on the Chimneys.</u> | -43- |
| C. | <u>The Master Abused His Discretion in Precluding Damage Testimony Related to the Condominium's Duct Work.</u> | -43- |
| VI. | THE LOWER COURT ERRED IN AWARDING INTEREST ON PLAINTIFF'S CONTRACT CLAIM FROM THE DATE OF THE FILING OF THE COMPLAINT. | -45- |
| | Conclusion | -47- |

Table of Authorities

Cases

American Tower Owners Assoc. v. CCI Mechanical, 930 P.2d 1182 (Utah 1997) -21-

Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass. App. Ct. 385 (1988) -33-

Armbruster v. Hayden Company-Builder Developer, Inc., 622 S.W. 2d 704 (Mo. App. 1981) -20-

Aronsohn v. Mandara, 484 A. 2d 675 (N.J. 1984) -20-

Assoc. of Apartment Owners v. Child, 1 Haw. App. 130, 615 P. 2d 756 (1980) -20-

Barclay v. DeVeau, 384 Mass. 676 (1981) -41-

Barnes v. Mac Brown & Co. Inc., 342 N.E. 2d 619 (Ind. 1976) -20-

Bay State-Spray v. Caterpillar Tractor, 404 Mass. 103 (1989) -29-

Beachwalk Villas Condominium Association v. Martin, 406 SE2d 372 (S.C. 1991) -30-

Berg v. Stromme, 79 Wn. 2d 184, 484 P.2d 380 (1971) -21-

Berman v. , Watergate West, Inc., 391 A.2d 1351 (D.C. Ct. App. 1978) -20-, -25-

Blagg v. Fred Hunt Co., 612 S.W. 2d 321 (Ark. 1981) -20-

Board of Managers of the Fairways at North Hills -41-

Bolkum v. Staab, 346 A.2d 210 (Vt. 1975) -20-, -25-

Boston Hous. Auth. v. Hemingway, 363 Mass. 184 (1973) -21-, -22-, -23-

Boston Symphony Orchestra v. Commercial Union Ins. Co., 406 Mass. 7 (1989) -28-

Brewer v. Poole Construction Co., 2001 Mass. Super. LEXIS 151 -24-

| | | |
|--|-----------|----------|
| <i>Brown v. Fowler</i> , 279 N.W. 2d 907 (S.D. 1979) | . . . | -20- |
| <i>Butler v. Caldwell & Cook, Inc.</i> , 122 A.D. 2d 559, 505 N.Y.S. 2d 288 (1986) | | -20- |
| <i>Callaway v. City of Reno</i> , 993 P.2d 1259 (Nev. 2000) | | -21- |
| <i>Cigal v. Leader Development Corporation</i> , 408 Mass. 212 (1990) | | -29, 37- |
| <i>Clevert v. Jeff. W. Soden, Inc.</i> , 241 Va. 108, 400 S.E. 2d 181 (Va. 1991) | | -21- |
| <i>Coburn v. Lenox Homes Inc.</i> , 567 A.2d 599 (CT 1977) | | -20- |
| <i>Commonwealth v. Kapsalis</i> , 26 Mass. App. Ct. 448 (1988) | | -36- |
| <i>Commonwealth v. Pope</i> , 354 Mass. 625 (1968) | | -36- |
| <i>Compass Point Condominium Owners Ass'n v. First Fed. Sav. & Loan Ass'n</i> , 641 So. 2d 253 (Ala. 1994) | | -20- |
| <i>Condominium v. Fairway at North Hills</i> , 603 N.Y.S. 2d 867 (App. Div., 2 nd Dept.) | | -41- |
| <i>Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-turner Contracting Company</i> , 517 A.2d 336 (Md. 1986) | | -32- |
| <i>Council of Unit Owners of Breakwater House Condominium v. Simpler</i> , 603 A.2d 792 (Del. 1992) | | -20- |
| <i>Dixon v. Mountain City Construction Co.</i> , 632 S.W. 2d 538 (Tenn. 1982) | | -20- |
| <i>Dunant v. Wilmock, Inc.</i> , 176 Ga. App. 48, 335 S.E. 2d 162 (1985) | | -20- |
| <i>East River S.S. Corp. v. Transamerica Delaval</i> , 476 U.S. 858 (1986) | | -29- |
| <i>Elden v. Simmons</i> , 631 P.2d 739 (Okla. 1981) | | -20- |
| <i>Elderkin v. Gaster</i> , 447 Pa. 118, 288 A.2d 771 (1972) | | -20- |
| <i>Eliker v. Chief Indus., Inc.</i> , 242 Neb. 275, 498 N.W.2d 564 (1993) | | -20- |

| | |
|---|-----------|
| <i>Fretschel v. Burbank</i> , 351 N.W. 2d 403 (Minn. App. 1984) | -20- |
| <i>Gable v. Silver</i> , 258 So.2d 11 (Fla.App.), cert. discharged, 264 So. 2d 418 (Fla. 1972) | -20- |
| <i>Gailunas v. SPQR Management Assoc., Inc</i> , 1997 Mass. Super. LEXIS 579 | -27- |
| <i>Gaito v. Auman</i> , 327 S.E. 2d 870 (N. Car. 1985) | -20- |
| <i>Gateway Condominium Trust v. Clinton</i> , 1996 Mass. Super. LEXIS 409 | -27- |
| <i>Glickman v. Brown</i> , 21 Mass. App. Ct. 229 (1985), rev. den., 396 Mass. 1106 (1986) | -37- |
| <i>Gupta v. Ritter Homes, Inc.</i> , 646 S.W. 2d 168 (Tex 1983) | -20- |
| <i>Kennedy v. Columbia Lumber and Manufacturing Co.</i> , 384 S.E. 2d 730 (S.C. 1988) | -20- |
| <i>Keyes v. Guy Baily Homes, Inc.</i> , 439 So. 2d 670 (Miss. 1983) | -20- |
| <i>Kirk v. Ridgway</i> , 373 N.W. 2d 491 (1985) | -20- |
| <i>Lempke v. Dagenais</i> , 547 A.2d 290 (N.H. 1988) | -20- |
| <i>Libman v. Zuckerman</i> , 33 Mass. App. Ct. 341(1992) | -9- |
| <i>Loch Hill Construction Co. v. Fricke</i> , 284 Md. 708, 399 A.2d 883 (1979) | -20- |
| <i>Marcil v. John Deere Indus. Equip. Co.</i> , 9 Mass. App. Ct.625 (1980) | -27- |
| <i>McCann v. Brody-built Construction Co.</i> , 197 Mich. App. 512, 496 N.W. 2d 349 (1992) | -20- |
| <i>McDonough v. Whalen</i> , 365 Mass. 506(1974) | -19-, 26- |
| <i>McMahon v. M&D Builders, Inc.</i> , 360 Mass. 54(1971) | -18- |
| <i>Meadowbrook Condominium Association v. South Burlington Realty Corp.</i> , 565 A.2d 238, (Vt. 1989) | -19- |

| | |
|--|------|
| <i>Moransais v. Heathman</i> 744 So. 2d 973 (Fla. 1999) | -30- |
| <i>Moxley v. Laramie Builders, Inc.</i> , 600 P.2d 733 (Wyo. 1979) | -20- |
| <i>Multi Technology v. Mitchell Management Sys.</i> , 25 Mass. App. Ct. 333 (1988) | -36- |
| <i>Nader v. Citron</i> , 372 Mass. 96 (1977) | -28- |
| <i>National Academy of Sciences v. Cambridge Trust Co.</i> , 370 Mass. 303, (1976) | -42- |
| <i>Nichols v. R.R. Beaufort & Assocs.</i> , 727 A.2d 174 (R.I. 1999) | -20- |
| <i>Petersen v. Hubschman Constr. Co., Inc.</i> , 76 Ill. 2d 31, 389 N.E.2d 1154, 27 Ill. Dec. 746 (Ill. 1979) | -19- |
| <i>Real Estate Marketing v. Franz</i> , 885 S.W. 2d 921 (Ky. 1994) | -20- |
| <i>Redarowicz v. Ohlendorf</i> , 441 N.E. 2d 324 (Ill. 1982) | -20- |
| <i>Richards v. Powercraft Homes, Inc.</i> , 678 P.2d 427 (Ariz. 1984) | -20- |
| <i>Rogers v. Scyphers</i> 161 S.E.2d 81 (S.C. 1968) | -23- |
| <i>Rothberg v. Olenik</i> , 262 A.2d 461 (Vt. 1970) | -24- |
| <i>Saltis v. Lakes Heating & Air Conditioning</i> , 2001 Ohio App. LEXIS 1279. | -21- |
| <i>Samuelson v. A.A. Quality Constr.</i> , 749 P.O. 2d 73 (Mont. 1988) | -21- |
| <i>Schipper v. Levitt & Sons, Inc.</i> , 207 A.2d 314, (N.J. 1965) | -25- |
| <i>Seal Harbor III Condominium Trust v. Kaplan</i> ,1997 Mass. Super. LEXIS 126 | -28- |
| <i>Sewell v. Gregory</i> , 371 S.E. 2d 82 (W. Va. 1988) | -20- |
| <i>Shisler v. Frank</i> , 582 N.W.2d 504, (Wisc. Ct. App. 1998) | -19- |

