

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2015-P-0685

NUBAR HAGOPIAN AND NEWBURY GUEST HOUSE, INC.
D/B/A HAGOPIAN HOTELS,
PLAINTIFFS-APPELLANTS,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
DEFENDANT-APPELLANT,

FRANCIS CROKEN AND JOHN TAMAYO,
INTERVENORS-APPELLEES.

ON APPEAL FROM JUDGMENT OF THE SUFFOLK SUPERIOR COURT

***AMICUS CURIAE* BRIEF FOR THE MASSACHUSETTS DEFENSE
LAWYERS ASSOCIATION**

Emily G. Coughlin
BBO #554526
Andrew R. Ferguson
BBO #649301
Matthew J. Lynch
BBO #689363
Coughlin Betke LLP
175 Federal Street
Boston, Massachusetts 02110
(617) 988-8050
ecoughlin@coughlinbetke.com
aferguson@coughlinbetke.com
mlynch@coughlinbetke.com

Dated: April 29, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE INTEREST OF THE *AMICUS*.....1

ISSUE PRESENTED.....2

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....3

STANDARD OF REVIEW.....4

ARGUMENT.....5

 I. THE MASSACHUSETTS INTEREST RATE MUST BE
 RATIONALLY RELATED TO A LEGITIMATE
 PURPOSE.....5

 II. MASSACHUSETTS RECOGNIZES THAT THE SOLE
 PURPOSE OF PREJUDGMENT INTEREST IS
 PURELY TO COMPENSATE A DAMAGED PARTY
 FOR LOSS OF USE OR THE UNLAWFUL
 DETENTION OF MONEY.....7

 A. Compensation for loss of use or
 unlawful detention of money is the
 only purpose for prejudgment
 interest acknowledged by
 Massachusetts courts.....7

 B. The MCAD’s attempt to argue other
 purposes for prejudgment interest
 is misplaced.....9

 C. The MCAD’s attempt to dismiss the
 economic impact of a 12% rate of
 return is unsupported and also
 misplaced.....15

 D. Unlike Massachusetts, Other States
 That Allow For Prejudgment
 Interest For Different Purposes
 Have Drafted Rules And Statutes
 Tailored To Those Goals.....17

| | |
|--|----|
| III. THE 12% INTEREST RATE IS OUTDATED AND RESULTS IN A WINDFALL TO THE PLAINTIFF..... | 22 |
| A. The 12% interest rate is outdated and does not reflect the current economic conditions..... | 22 |
| B. The interest rate does not rationally serve to compensate plaintiffs fairly because, as this Court has recognized, the 12% interest rate results in a "windfall" to plaintiffs and does not accurately reflect the value of money lost..... | 30 |
| C. A less arbitrary means of accomplishing the Legislature's goal of providing compensation is obviously available and thus the 12% interest rate is unconstitutional..... | 32 |
| D. In other contexts, courts have found that an interest rate that was constitutional at the time it was set had subsequently become unconstitutional due to changing economic conditions..... | 35 |
| IV. THE 12% INTEREST RATE IS NOT ONLY UNCONSTITUTIONAL UNDER RATIONAL BASIS REVIEW, BUT ALSO VIOLATES DUE PROCESS AS AN EXCESSIVE PUNITIVE AWARD..... | 39 |
| CONCLUSION..... | 43 |
| ADDENDUM | |
| CERTIFICATE OF RULE 16(K) COMPLIANCE | |

TABLE OF AUTHORITIES

CASES:

Aetna Cas. & Sur. Co. v. Comm’r of Ins.,
358 Mass. 272 (1970).....5

Bernier v. Boston Edison Co.,
380 Mass. 372 (1980).....8, 13

Blue Hills Cemetery, Inc. v. Bd. of Registration
in Embalming & Funeral Directing,
379 Mass. 368 (1979).....32-33

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996).....40

Boardman v. Dorsett,
38 Wash. App. 338, 685 P.2d 615 (1984).....29

Brown v. Office of Com’r of Prob.,
2011 WL 3612284 (Mass. Super. July 5, 2011).....41

City Coal Co. of Springfield, Inc. v. Noonan,
424 Mass. 693 (1997).....35

City of Marlborough v. Marlborough Pub. Works
Equip. Operators Ass’n,
2015 WL 1725139 (Mass. App. Ct.,
April 16, 2015).....38