| | |
|---|------|
| <i>Sutton Corporation v. Metropolitan District Commission</i> , 38 Mass. App. Ct. 764 (1995) | -9- |
| <i>Sylvia v. Johnson</i> , 44 Mass. App. Ct. 483 (1998) . . . | -33- |
| <i>Tusch Enters. v. Coffin</i> , 113 Idaho 37 (Idaho 1987) . . | -19- |
| <i>Utz v. Moss</i> , 503 P.2d 365 (Colo. 1972) | -20- |
| <i>Wimmer v. Down East Properties Inc.</i> , 406 A.2d 88 (Me 1989) | -20- |
| <i>Yepsen v. Burgess</i> , 269 Or. 635, 525 P.2d 1019 (1974 (en banc) | -20- |

Statutes and Regulations

| | |
|---------------------------------------|------|
| 780 CMR 101.4 | -22- |
| 780 CMR 118.1 | -22- |
| Mass. Gen. Laws c. 231 § 6C | -45- |

Other Authority

| | |
|--|------------|
| <i>Hyatt and Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations</i> , 12 Wake Forest L. Rev. 915, 973 (1976) | -41- |
| <i>Restatement (Second) of Torts</i> , § 385 | -32- |
| <i>Restatement (Second) of Torts</i> , § 424 | -31- |
| <i>Uniform Condominium Act Section</i> , 3-103(a) | -40-, -41- |

Statement of the Issues

- Whether there is an implied warranty of habitability in the sale of a completed dwelling by its builder-vendor.
- Whether the economic loss rule prohibiting the bringing of a negligence claim applies where (1) a builder has violated a legal duty imposed by the building code, (2) the result of the negligence is the creation of a dangerous condition, (3) where there is consequential property damage to the same dwelling caused by the defect or (4) where the parties are not in contractual privity.
- Whether the court improperly limited plaintiffs' M.G.L. c. 93A claims.
- Whether the Court improperly limited plaintiff's recovery of damages relating to defendant's breach of fiduciary duties.
- Whether the lower court improperly applied interest to plaintiffs' contract claim from the date of the complaint rather than from the date of the breach.

Statement of the Case: Nature of Case, Course of Proceedings & Disposition Below

This is a case in which the Trustees of a condominium unit owner's trust is seeking recovery from

the condominium developer/vendor for shoddy construction of the condominiums.

The plaintiffs in this case are the successor trustees of the Trust of the Cotuit Bay Condominium (hereinafter "the Association Trust") established pursuant to M.G.L. c. 183A. *App. (Vol 1), A479, ¶ 1.*

The defendant Stuart Bornstein (hereinafter "the developer") is an individual, who was (i) an original trustee of the Association Trust, (ii) a trustee of the Cotuit Bay Condominium Trust (hereinafter "the Nominee Trust"), the entity that acquired the property on which the Cotuit Bay Condominium (hereinafter "the Condominium") was constructed and that financed the construction, and (iii) the president of the defendant Cotuit Bay Condominium, Inc., the general contractor that constructed the Condominium. *Id., A479, ¶ 2.*

The defendant Jamila Bornstein is Stuart Bornstein's wife and was from October, 1981, until June, 1985, a trustee of the Association Trust. *Id., ¶ 3.*

The defendant Paul Bornstein is Stuart Bornstein's brother and was from October, 1981, until July, 1984, a trustee of the Association Trust. *Id., ¶ 4.*

The defendant Morris Bornstein is Stuart Bornstein's father and was from October, 1981, until

July, 1983, a trustee of the Association Trust. *Id.*, ¶ 5.

On January 28, 1987, plaintiffs filed the Complaint in this action in the Land Court.

On April 21, 1988, the Land Court ordered the case transferred to the Barnstable Superior Court.

On or about October 26, 1988, plaintiffs filed a Third Amended Complaint (hereafter "the Complaint"). *Id.*, A91-A119.

On December 21, 1993, the Superior Court (O'Neill, J.) granted Stuart Bornstein's and Cotuit Bay Condominium Inc.'s motion to dismiss Counts I and II of the Complaint, sounding in negligence. *Id.*, A183-A186. Judge O'Neill declared that "[b]ecause the plaintiffs' complaint fails to assert any damage other than the allegedly defectively designed and constructed condominium itself, this claim is barred by the 'economic loss' doctrine, and shall therefore be dismissed. *Id.* A184. Judge O'Neill also dismissed Count X, a claim that the developer had breached the implied warranty of habitability, ruling that "[u]nder the current state of the law in this Commonwealth, such a cause of action arises only in situations involving the rental of residential property, and does not extend to the purchase of a house or condominium." *Id.* A185.

On January 19, 1994, plaintiffs filed a Petition for Interlocutory Relief Under G.L. c. 231 § 188 (First Paragraph) seeking review of the Superior Court's granting of the Motion to Dismiss on the negligence and implied warranty of habitability claims. *Id.* A198-A205.

On February 4, 1994, Justice Dreben denied the Petition for Interlocutory Review without stating reasons for the denial. *Id.* A 221. She noted, however:

Since the evidence on the counts remaining in this matter is for the most part relevant to the dismissed counts (I, II and X), it is suggested that any additional otherwise admissible evidence, if any, which is only relevant to the dismissed counts also be admitted. This procedure may preserve the issues without the necessity of a new trial in the event that the issues are appealed and the appellate panel disagrees with the decision of the motion judge.

Id.

Forty one days of hearings were held before a master (Charles Sabatt) between January 3, 1994 and January 24, 1995. Thirty eight witnesses were called by the plaintiffs, while the defendants called only one witness. *Id.*, A483, ¶ 21. Defendants did not call a single witness asserting that the condominiums were constructed in accordance with the provisions of the Massachusetts Building Code or a single witness disputing the amount of damages claimed by plaintiffs

relating to their claims that the condominium was defectively constructed.

On December 20, 1994, Mr. Sabatt, ruling from the bench, dismissed all but one of Plaintiff's claims that Mr. Bornstein violated M.G.L. c. 93A. *App. (Vol 10), A5100B-A5100H.*

On May 1, 1996, a Master's Report was filed with the Court. *App. (Vol 1), A391-A455.* Among other findings, the Master found that the wording of Count XI of the Complaint required that the breach of fiduciary duty claim against Stuart Bornstein must be construed as a claim only against him individually for his acts as trustee of the Association Trust. *Id., A395, ¶ 17.* Nevertheless, the Master found that Stuart Bornstein had breached his fiduciary duties owed to the plaintiffs by failing to replace certain defects in construction and awarded plaintiffs \$295,562.77 in damages (prior to the addition of interest) for the breach of fiduciary duty. *Id., A449, ¶¶ 296-298.* In addition, the Master found that Stuart Bornstein had breached a contract with the Association Trust by failing to pay \$36,223 in common area fees due. *Id., A411-A412, ¶¶ 106, 108.* However, he concluded that plaintiffs had suffered no damages relating to the breach of contract claim, because Mr. Bornstein through

the defendant Cotuit Bay Condominium Inc. had paid for certain expenses and maintenance costs which he was not otherwise obligated to pay and which offset his failure to pay the common area fees due. *Id.*, A412, ¶ 109.

On February 28, 1997, Judge O'Neill issued a Memorandum and Order ruling on (1) Defendants' motion to modify and confirm Master's Report or In the Alternative to Recommit, (2) Defendants' Objection to Master's Report and Request for Further Findings and (3) Plaintiffs' Objections to Master's Report. *Id.* A468. Judge O'Neill remanded the case to the Master, declaring that the Master's findings that Bornstein failed to insure that units admitted were constructed in accordance with the State Building Code to be inconsistent with his ruling that the breach of fiduciary duty claim was brought against Bornstein solely in his role as trustee of the Association Trust. *Id.*, A471. He ordered the Master "to make findings of damages limited to Bornstein's failure to 'maintain, repair, and replace' common areas from October, 1981 to July, 1985 (the dates during which Bornstein was a trustee of the Association Trust), in breach of his fiduciary duty as Trustee of the Association Trust." *Id.* A472. In addition, Judge O'Neill held that Bornstein, as an owner of a number of the condominium

units, could not set-off expenditures he made as the developer, against his contractual duty to pay common fees, and, thus, awarded plaintiffs \$36,233 in damages on its breach of contract claim. *Id.* A469-A470.

On September 14, 1999, the Master issued his second Master's Report (hereafter "Master's Report II"). *Id.* A478. Master's Report II reduced plaintiffs' damages on its breach of fiduciary duty claim from \$295,562.77 to \$104,022.70. *Id.*, A529, ¶¶ 267-269. The Master interpreted Judge O'Neill's February 28, 1997, Order as requiring him to limit his findings of breach of a fiduciary duty to defects in the common area of which Stuart Bornstein had actual notice during his tenure as a Trustee of the Association Trust. *Id.* A533-A534, ¶¶ 295-296. He concluded that Bornstein only had actual notice of damage resulting from defective construction which would cost \$104,022.70 to repair or replace. *Id.* A534, A529, ¶¶ 296, 267-269. He expressed his personal opinion that Judge O'Neill was wrong in so limiting him, *Id.*, A533-A534, ¶ 295, n. 2, and he filed as an Appendix "Alternative Findings and Conclusions of Law - Other Common Area Defects" indicating that if not restricted by the Court's order he would have continued

to award plaintiffs the additional \$191,605.00 he had awarded them in his first report. *Id.*, A542-A550.

On May 1, 2000, Justice O'Neill issued a Memorandum of Decision and Order on Defendant Bornstein's Objections to Master's Report, and Motion to Modify and Adopt the Master's Report. *Id.*, A563. The court affirmed the Master's Report II in all respects.

On August 22, 2000, judgments were issued reflecting the findings in the Master's Report II. *Id.*, A567-A569.

Statement of Facts

On October 30, 1981, the Cotuit Bay Condominium was created by the defendant Cotuit Bay Condominium

Trust. App(Vol 1), A508 ¶ 149 ¹, App. (Vol 2), "Master Deed", A751-A878.

The Cotuit Bay Condominium Trust was a Nominee Trust for which Stuart Bornstein was the trustee and principal beneficiary.² App. (Vol 1), A479, A508, ¶¶ 2, 151. All building permits required for the construction of the condominium were issued to the Nominee Trust. *Id.*, A508, ¶ 152. The Nominee Trust owned every condominium unit from the date that it was admitted to the Condominium until it was sold to a third party purchaser. *Id.*, A495, ¶ 88.

1

The vast majority of the Statements of Fact are taken from the Master's Report II. On September 17, 1992, a Joint Motion to Refer the Case to a Special Master was allowed. App. (Vol 1) A120. In the motion, the parties agreed that the hearing on the merits would be on a "facts final basis". *Id.* A123. As the court noted in *Sutton Corporation v. Metropolitan District Commission*, 38 Mass. App. Ct. 764, 765-766 (1995), after referral to a master on a "facts final basis", "[t]he subsidiary findings of the master are binding upon us [the appellate court] unless they are 'clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law.'" See, also, *Libman v. Zuckerman*, 33 Mass. App. Ct. 341, 343 (1992) ("A master's subsidiary findings are supposed to have heft, and they will not be set aside unless the reviewing court is firmly and definitively convinced that they are mistaken.")

2

The Cotuit Bay Condominium Trust ("the Nominee Trust") is to be distinguished from the Trust of the Cotuit Bay Condominium ("the Association Trust"), whose trustees are the plaintiff in this case.

Construction of the Condominium occurred between 1981 and 1985. *Id.*, A508, A511, ¶ 154, 176. In total, 62 units were constructed. *Id.*, A512, ¶ 177.

Construction was undertaken by the defendant Cotuit Bay Condominium, Inc., a company for which Stuart Bornstein was either the sole stockholder or the majority stockholder. *Id.*, A508, ¶¶ 155, 156. In fact, all of the entities that constructed and developed the Cotuit Bay Condominium were legal entities within which Stuart Bornstein or members of his immediate family held beneficial interests, within which Stuart Bornstein exercised exclusive control, or within which Stuart Bornstein was the sole director or officer. *Id.*, A509, ¶ 159.

The plaintiff Association Trust (the unit owners' organization) was formed by means of a declaration of trust dated October 30, 1981. *Id.*, A509, ¶160. The original Trustees of the Association Trust were the defendants Morris Bornstein, Paul Bornstein, Jamila Bornstein, Stuart Bornstein and Ronald Schmidt (an employee of Cotuit Bay Condominium, Inc.) (collectively referred to as "The Defendant Association Trustees"). *Id.*, A510, ¶ 163. Stuart Bornstein admitted retaining control of the Trust until June, 1984, and remained a trustee until 1985. *Id.*, A510, ¶ 170.

All of the members of the Bornstein family supposedly acting as Association Trustees abandoned their trustee responsibilities owed to the unit owners. Stuart Bornstein conceded that his family members played no role in the administration of the trust. *App. (Vol 5), A2425-A2426.* In fact, Maurice Bornstein (Stuart Bornstein's father) testified that he did not even know that he was a trustee. *App. (Vol 6), A2890.* Stuart Bornstein further conceded that he was "more involved as the President of Cotuit Bay Condominium, Inc." (the construction company) and that his "role as Trustee was a very passive one at most." *Id. A2721.* He stated that the only time he "even thought as a trustee was at an annual meeting when we had it" and that he "was trustee for one day a year." *Id. A2721-A2722, A2724.*

The construction of the condominium units were replete with deficiencies and defects.

During the tenure of the defendants as Trustees of the Association Trust, the following common areas experienced water leaks and required maintenance, repair or replacement: sliders, chimneys, skylights, decks and flat roofs. *App. (Vol 1), A512-A513, ¶ 182.* In all cases in which the water leaked from the structural components of the units, namely from the

chimney enclosures, roofs, skylights and sliders, there was consequential damage to the sheet rock and other interior elements. *Id.*, A514, ¶ 190. None of the skylights, chimneys or sliders which leaked were installed with the appropriate flashing required by the State Building Code. *Id.*, ¶¶ 191-195.

During the tenure of the defendants as Trustees of the Association Trust, there was also evidence of rotting and deterioration of the outside decks. *Id.*, A515, ¶ 202. The supporting columns for the outside decks were not constructed of pressure treated wood and were built directly into the ground causing them to decay or rot. *Id.*, A516, ¶ 204. None of the decks at the Condominium were constructed in accordance with the Massachusetts Building Code nor were they constructed in a good and workmanlike manner. *Id.*, ¶ 207. While decks constructed in accordance with the State Building Code and good building practices would be expected to have a life of 15 to 20 years, none of the decks at the Cotuit Bay Condominium survived for longer than ten years and in some cases they survived for far fewer than even ten years. *Id.*, A517, ¶ 216-217.

Other "latent" defects³ existed in the construction of the condominiums during the tenure of the Association Trustee Defendants. These included improper bathroom ventilation, improper attic ventilation, and improper fastening of the chimneys to the roofs of the buildings. *Id.*, A529, ¶ 271.

The bathroom exhaust venting system did not provide for any ventilation to the outside of the buildings and violated the Massachusetts State Building Code. *Id.*, A530, ¶ 273, 274. Over time, the lack of adequate bathroom ventilation will cause decay to the wooden rafters and sheathing in the condominium buildings. *Id.*, ¶ 275.

In none of the condominium buildings were ridge vents installed nor baffles provided as required by the Massachusetts Building Code. *Id.*, A531, ¶ 278. In some cases, the eaves vents were stuffed with

3

The Master concluded that Stuart Bornstein, in his role as Association trustee, did not have notice of these defects during his tenure. *App. (Vol 1)*, A534, ¶ 297. To reach this conclusion, the Master felt compelled by the Court's remand to "ignore" Stuart Bornstein's knowledge "derived from his multiple roles as builder and developer". *Id.* Moreover, the Master acknowledges that in fact an architect had advised Stuart Bornstein that the attics were not vented in accordance with code. *Id.*, A531, A534, ¶¶281, 298. Nevertheless, the Master somehow concluded that because the inadequate ventilation had yet to manifest itself in actual damage to the attics that Mr. Bornstein was not under sufficient notice to obligate him to undertake repairs.

insulation, which also violated the Massachusetts Building Code. *Id.*, ¶ 279. Over time, the above described violations of the Building Code relating to ventilation of the attics will result in the decay of the timbers, rafters and plywood. *Id.*, ¶ 280.