Coffee-Rich, Inc. v. Comm’r of Pub. Health,
348 Mass. 414 (1965).....5, 33

Concord Gen. Mut. Ins. Co. v. Gritman,
2016 WL 1613950 (Vt. April 22, 2016).....21

Conway v. Electro Switch Corp.,
402 Mass. 385 (1988).....8, 9

Craig v. Magee Mem’l Rehab. Ctr.,
512 Pa. 60, 515 A.2d 1350 (1986).....17-18

D’Amico v. Cariglia,
330 Mass. 246 (1953).....23

| | |
|---|---------------|
| <u>Evans v. Lorillard,</u> 465 Mass. 411 (2013)..... | 39 |
| <u>Franklin Office Park Realty Corp. v.</u> <u>Comm’r Dep’t Enviro. Prot.,</u> 466 Mass. 454 (2013)..... | 14 |
| <u>Gillespie v. City of Northampton,</u> 460 Mass. 148 (2011)..... | 4 |
| <u>Goodridge v. Dep’t of Pub. Health,</u> 440 Mass. 309 (2003)..... | 4, 15, 38 |
| <u>Heritage Farms, Inc. v. Markel Ins. Co.,</u> 810 N.W.2d 465 (Wis. 2012)..... | 19 |
| <u>Houle v. Low,</u> 407 Mass. 810 (1990)..... | 30 |
| <u>Izzarelli v. R.J. Reynolds Tobacco Co.,</u> 767 F. Supp. 2d 335 (D. Conn. 2011)..... | 20 |
| <u>Kastal v. Hickory House, Inc.,</u> 187 A.2d 262 (R.I. 1963)..... | 21, 29 |
| <u>Labonte v. Hutchins & Wheeler,</u> 424 Mass. 813 (1997)..... | 40 |
| <u>Lawrence Sav. Bank v. Levenson,</u> 59 Mass. App. Ct. 699 (2003)..... | 31 |
| <u>Lou v. Otis Elevator Co.,</u> 77 Mass. App. Ct. 571, <u>review denied,</u> 458 Mass. 1108 (2010)..... | 8, 10 |
| <u>Mansfield Beauty Acad., Inc. v. Bd. of Registration</u> <u>of Hairdressers,</u> 326 Mass. 624 (1951)..... | 5 |
| <u>McEvoy Travel Bureau, Inc. v. Norton Co.,</u> 408 Mass. 704 (1990)..... | <i>passim</i> |
| <u>Miller v. United States,</u> 620 F.2d 812 (Ct. Cl. 1980)..... | 36, 37 |
| <u>Mirageas v. Mass. Bay Transp. Auth.,</u> 391 Mass. 815 (1984)..... | 8, 24, 25 |

| | |
|---|---------------|
| <u>Morrison v. Toys “R” Us, Inc.,</u> 441 Mass. 451 (2004)..... | 13, 21 |
| <u>Oden v. Schwartz,</u> 71 A.3d 438 (R.I. 2013)..... | 21 |
| <u>Porter v. Clerk of Super. Ct.,</u> 368 Mass. 116 (1975)..... | 23 |
| <u>Remy v. Michael D’s Carpet Outlets,</u> Pa. Super., March 12, 1990..... | 18 |
| <u>Rhodes v. AIG Domestic Claims, Inc.,</u> 461 Mass. 486 (2012)..... | 41 |
| <u>Salvi v. Suffolk County Sheriff’s Dept.,</u> 67 Mass. App. Ct. 596 (2006)..... | 8-9 |
| <u>Sec’y of Admin. & Fin. v. Labor Relations Comm’n,</u> 434 Mass. 340 (2001)..... | <i>passim</i> |
| <u>Sheehan v. Weaver,</u> 467 Mass. 734 (2014)..... | 14 |
| <u>Shell Oil Co. v. Revere,</u> 383 Mass. 682 (1981)..... | 4, 6 |
| <u>Sperry & Hutchinson Co. v. McBride,</u> 307 Mass. 408 (1940)..... | 5 |
| <u>State Farm Mut. Auto. Ins. Co. v. Campbell,</u> 538 U.S. 408 (2003)..... | 39-40, 41 |
| <u>Steinberg v. Jensen,</u> 534 N.W.2d 361 (1995)..... | 19 |
| <u>Stonehill Coll. v. Mass. Comm’n Against Discrimination,</u> 441 Mass. 549 (2004)..... | 10 |
| <u>Tektronix, Inc. v. United States,</u> 552 F.2d 343, <u>opinion modified on denial of reh’g</u> , 557 F.2d 265 (Ct. Cl. 1977)..... | 36 |
| <u>Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.,</u> 405 Mass. 682 (1989)..... | 8 |