The several hundred pound chimneys were attached to the roofs with nothing other than eight penny nails banged into the sheathing. *Id.*, A532, ¶ 287. Not surprisingly, several of the chimneys have fallen off of the roofs. *Id.*, ¶ 289.

Summary of Argument

The lower court improperly dismissed plaintiff's claim that there is an implied warranty of habitability in the sale of a completed dwelling by its builder-vendor. Courts in a vast majority of states now hold that an implied warranty arises in the sale of new homes by their builder-vendor. The same rationale employed by the Supreme Judicial Court in the case of *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 191-97 (1973) supporting the proposition that there is an implied warranty of habitability in every lease supports the conclusion that in the modern world the primary interest of the purchaser of a home is not in the land conveyed but in finding upon it an objectively habitable home, i.e. one complying with all relevant

building codes. There is particularly no meaningful distinction between the mass production and sale of manufactured goods and the mass production and sale of condominium homes. *See Section II, infra at 18-25.*

The lower court also erred in dismissing plaintiff's negligence claim, because of the economic loss rule. The economic loss rule does not apply to this case, because plaintiffs suffered more than the economic loss measured by the need to replace the defective work. In particular, water leaks caused consequential damages to sheetrock and other interior elements. Inadequate ventilation resulted in decay to surrounding elements. The economic loss rule also does not apply as the parties were not in contractual privity. The plaintiff had no opportunity to protect itself contractually, and, thus, should not be limited in its ability to recover under a negligence theory. Finally, the violations of legal duties imposed by the State Building Code dictates against imposition of a court-imposed economic loss rule. *See Section III, infra at 25-33.*

The lower court should not have dismissed the vast majority of plaintiff's chapter 93A claims on the basis that the Complaint's claims did not relate to the common areas which the plaintiff association had

standing to protect. The Complaint attached and incorporated plaintiff's demand letter into the Complaint, and the Court's refusal to acknowledge the claims set forth in the demand letter was an abuse of discretion. *See Section IV, infra at 33-38.*

The lower court erroneously limited plaintiff's damages to \$104,022.70 resulting from defendant's breach of fiduciary duties. Damages should not have been limited to those defects of which defendant had actual knowledge, as defendant had a fiduciary duty to make a reasonable inquiry as to the truth of assertions that the condominiums exceeded all required building codes, as well as a fiduciary duty as a developer to ensure that the condominium units were constructed properly. Moreover, the Court, apparently accidentally, undercalculated plaintiff's damages by \$9,500. Finally, the Master below abused his discretion in refusing to allow testimony relating to the cost of repairing the condominium's duct work, while acknowledging that the testimony was consistent with pretrial disclosures and consumed in the disclosure of the cost of larger repairs. *See Section V, infra at 38-45.*

The court erroneously applied interest on plaintiff's contract claim from the date of entry of

the judgment rather than from the dates of the breaches of contract. See Section VI, *infra* at 45-47.

Argument

I. INTRODUCTION

The lower court in this case in essence found that the condominiums built and sold by the defendants were shoddily constructed in flagrant disregard of numerous Building Code provisions. Yet, through the exercise of legal gymnastics and hair-splitting, the court also determined that the plaintiffs were only entitled to \$104,022 of the \$295,562 in damages that they suffered as the result of this shoddy construction.⁴ This simply cannot be the law.

Whether plaintiffs should prevail because the developer's fiduciary duties must be more broadly interpreted, because the chapter 93A claim should not have been dismissed, because plaintiff's negligence action is not barred by the economic loss rule or because there is an implied warranty of habitability that attaches to the sale of a dwelling (or at least to the sale of a condominium unit) is of no particular moment to the plaintiffs, so long as they prevail. On

4

Given that interest on the judgment runs from January 28, 1987, the lower court's opinion after interest denies plaintiffs over one half million dollars in damages that they have sustained.

the other hand, it is of considerable moment to this Court to establish the exact boundaries of the economic loss rule, the parameters of the implied covenant of habitability, and the duties imposed on a fiduciary in order that future home purchasers, unlike the plaintiffs in this case, will not have to struggle for fifteen years in court in order to enforce their rights.

II. THERE IS AN IMPLIED WARRANTY OF HABITABILITY IN THE SALE OF A COMPLETED DWELLING BY ITS BUILDER-VENDOR.

The lower court erroneously dismissed plaintiff's claim that there is an implied warranty of habitability in the sale of a completed dwelling by its builder-vendor. In *McMahon v. M&D Builders, Inc.*, 360 Mass. 54, 62 (1971), the Supreme Judicial Court noted the trend in other jurisdictions to impose on the builder-vendor of a dwelling house an implied warranty to the initial purchaser (a) that the house was built in a good and workmanlike manner, (b) that it is suitable for habitation, and (c) that it was built in compliance with applicable building laws, ordinances, regulations or codes. The Court concluded that the issue had not been raised properly in that case and did not need to be reached; however, the court twice described the

issue as an "important question" for the Massachusetts courts to decide.⁵

Since 1971, the trend has, if anything, accelerated and even more jurisdictions have concluded that there is an implied warranty of habitability⁶ in the sale of a completed dwelling by its builder-vendor. As of today, courts in a vast majority of states now

5

In *McDonough v. Whalen*, 365 Mass. 506, 511 (1974), the Court similarly found that the parties had failed to raise the issue of whether an implied warranty of habitability is tied to the sale of dwelling by a builder/vendor. Nevertheless, the Court did note that "there is no sound reason to treat a builder of houses or other realty structures differently from a manufacturer of chattels."

6

Plaintiffs have termed the implied warranty as one of habitability. They have done so as that is the term used by Massachusetts appellate courts to describe the implied warranty in the context of residential leases. Some jurisdictions style this implied warranty as one of habitability. See, e.g., *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022, 1030 (Idaho 1987). Others call it an implied warranty for fitness of purpose or intended use. See, e.g., *Petersen v. Hubschman Constr. Co., Inc.*, 76 Ill. 2d 31, 389 N.E.2d 1154, 1158, 27 Ill. Dec. 746 (Ill. 1979). Yet, others call it an implied warranty of good quality and workmanship. *Council of Unit Owners of Breakwater House Condominium v. Simpler*, 603 A.2d 792, 795 (Del. 1992). However, as the court noted in *Shisler v. Frank*, 582 N.W.2d 504 (Wisc. Ct. App. 1998), "the substance of the warranty is defined in a similar manner: Implied in the contract for sale from the builder-vendor to the vendees is a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use." See, also, *Meadowbrook Condominium Association v. South Burlington Realty Corp.*, 565 A.2d 238, 241 (Vt. 1989) (Issue of whether breach of implied warranty in common area not turn on whether area is habitable but on quality of construction).

hold that an implied warranty arises in the sale of new homes by their builder-vendor. In fact, forty (40) states plus the District of Columbia have found such an implied warranty to exist.⁷ In one other state, an

7

Blagg v. Fred Hunt Co., 612 S.W. 2d 321 (Ark. 1981); *Richards v. Powercraft Homes, Inc.* , 678 P.2d 427 (Ariz. 1984); *Council of Unit Owners of Breakwater House Condominium v. Simpler*, 603 A.2d 792 (Del. 1992); *Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. Ct. App. 1978); *Tusch Enterprises v. Coffin*, 740 P.2d 1022 (Ida. 1987); *Gable v. Silver*, 258 So.2d 11 (Fla.App.), cert. discharged, 264 So. 2d 418 (Fla. 1972); *Redarowicz v. Ohlendorf*, 441 N.E. 2d 324 (Ill. 1982); *Barnes v. Mac Brown & Co. Inc.*, 342 N.E. 2d 619 (Ind. 1976); *Keyes v. Guy Baily Homes, Inc.*, 439 So. 2d 670 (Miss. 1983); *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988); *Aronsohn v. Mandara*, 484 A. 2d 675 (N.J. 1984); *Gaito v. Auman*, 327 S.E. 2d 870 (N. Car. 1985); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Nichols v. R.R. Beaufort & Assocs.*, 727 A.2d 174 (R.I. 1999); *Gupta v. Ritter Homes, Inc.*, 646 S.W. 2d 168 (Tex 1983); *Sewell v. Gregory*, 371 S.E. 2d 82 (W. Va. 1988); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Utz v. Moss*, 503 P.2d 365 (Colo. 1972); *Kennedy v. Columbia Lumber and Manufacturing Co.*, 384 S.E. 2d 730 (S.C. 1988); *Bolkum v. Staab*, 346 A.2d 210 (Vt. 1975); *Compass Point Condominium Owners Ass'n v. First Fed. Sav. & Loan Ass'n*, 641 So. 2d 253 (Ala. 1994); *Coburn v. Lenox Homes Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Real Estate Marketing v. Franz*, 885 S.W. 2d 921 (Ky. 1994); *Dunant v. Wilmock, Inc.*, 176 Ga. App. 48, 335 S.E. 2d 162 (1985); *McCann v. Brody-built Construction Co.*, 197 Mich. App. 512, 496 N.W. 2d 349 (1992); *Fretschel v. Burbank*, 351 N.W. 2d 403 (Minn. App. 1984); *Armbruster v. Hayden Company-Builder Developer, Inc.*, 622 S.W. 2d 704 (Mo. App. 1981); *Butler v. Caldwell & Cook, Inc.*, 122 A.D. 2d 559, 505 N.Y.S. 2d 288 (1986); *Brown v. Fowler*, 279 N.W. 2d 907 (S.D. 1979); *Assoc. of Apartment Owners v. Child*, 1 Haw. App. 130, 615 P. 2d 756 (1980); *Kirk v. Ridgway*, 373 N.W. 2d 491 (1985); *Wimmer v. Down East Properties Inc.*, 406 A.2d 88 (Me 1989); *Loch Hill Construction Co. v. Fricke*, 284 Md. 708, 399 A.2d 883 (1979); *Eliker v. Chief Indus., Inc.*, 242 Neb. 275, 498 N.W.2d 564 (1993); *Yepsen v. Burgess*, 269 Or. 635, 525 P.@d 1019 (1974 (en banc); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); *Dixon v. Mountain City*

intermediate appellate court has indicated that an implied warranty may exist, although it required proof of negligence to sustain a claim.⁸ Only three states have outright rejected the claim that a builder/developer owes a purchaser an implied warranty of habitability.⁹ Massachusetts is one of only six states that has apparently not ruled on this "important issue".¹⁰

In *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 191-198 (1973) this Court inferred from a landlord's statutory duty to comply with the Commonwealth's Sanitary Code a legislative intention that tenants should only pay rent for habitable premises, and concluded that the *caveat emptor* doctrine had outlived any purposeful use. The Court thus implied in all

Construction Co., 632 S.W. 2d 538 (Tenn. 1982); *Berg v. Stromme*, 79 Wn. 2d 184, 484 P.2d 380 (1971); *Clevert v. Jeff. W. Soden, Inc.*, 241 Va. 108, 400 S.E. 2d 181 (Va. 1991); *Shisler v. Frank*, 582 N.W. 2d 504 (Wes. App. 1998).

8

Saltis v. Lakes Heating & Air Conditioning, 2001 Ohio App. LEXIS 1279.

9

Samuelson v. A.A. Quality Constr., 749 P.O. 2d 73 (Mont. 1988); *Callaway v. City of Reno*, 993 P.2d 1259 (Nev. 2000); *American Tower Owners Assoc. v. CCI Mechanical*, 930 P.2d 1182 (Utah 1997).

10

Alaska, California, Kansas, Massachusetts, New Mexico, and North Dakota.

residential leases a warranty of habitability. 363

Mass. at 199.

An examination of the rationale of this Court in *Hemingway* shows that much of the court's reasoning in that case is applicable to the case at hand. In *Hemingway*, the Court concluded that passage of the State Sanitary Code had already encroached upon the common law rule of caveat emptor. Similarly, passage of the State Building Code, aimed at securing adequate "sanitary conditions, light and ventilation", 780 CMR 101.4, and securing "safety to life and property", *id.*, and making it a criminal act to construct a dwelling in violation of the Code, 780 CMR 118.1, has also encroached upon the common law rule of caveat emptor.

The Court expressed the following rationale for abandoning rules designed to fit an agrarian society and to replace them with rules designed to fit a modern urban society:

Our reexamination leads us to conclude that the exception to the independent covenants rule carved out by the *Ingalls* case, 156 Mass. 348, *supra*, in response to what was then an unusual situation, must now become the rule in an urban industrial society where the essential objective of the leasing transaction is to provide a dwelling suitable for habitation... . Modern tenants, rightfully expect that the premises they rent, whether furnished or unfurnished, will be suitable for occupation. . . . [T]oday's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs

like the 'jack-of-all-trades' farmer who was the common law's model of the lessee. . . . Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. . . . In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. (citation omitted).

363 Mass. at 196-198

The purchaser of a home dwelling similarly is more interested in purchasing a dwelling suitable for habitation than in obtaining the land on which the dwelling sits. The purchaser is unlikely to be a jack-of-all trades capable of detecting latent defects in construction, and, like the tenant, is far more mobile than ever before.

Courts in other states have applied the same logic this Court used in *Hemingway* to imply a warranty of habitability or good and workmanlike building in the sale of a dwelling structure. In *Rogers v. Scyphers* 161 S.E.2d 81,84 (S.C. 1968) the court found that

"Conditions have radically changed since the origin of the general common law rule. Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thoroughly his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise, he would be at the vendor's mercy. (Citation omitted).

In *Rothberg v. Olenik*, 262 A.2d 461, 467 (Vt. 1970), the court imposed an implied warranty of habitability on a builder/vendor finding that "The law should be based upon current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast with the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they appear to have been step by step in the cases."

Thus, it is not surprising that in the recent Superior Court case of *Brewer v. Poole Construction Co.*, 2001 Mass. Super. LEXIS 151,** 16-17, Judge Welch predicted that this Court would extend the implied warranty of habitability to the sale of new homes by their builder/vendor. He wrote:

The rationale of the Court in . . . *Hemingway* is readily applicable to the case at bar. The primary interest of the plaintiffs here, like those above, is not in the land conveyed but in finding upon it an objectively habitable home, i.e. one complying with all relevant building codes.

Even if this Court were to find that there is not an implied warranty in the sale of all dwellings, it would nevertheless be appropriate to impose such a warranty on the sales of condominium units by their developer. The dependence of multiple unit owners on a developer closely resembles the dependence of a

multiple tenants on their landlord. *Cf. Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. App. 1978) (There is no meaningful distinction between the mass production and sale of automobiles and mass production and sale of homes); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 325 (N.J. 1965) (same).

Count X of the Complaint, alleging a breach of the implied warranty of habitability, names Stuart Bornstein, both individually and as he was trustee of the Nominee Trust, as the defendant. Defendants in this case have spent much of their time seeking to divide up Mr. Bornstein legal existences in order to avoid liability. However, a number of courts have found that the implied warranty of habitability applies to developers regardless of the legal structures they have created to attempt to separate the builders of the dwellings from the sellers of the dwellings. See *Council of Unit Owners of Breakwater House Condominium v. Simpler*, 603 A.2d 792, 796 (Del. 1992); *Bolkum v. Staab*, 346 A.2d 210, 211 (Vt. 1975); *Berman v. Watergate West, Inc.*, *supra* at 1359.

III. THE ECONOMIC LOSS RULE PROHIBITING THE BRINGING OF A NEGLIGENCE CLAIM DOES NOT APPLY TO THIS CASE.

- A. The Economic Loss Rule Does Not Apply to this Case Because Plaintiffs Suffered More than Economic Loss.

In this case, the Master found two types of defects in construction: (1) those defects related to inadequate flashing which had already caused consequential property damage, (2) those defects related to inadequate ventilation which over time would cause consequential property damage, and (3) those defects, such as construction of the decks and the improper fastening of the chimneys, which would require only replacement of the original work itself. Specifically, the Master found that in all cases in which the water leaked from the structural components of the units, namely from the chimney enclosures, roofs, skylights and sliders, there was consequential damage to the sheet rock and other interior elements. *App. (Vol.1), A514, ¶ 190*. In addition, the Master found that the failure to adequately vent the bathrooms and attics over time would cause decay to the wooden rafters, timbers, plywood and sheathing in the condominium buildings. *Id., A530, A531, ¶¶ 275, 380*.

Given these findings, the first two types of defects, which either caused or will cause consequential damage, are clearly not barred by the economic loss rule as currently articulated by this Court. In *McDonough v. Whalen*, 365 Mass. 506, 512 (1974), this Court declared:

Liability will be imposed, however, only if it is foreseeable that the contractor's work, if negligently done, **may cause damage to the property** or injury to persons living on or using the premises. (emphasis added).