| | |
|--|--------|
| <u>United States v. Blankinship,</u> 543 F.2d 1272 (9th Cir. 1976)..... | 11 |
| <u>Vasallo v. Baxter Healthcare Corp.,</u> 428 Mass. 1 (1998)..... | 29 |
| <u>Verrochi v. Commonwealth,</u> 394 Mass. 633 (1985)..... | 36, 37 |
| <u>Wolfberg v. Hunter,</u> 385 Mass. 390 (1981)..... | 21 |
| <u>Zintek v. Perchik,</u> 471 N.W.2d 522 (Ct. App. 1991)..... | 19 |

STATUTES:

| | |
|--|--------------------|
| 28 U.S.C.A. § 1961(a) | 26 |
| M.G.L. c. 93A..... | 12, 13, 19, 21 |
| M.G.L. c. 176D..... | 12, 13, 14, 19, 21 |
| M.G.L. c. 107, § 3..... | 23, 43 |
| M.G.L. c. 151B..... | 11 |
| M.G.L. c. 151B, § 5..... | 12 |
| M.G.L. c. 229, § 11..... | 37 |
| M.G.L. c. 231, § 6B..... | <i>passim</i> |
| M.G.L. c. 231, § 6C..... | 24 |
| M.G.L. c. 231, § 6I..... | 16, 33, 34, 43 |
| M.G.L. c. 231, § 6K..... | 16, 43 |
| St. 1974, c. 224, § 1..... | 24 |
| St. 1980, c. 322, § 2..... | 24 |
| St. 1982, c. 183, § 2..... | 24 |
| St. 1983, c. 652, § 2..... | 24 |
| St. 2004, c. 252, § 1..... | 13 |
| 41 PA. CONS. STAT. ANN. § 202 | 27 |
| 42 PA. CONS. STAT. ANN. § 8101..... | 27 |
| 735 ILL. COMP. STAT. 5/2-1303 | 26 |
| 815 ILL. COMP. STAT. ANN. 205/2..... | 26 |
| 9 V.S.A. § 41 | 28 |
| ALA. CODE § 8-8-10 | 27 |
| ALA. CODE §§ 8-8-1, 8-8-10 | 26 |
| ALASKA STAT. §§ 09.30.070 AND 45.45.010..... | 26, 44 |
| ARIZ. REV. STAT. ANN. § 44-1201..... | 26 |
| ARK. CODE ANN. § 16-65-114..... | 26 |