Similarly, the Appeals Court held in *Marcil v.*

John Deere Indus. Equip. Co., 9 Mass. App. Ct.625, 631, n.3 (1980):

'Economic loss' has been defined, in the context of the Economic Loss Rule, to include 'damages for inadequate value, cost of repair and replacement of the defective product or consequent loss of profits **without any claim of personal injury or damage to other property.** . .'" (Emphasis added) (citation omitted).

In other words, the economic loss rule does not prevent recovery where there has been or "may" be not only personal injury but also where there may be damage to the property other than the defect itself. In this case, as noted above, the Master found that there already has been or will be over time damage to the property other than the defect caused by water damage and inadequate ventilation. Three other Superior Court judges have disagreed with Judge O'Neill's ruling in this case, all declaring that the economic loss rule does not apply to claims that the defects in the building of a condominium caused consequential water damage. *Gateway Condominium Trust v. Clinton*, 1996 Mass. Super. LEXIS 409, *5 (Welch, J.); *Gailunas v. SPQR Management Assoc., Inc.*, 1997 Mass. Super. LEXIS

579, *4-5,7 (Cowin, J.); *Seal Harbor III Condominium Trust v. Kaplan*, 1997 Mass. Super. LEXIS 126, *3,10 (Hinkle, J.).¹¹

B. The Economic Loss Rule Does Not Apply as the Parties Were Not in Contractual Privity.

In fact, none of plaintiffs' negligence claims should be barred by the economic loss rule. At a minimum, the economic loss rule should not apply where the parties are not in contractual privity.

11

Justice O'Neill dismissed the Complaint "[b]ecause the plaintiffs' complaint fails to assert any damage other than the allegedly defectively designed and constructed condominium itself. . ." In fact, the Complaint does not seek to set forth the exact damages suffered, but notes that there will be "substantial expense" to "correct said defects and deficiencies". *App. (Vol 1), A106-A107, ¶¶ 72, 75*. The defects specifically noted in the Complaint include the lack of flashing and the inadequate ventilation. *Id., A99-A100, ¶ 30(1)&(p)*.

In dismissing the Complaint, Justice O'Neill failed to apply the proper standards for reviewing a Motion to Dismiss. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Nader v. Citron*, 372 Mass. 96, 98 (1977). "The process is not one of looking at the legal theory enunciated by the pleader but of 'envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint . . .'" *Boston Symphony Orchestra v. Commercial Union Ins. Co.*, 406 Mass. 7, 12-13 (1989). In this case, the court certainly could have and should have envisioned that inadequate flashing will result in consequential water damages and that inadequate ventilation will result in deterioration of surrounding structural elements. In fact, in its Opposition to the Motion to Dismiss, plaintiffs specifically argued that "the defective work has resulted in damage to property". *App. (Vol 1), A134, n.3*. At a minimum, plaintiff should have been afforded the opportunity of amending the complaint rather than having its complaint dismissed.

The underlying rationale for applying the economic loss doctrine is that "when a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong". *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871 (1986). As the Court stated in *Bay State-Spray v. Caterpillar Tractor*, 404 Mass. 103, 109-110,

The commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses. A person physically injured by a defective product generally had neither the bargaining power nor the opportunity to bargain with its manufacturer or seller and so could not reasonably provide himself with the same kind of protection that a purchaser of goods could.

In this case, the plaintiff had no opportunity to protect itself contractually against the defendants' defective construction and therefore should not be held to the limitations of the economic loss rule. The plaintiff in this case is the unit owners' Trust. The Court noted in *Cigal v. Leader Development Corporation*, 408 Mass. 212, 217-218 (1990), that the unit owners' association must act as the exclusive representative for unit owners in litigation alleging negligent construction of common areas. The Court concluded that

such litigation "is not governed by contract principles". *Id.*

The common areas were in essence foisted upon the unit owners' association by the developer, who had one or more of his family sitting on the Association Trust for the first four years of the trust's existence. The plaintiffs never purchased any of the common areas and never had the opportunity to bargain for any express contractual warranties; there are thus no alternative remedies weakening the reasons for imposing tort duties on the defendants. *See Beachwalk Villas Condominium Association v. Martin*, 406 SE2d 372 (S.C. 1991) ("economic loss rule" limited to those cases where duties are created solely by contract); *Moransais v. Heathman* 744 So. 2d 973, 983 (Fla. 1999) (the economic loss rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis).

C. The Economic Loss Rule Does Not Apply As Defendants Violated Clearly Established Legal Duties Owed to the Plaintiffs.

The Master found that the condominiums were built in direct contravention of numerous building code

provisions. See *App. (Vol 2), A882-A907 for excerpts of sections of the Building Code violated by defendants.* Even if the lack of a contractual relationship between the plaintiff and defendants does not render the economic loss rule inapplicable to this case, the independent violation of a legal duty dictates that the court-imposed economic loss rule not be applied in this case.

The *Restatement (Second) of Torts, § 424* is clear:

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

As the court noted in *Kennedy v. Columbia Lumber And Manufacturing Company*, 384 S.E.2d 730, 737 (S.C. 1989):

Builder "A" and Builder "B" can be equally blameworthy, and build equally shoddy housing, but because Builder "A"'s negligence happened to be discovered early enough, no one was harmed. It hardly seems fair that Builder "A" should profit from a diligent buyer's discovery, or because he was fortunate. The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort. . . . [A] violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses.

D. At a Minimum, the Economic Loss Rule Does Not Apply to Plaintiffs' Claims of Defects Which Potentially Affect the Safety of the Homeowners.

At least one court has held that the economic loss rule does not apply to defects potentially affecting the safety of the homeowners. *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-turner Contracting Company*, 517 A.2d 336 (Md. 1986). The Maryland court relied on the provisions of Section 385 of the *Restatement (Second) of Torts*, which provides:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others." *Id.* at 341.

The court concluded that "the determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage." *Id.* at 345.

In this case, at a minimum, defendants must be held liable for (1) their defective construction of the decks, whose supporting columns for the outside decks were not constructed of pressure treated wood and were

built directly into the ground causing them to decay or rot and (2) the defective fastening of the chimneys. These defects, which could have resulted in the decks collapsing and the chimneys falling to the ground, clearly potentially endangered the health and safety of the homeowners. See testimony of plaintiff's expert Robert Brandon re. dangerousness of defendant's construction. App. (Vol 9), A4547-A4548.

IV. THE COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S 93A CLAIMS ALLEGING MISREPRESENTATIONS AND FAILURES TO DISCLOSE RELATING TO THE COMMON AREAS OF THE CONDOMINIUMS.

Paragraph 107 of the Complaint alleges that Stuart Bornstein¹² in developing and marketing the condominium violated M.G.L. c. 93A as follows:

- a. by failing to disclose his knowledge as to defects and deficiencies with the design and construction of the Condominium;

¹²

Count XIII, which alleges violations of chapter 93A, names Stuart Bornstein as the defendant. App. (Vol 1) A112. The Complaint also identifies Bornstein as a trustee of the Cotuit Bay Condominium Trust which established the condominium project. Id., A96. ¶¶ 16-17. As noted in the Statement of Facts, the Master found the Cotuit Bay Condominium Trust to be a "nominee trust". As the trustees of nominee trusts are personally liable for the actions of the trust, as the relationship created by such an instrument is in the nature of a partnership and not a trust, *Apahouser Lock & Sec. Corp. v. Carvelli*, 26 Mass. App. Ct. 385, 388 (1988); *Sylvia v. Johnson*, 44 Mass. App. Ct. 483, 485-486 (1998), Bornstein is personally liable under Count XIII both for personal misrepresentations made to unit owners as well as misrepresentations made through the Nominee Trust in such material as brochures.

- b. by failing to correct defects and deficiencies after representing such would be cured and/or corrected; . . .
- f. by failing to provide various features, components and elements of the Condominium after representing the same would be provided; . . .
- h. generally, by failing to deliver the Condominium as represented.

App. (Vol 1) A112.

Paragraph 112 of the Complaint incorporated by reference the allegations contained in plaintiff's 93A Demand Letter, which was attached to the Complaint. *Id. A113-A114.* The Demand Letter alleged, among other things, that Bornstein had represented that (1) the condominium would have a heated pool when it in fact had an unheated pool, (2) a satellite and cable television system would be installed when in fact a satellite system with no cable was installed, (3) hand-carved front doors would be installed when in fact standard, common doors were installed, and (4) the condominium would be constructed in conformity with state building code requirements. *App. (Vol 2), A602-A603.*¹³ The Letter further alleged that the above

13

Plaintiffs introduced into evidence a brochure which specifically included all of the above misrepresentations including a representation that "Cotuit Bay Condominiums have been built to last. Its structural design and materials **exceed** all currently required building codes and fire laws." (Emphasis in original). *App. (Vol 2), A599.* Mr. Bornstein admitted that this brochure was provided to prospective purchasers of condominium units. *App. (Vol 6),*

misrepresentations and failures to disclose had led to, among other things, improperly built decks, improper installation of flashing, improper ventilation and inadequate television reception. *Id.*, A604-A606.

On December 20, 1994, Mr. Sabatt, ruling from the bench, limited Count XIII against the developer to the allegation that he had violated M.G.L. c. 93A by failing to pay common area charges when due. *App. (Vol. 10)*, A5100C-A5100H. He dismissed the allegations made in subparagraphs 107(a) (b) (f) and (h) noted above, concluding that these claims were "held by individuals" and that "these individuals were not clearly identified as claimants". *Id.* A5100F.

On August 22, 2000, judgment was issued dismissing plaintiff's 93A Count. *App. (Vol 1)*, A567.

In his December 20, 1994, ruling, the Master gives no explanation of why allegations of (i) failing to disclose knowledge as to defects and deficiencies with the design and construction of the Condominium, (ii) failing to correct defects and deficiencies after representing such would be cured and/or corrected, or (iii) failing to provide promised features after promising they would be provided are allegations only

A2670-A2672.

relevant to individual units and not relevant also to the common areas. This Court has indicated that only notice pleading is required to support a 93A Claim. *Multi Technology v. Mitchell Management Sys.*, 25 Mass. App. Ct. 333, 335 (1988). Even without the incorporation by reference of the Demand Letter, the pleadings are sufficient to state a claim going to the common areas as well as to the individual units in the Condominium. With the incorporation by reference of the Demand Letter (which specifically notes problems in the common areas), there is no question but that defendant has been placed on sufficient notice of claims going to the common areas.¹⁴

The association trust, and not the individual unit owners, is the proper plaintiff for a 93A action

¹⁴

In prefatory remarks to dismissing the 93A Count, the Master noted that he is a "strict constructionist" and "guess[ed] that my philosophy will be tested in the appeals court", and concluded that incorporation of the demand letters by reference was not "magic enough to say that we are alleging that everything in those letters is hereby an allegation in this count". *App. (Vol 10), A5100C-A5100E*. In fact, the courts in Massachusetts have made it clear that matters incorporated by reference should be reviewed in analyzing the sufficiency of a Complaint. See *Commonwealth v. Kapsalis*, 26 Mass. App. Ct. 448, 454 (1988) (information incorporated by reference sufficient for defendant to know nature of accusation against him); cf *Commonwealth v. Pope*, 354 Mass. 625, 629 (1968) (complaint attached to warrant becomes a part thereof).

alleging misrepresentations and nondisclosures involving the common areas. In *Cigal v. Leader Development Corporation*, 408 Mass. 212, 218 (1990), the court concluded that chapter 183A vests the association trust with the "power to conduct litigation concerning the common areas".

In *Glickman v. Brown*, 21 Mass. App. Ct. 229 (1985), *rev. den.*, 396 Mass. 1106 (1986), the court held a condominium developer liable for misrepresentations that a common heating system was in good working order, even if the developer had no actual knowledge of the defects in the system, where the developer and the agent could have readily discovered the defects in the system had they made an effort to do so. Significantly, the Court concluded that it was irrelevant whether individual unit owner actually relied on the misrepresentations, because "[a]ll that is required in a case such as the present is proof of a causal relationship between the misrepresentations and the cost of replacing the risers." *Id.* at 236. Thus, unlike the fraud claims in this case, which had been assigned to the association trust and dismissed because of lack of proof of reliance by individual unit owners, the 93A claims of misrepresentations involving common

areas should not have been dismissed, as they belong in the first instance to the association trust and do not require proof of reliance.

V. THE LOWER COURT ERRED IN AWARDING PLAINTIFFS ONLY \$104,022.70 IN DAMAGES FOR DEFENDANT STUART BORNSTEIN'S BREACH OF HIS FIDUCIARY DUTIES TO THE PLAINTIFF.

A. The Lower Court Improperly Narrowed The Fiduciary Duties Owed by The Defendants to The Plaintiffs.

1. The Court Improperly Limited Defendant's Fiduciary Duties to the Duty to Maintain, Repair and Replace Common Areas.¹⁵

In his Memorandum of Decision issued on February 28, 1997, Judge O'Neill ordered the Master to limit his findings on Count XI to "Bornstein's failure to 'maintain, repair, and replace' common areas from October 1981 to July, 1985, in breach of his fiduciary duty as Trustee of the Association Trust." *App. (Vol 1), A472*. In fact, as trustee of the Association Trust Bornstein also owed the Unit Owner's Association a duty

15

The critical issue is the definition of the trustees' duties. There is no doubt that, however defined, the Bornstein family abandoned its duties, as all but Stuart Bornstein acknowledge they did nothing as trustees and Stuart Bornstein acknowledges he acted as a trustee for only one day a year. *See Statement of Facts.*

to ensure that the condominium units were constructed properly.¹⁶

Because Bornstein personally directed and controlled the work on the condominium, *App. (Vol 1)*, A508-A509, §§ 155, 156, 159, controlled the admission of newly constructed buildings in the condominium for his own profit motivated interests, *App. (Vol 2)*, A765-A768, sec. 8, while contemporaneously acting as the

16

Moreover, the court's limiting Bornstein's liability to his liability as a trustee of the Association Trust was overly restrictive. Count XI alleging breach of fiduciary duty was brought against "Stuart Bornstein". *App. (Vol 1)*, A110. Mr. Bornstein is identified in the caption of the case as "STUART BORNSTEIN, individually and as Trustee of the Cotuit Bay Condominium Trust (i.e. the "Nominee Trust" and not the "Association Trust"). *Id.*, A91. He is identified in the body of the Complaint as both the trustee of the Nominee Trust but also as the "Person who directed and controlled the development of the Condominium" (i.e. through the Nominee Trust), "a principal beneficiary of the Cotuit Bay Condominium Trust" (i.e. the Nominee Trust) and a "Trustee of the organization of Unit Owners of the Condominium" (i.e. the "Association Trust"). *Id.*, A92-A93, §§ 3,4. In Count XI, it is alleged, among other things, that Bornstein breached his fiduciary duty "to ensure that the Condominium was properly constructed and that all potential defects and deficiencies were addressed . . . and to "ensure that all that had been represented was provided" (i.e. in his capacity as developer and trustee of the Nominee Trust). *Id.*, A110-A111, §§ 100, 101. At a minimum, even if insisting on reading the Complaint in such a parsimonious and limited manner, the Master should have allowed the Complaint to be amended to reflect its intent rather than finding that the claim was somehow limited.

controlling trustee of the association trust, *App. (Vol 1) A510, ¶ 170*, he owed heightened fiduciary duties to the unit owners association to assure that the construction on the units being admitted into the condominium was proper.¹⁷ As a trustee who is also the developer it was incumbent upon Bornstein to assure that economic decisions made as the developer to cut costs or corners not be made at the expense of the unit owners' association.

Section 3-103(a) of the Uniform Condominium Act provides that "[i]n the performance of their duties, the officers and members of the executive board [of a unit owner's association] are required to exercise (i) if appointed by the declarant, the care required of fiduciaries of the unit owners." Comment 1 to Section 3-103 notes that "[t]his provision imposes a very high standard of duty . . . because there is a great potential for conflicts of interest between the unit

17

The Master notes that Judge O'Neill misread his first Report as he "did not find Stuart Bornstein liable for acts committed in his capacity as Trustee of the Nominee Trust" but "found him liable for acts committed in his capacity as Trustee of the Association Trust because of his dual and concurrent position as Trustee of the Nominee Trust and as the builder of the units." *App. (Vol 1), A533-A534, ¶ 295, n. 2.*

owners and the declarant."¹⁸ On point is the case of *Board of Managers of the Fairways at North Hills Condominium v. Fairway at North Hills*, 603 N.Y.S. 2d 867, 868-869 (App. Div., 2nd Dept.), in which the court found a breach of fiduciary duty by the trustees of the association trust in their failure to correct the deficient construction of the units. The court, relying upon the Uniform Condominium Act § 3-103, comment 1, found:

The first board of managers of a condominium, synonymous as it often is with the sponsor, and linked with the sponsor's legitimate pursuit of lawful profits, assumes a dual role. On the one hand, it "is vested with great power over the property interests of unit owners," (Uniform Condominium Act § 3-103, comment 1 [7 ULA 505]) while at the same time it receives its authority from the profit-motivated sponsor. In consequence, a condominium's first board of managers is subject to "a great potential for conflicts of interest," such that "a very high standard of duty" must be imposed upon it to ensure that its members do not gear their decisions to benefit the sponsor at the expense of the association or its members (Uniform Condominium Act § 3-103, comment 1 [7 ULA 505]).