| | |
|---|--------|
| CAL. CIV. PROC. § 685.010 | 26 |
| CAL. CIV. § 3289 | 26 |
| CAL. CONST. ART. XV, § 1 | 26 |
| COLO. REV. STAT. ANN. §§ 5-12-102, 13-21-101 | 26 |
| CONN. GEN. STAT. ANN. § 52-192A | 20, 27 |
| CONN. GEN. STAT. ANN. §§ 37-3a, 37-3b, 52-192a | 26 |
| DEL. CODE ANN. TIT. 6, § 2301 | 26, 44 |
| FLA. STAT. ANN. § 55.03 | 26, 44 |
| GA. CODE ANN. § 51-12-14 | 18 |
| GA. CODE ANN. § 51-12-14(c) | 19 |
| GA. CODE ANN. §§ 7-4-12, 51-12-14 | 25, 27 |
| HAW. REV. STAT. §§ 478-3, 662-2 | 26 |
| IND. CODE ANN. §§ 24-4.6-1-101, 24-4.6-1-103, 34-51- 4-9 | 26 |
| IDAHO CODE ANN. § 28-22-104 | 26, 28 |
| IOWA CODE ANN. § 535.2 | 26 |
| IOWA CODE ANN. §§ 535.3, 668.13 | 26, 44 |
| KAN. STAT. ANN. § 16-201 | 26 |
| KAN. STAT. ANN. § 16-204 | 26, 44 |
| KY. REV. STAT. ANN. § 360.040 | 28 |
| KY. REV. STAT. ANN. § 360.010 | 26-27 |
| LA. CIV. CODE ANN. ART. 2924 | 26, 44 |
| LA. REV. STAT. ANN. § 13:4202(B)(1) | 26 |
| LA. REV. STAT. ANN. § 13:4202 | 44 |
| MD. CODE ANN., COM. LAW I §12-102 | 27 |
| MD. CODE ANN., CTS. & JUD. PROC. §§ 11-301, 11-107 | 27 |
| ME. REV. STAT. ANN. TIT. 14 §§ 1602-B, 1602-C | 26, 44 |
| MICH. COMP. LAWS § 600.6013 | 18, 26 |
| MINN. STAT. ANN. § 549.09 | 26, 44 |
| MISS. CODE ANN. §§ 75-17-1, 75-17-7 | 27 |
| MO. ANN. STAT. § 408.040 | 26 |
| MONT. CODE ANN. §§ 25-9-205 AND 31-1-106 | 27 |
| N.C. GEN. STAT. ANN. § 24.5 | 26 |
| N.D. CENT. CODE §§ 28-20-34, 47-14-05 | 27, 28 |
| N.H. REV. STAT. ANN. § 336:1(II) | 26 |
| N.J. STAT. ANN. § 4:42-11 | 26 |
| N.M. STAT. ANN. § 56-8-4(A)(2) | 19 |
| N.M. STAT. ANN. § 56-8-4(B) | 19 |
| NEB. REV. ST. § 45-104 | 28 |
| NEB. REV. STAT. §§ 45-103, 45-103.01 | 26, 44 |
| NEV. REV. STAT. ANN. §§ 99.040, 17.130 | 26 |
| OHIO REV. CODE ANN. § 1343.03(A) | 26 |
| OKLA. STAT. ANN. TIT. 12 §§ 727, 727.1 | 26, 44 |
| OR. REV. STAT. ANN. § 82.010 | 27 |
| R.I. GEN. LAWS ANN. § 9-21-10 | 28 |
| S.C. CODE ANN. § 34-31-20 | 26, 27 |
| TENN. CODE ANN. §§ 47-14-121, 47-14-123 | 26 |

| | |
|---|--------|
| TENN. CODE ANN. §§ 47-14-123, 47-14-103 | 27 |
| TEX. FIN. CODE ANN. § 304.003 | 26 |
| TEX. FIN. CODE ANN. § 304.103 | 26 |
| UTAH CODE ANN. §§ 15-1-1, 15-1-4 | 27 |
| VA. CODE ANN. §§ 6-2-302, 8.01-382 | 27 |
| VT. STAT. ANN. TIT. 9, § 41A..... | 28 |
| W.VA. CODE § 56-6-31 | 26, 44 |
| WASH. REV. CODE ANN. § 19.52.010..... | 29 |
| WIS. STAT. ANN. § 814.04(4) AND § 807.01(4) | 28 |
| WIS. STAT. ANN. §§ 807.01, 814.04 | 19 |
| WIS. STAT. ANN. §§ 814.04, 807.01 | 26 |
| WYO. STAT. ANN. §§ 1-16-102, 40-14-106 | 27 |

RULES:

| | |
|---|--------|
| Massachusetts Rule of Civil Procedure 68..... | 20 |
| N.J. R. SUPER. TAX SURR. CTS CIV. R. 4:42-11..... | 26, 27 |
| N.Y.C.P.L.R. § 5004..... | 27 |
| Pa. R. Civ. P. 238 (Explanatory Comment, 1988)... | 17, 18 |
| Pa. R. Civ. P. 238(a)(3)..... | 18, 26 |
| Pa. R. Civ. P. 238(b)(1)(i) and (b)(3)..... | 17 |

STATEMENT OF THE INTEREST OF THE AMICUS

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. MassDLA is actively involved in assisting courts on issues of interest to its members. It has appeared as *amicus curiae* in numerous appellate cases.

In addition to representation in appellate matters and comment on proposed Court Rules, MassDLA provides its members with professional fellowship, specialized continuing legal education, and multifaceted support, including a forum for the exchange of information and ideas. MassDLA members represent clients in defending actions in all types of civil matters. As a result, they have a direct interest that the law in this area is correct.

Although the Massachusetts Commission Against Discrimination ("MCAD") is not statutorily required to use the prejudgment interest rate of G.L. c. 231, § 6B, both the MCAD and petitioners concede that the MCAD has incorporated the 6B rate as the rate it uses for its judgments. As a result, the constitutionality

of the fixed rate set in 6B is squarely before this Court.

Counsel for MassDLA has reviewed briefing in this matter and believes MassDLA can provide an important broader perspective that goes beyond the facts of this particular case. No party has funded this *amicus* brief nor has any party drafted it. It is the work of counsel representing MassDLA.