See, also, Hyatt and Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915, 973 (1976) ("[C]ases uniformly hold that the developer

18

As the Supreme Judicial Court noted in *Barclay v. DeVeau*, 384 Mass. 676, 685, n. 17 (1981), the Uniform Condominium Act may present useful guidelines to the Court.

may not make decisions for the association which benefit his own interests at the expense of the association or its members.)

2. The Master Wrongfully Interpreted the Court Order as Limiting Recovery to Matters of Which Stuart Bornstein Had Actual Knowledge.

As noted in the prior section, Judge O'Neill ordered the Master to limit his findings on Count XI to "Bornstein's failure to 'maintain, repair, and replace' common areas from October 1981 to July, 1985. . ." For inexplicable reasons, the Master interpreted this order as requiring him "to confine findings of damages only to those items for which there is evidence that Stuart Bornstein had actual notice . . ." *Master's Report II*, ¶ 295.

The law in Massachusetts is clear that a fiduciary must make reasonable efforts to ascertain the true state of facts it has represented. *National Academy of Sciences v. Cambridge Trust Co.*, 370 Mass. 303, 309 (1976). Mr. Bornstein represented that the structural design and materials of the Cotuit Bay Condominiums exceeded all currently required building codes. See *Footnote 13 to this Brief*. Whether or not he had actual knowledge of all of the building code violations, he was under a fiduciary obligation to make

a reasonable inquiry to determine the truth of his assertions.¹⁹

B. The Master Understated The Fair And Reasonable Cost to Repair The Fastenings on the Chimneys.

The Master found that "Plaintiffs' expert testified that the fair and reasonable cost for labor and materials to make the repairs for each chimney is \$875.00 per chimney and the total cost is \$16,625.00." In fact, plaintiffs' expert, Robert Brandon, testified that the fair and reasonable cost to make the repairs for each chimney is \$1,375.00 per chimney. *App. (Vol 9), A4553-A4554, A4558-A4570.* As the Master found that 19 chimneys needed to be repaired, *App. (Vol 1), A532, ¶290*, the total cost to make the repairs is \$26,125.00 and not \$16,625.00.

C. The Master Abused His Discretion in Precluding Damage Testimony Related to the Condominium's Duct Work.

The Master precluded plaintiff from presenting expert testimony relating to the damages flowing from the defective duct work in the condominiums. *App. (Vol. 9) A4960-A4974.* He precluded the testimony because of

¹⁹

The Master indicated that if not restricted by the Court's order to finding damages related to defects of which Mr. Bornstein had actual notice, he would have awarded plaintiffs an additional \$191,605.00 in damages.

supposed lack of disclosure during discovery of the amount of damages claimed as the result of the defective work. *Id.*

The Master abused his discretion in precluding this testimony. There had been ample disclosure that there would be expert testimony relating to the inadequate duct work. *App.(Vol 1) A166-A168.* There was disclosure of the cost of replacing the heating system (including the duct work). *App.(Vol 1) A309-A310.* The Master acknowledged that the proposed testimony was "consistent" with the disclosures. *App.(Vol 9) A4970.* He nevertheless precluded the testimony, because the cost of replacing the duct work "appears almost as a subnote" to the overall cost presented for repairing the entire heating system, as it was not broken down separately from an overall cost of replacing the entire system. *App.(Vol 9), A4971.* At the time of trial, plaintiff was no longer seeking replacement of the entire heating system, but was only seeking replacement of the duct work. *App.(Vol 9), A4969-A4970.* As defendant had ample opportunity during discovery to seek to break down the cost of replacing the entire system to determine what percentage of that cost was attributable to the replacement of the

ductwork, and was certainly not caught by surprise that plaintiff was claiming that the duct work was inadequate, plaintiff should not have been precluded from offering testimony relating to the cost of replacing the duct work.

VI. THE LOWER COURT ERRED IN AWARDING INTEREST ON PLAINTIFF'S CONTRACT CLAIM FROM THE DATE OF THE FILING OF THE COMPLAINT.

The Court entered judgment on behalf of the plaintiffs in "the sum of \$36,223.00 with interest of 12% as provided by law from January 28, 1987, on Count XII." *App. (Vol 1), A567.* January 28, 1987 is the date that this case was commenced. In Count XII, plaintiffs alleged that the defendant Stuart Bornstein had breached his contract with plaintiffs by failing to pay condominium fees on the units owned by him.

App. (Vol 1), A111, ¶ 105.

Mass. Gen. Laws c. 231 § 6C provides in relevant part:

In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand. If the date of the breach or demand is not established, interest shall be added by the clerk of the court, at such contractual rate, or at the rate of twelve per cent per annum from the date of the commencement of the action .

. . .

Plaintiff in this case clearly established the dates of the breach of contract. Plaintiffs introduced the Trust of the Cotuit Bay Condominium (hereafter "the Contract") which provided that condominium fees were to be paid within thirty days and were to be issued no later than 30 days prior to the commencement of the fiscal year, except for the first bill which was to go out within 30 days of the execution of the Contract. *App. (Vol 2) A636, Art. V, § 2B.* The Contract was executed on October 30, 1981. *Id., A628.* The fiscal year was established as beginning on July 1. *Id. A643.*

The Master found that defendant in fact failed to issue bills to himself for condominium properties which he owned. *App. (Vol 1), A495 (§ 91), A498 (§107).* Thus the dates of the breach are the dates that condominium bills should have been paid if issued in a timely fashion (i.e. January 1, 1982, July 1, 1982, July 1, 1983, July 1, 1985 and July 1, 1985).

Plaintiff introduced into evidence a chart from which it can be determined the amount of condominium fees which defendant failed to pay on each day of its breach of contract. *App. (Vol 2), A932-A933.* Specifically, the chart indicates the date each unit of the condominium was incorporated (i.e. the date that

the unit began to owe condominium fees), the date each unit was sold by the developer to a buyer (i.e. the date on which the developer stopped owing condominium fees) and the amount of fees assessed per unit during each year. From this chart, it can be established that of the \$36,223.00 of condominium fees that the Court found that the developer failed to pay, \$7,150 was due and unpaid on January 1, 1982, \$10,893 was due and unpaid on July 1, 1982, \$10,767 was due and unpaid on July 1, 1983, \$5,321 was due and unpaid on July 1, 1984, and \$2,090 was due and unpaid on July 1, 1985. *See Appendix to this Brief for chart of condominium fees due.*

Conclusion

For the reasons stated in this Brief, judgment should be issued in plaintiff's favor on Counts I (Negligence), II (Negligence), X (Breach of Implied Warranty of Habitability), XI (Breach of Fiduciary Duty) and XIII (93A) in the amount of \$305,062.77.²⁰ In addition, the case should be remanded for the trial court to determine (i) whether defendants are liable

²⁰

\$305,062.77 = \$295,562.77 (the amount of damages found by the Master in his first report) + \$9,500 (the amount by which the Master undercounted the cost of repairing the chimneys).

under Counts I, II, X, XI and/or XIII for defective construction of the duct work, and, if so, the amount of damages suffered by plaintiff, (ii) whether defendants are liable for multiple damages under Count XIII, and (iii) the amount of attorneys fees to which plaintiff are entitled for defendant's violations of M.G.L. c. 93A. Finally, judgment for plaintiff should be affirmed on Count XII in the amount of \$36,223, with the case remanded to the lower court to enter interest on \$7,150 of the \$36,223 judgment from January 1, 1982, \$10,893 of the \$36,223 judgment from July 1, 1982, \$10,767 of the \$36,223 judgment from July 1, 1983, \$5,321 of the \$36,223 judgment from July 1, 1984, and \$2,090 of the \$36,223 judgment from July 1, 1985.

BY PLAINTIFF/
APPELLANT/CROSS-
APPELLEE'S ATTORNEY,

Stephen Schultz, Esq.
BBO # 447680
Engel & Schultz, P.C.
125 High Street, Suite
2601
Boston, MA 02110
(617) 951-9980 (Tel)
(617) 951-0048 (Fax)

Date: _____