MassDLA is not taking a position on the merits of the underlying case or any legal issues relating to the trial of this matter. Rather, MassDLA is submitting this brief because it feels compelled to address the draconian statutory interest rate at issue in this case, as it applies to virtually all civil matters regardless of the status or conduct of the defendant. For all of these reasons, MassDLA respectfully submits this *amicus* brief.

ISSUE PRESENTED

Whether the interest rate of 12% on a verdict, under G.L. c. 231, § 6B, is so excessive as to violate the Due Process Clause.

STATEMENT OF THE CASE

MassDLA adopts by reference the Statement of the Case contained in the Appellate Brief of Defendant-Appellant Hagopian Hotels at pp. 2-5.

SUMMARY OF ARGUMENT

The sole and exclusive purpose of prejudgment interest in Massachusetts is to provide compensation to a damaged party for the loss of use or unlawful detention of money. McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 717 (1990) and cases cited *infra* (pp. 7-9). Although adding some interest to a judgment may serve this purpose, the current 12% interest rate mandated by G.L. c. 231, § 6B (hereinafter "6B") has no rational relation to the legislative goal of compensation. Rather, "[g]iven fluctuating economic conditions, adherence to ... a significantly above-market interest rate, i.e. a flat twelve per cent rate," results in a "windfall" for a plaintiff and has no rational relation to a plaintiff's actual losses. Sec'y of Admin. & Fin. v. Labor Relations Comm'n, 434 Mass. 340, 346 (2001) (pp. 30-32). As applied, the 12% rate bears no relation to the legislative goal of compensation and

thus the rate violates due process under the United States Constitution and the Constitution of the Commonwealth of Massachusetts.

STANDARD OF REVIEW

A due process challenge to an economic statute not affecting fundamental rights is analyzed under rational basis review. Gillespie v. City of Northampton, 460 Mass. 148, 153 (2011) (citing Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 330 (2003)). "[R]ational basis analysis requires that statutes bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." Id. (internal quotation omitted). In other words, to pass constitutional muster under the rational basis test, a statute must serve a legitimate purpose and the means adopted by the Legislature must rationally relate to the achievement of that purpose. Shell Oil Co. v. Revere, 383 Mass. 682, 686 (1981).

Although challengers face a heavy burden, rational basis review is not toothless. Goodridge, 440 Mass. at 338-39. Using rational basis review, this Court has struck down economic regulations. See,

e.g., Aetna Cas. & Sur. Co. v. Comm'r of Ins., 358 Mass. 272, 281 (1970) (legislatively fixed interest rates for automobile insurers unconstitutional because rates so low as to be confiscatory); Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 426 (1965) (law prohibiting sale of wholesome food product unconstitutional as applied); Mansfield Beauty Acad., Inc. v. Bd. of Registration of Hairdressers, 326 Mass. 624, 627 (1951) (law prohibiting beauty schools from charging fees for funds spent on materials unconstitutional); Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 425 (1940) (laws prohibiting issuance of trading stamp and restricting rights of retailers to fix and change prices unconstitutional). In these cases, the Supreme Judicial Court found that while there existed a perfectly legitimate legislative purpose, the means enacted by the Legislature had no rational relationship to that end.

ARGUMENT

I. THE MASSACHUSETTS INTEREST RATE MUST BE RATIONALLY RELATED TO A LEGITIMATE PURPOSE

A statutory provision adding interest to an award generally serves a legitimate purpose by compensating a damaged party for funds that have been deemed

wrongfully retained by another party. McEvoy Travel Bureau, Inc., 408 Mass. at 718. If the purpose of 6B is compensation for funds wrongfully retained, as discussed *infra* in II.A, then the interest rate must also rationally relate to that purpose. See Shell Oil Co., 383 Mass. at 686. When 6B was enacted in 1982, 12% interest may have been reasonable and rational because the general public could receive a comparable rate of return on investments in the marketplace. Therefore, the interest rate then bore a rational relation to the value of money wrongfully withheld.¹ However, 12% interest on verdicts today cannot rationally accomplish this purpose without overcompensating plaintiffs and penalizing defendants since such a rate of return on investments is no longer reasonably attainable in the current economic environment. Particularly from 1991 to the present, an investor could not reasonably attain anything near a

¹ See discussion of the Federal Reserve's annual one-year constant maturity Treasury yield rate ("Annual Rate"), *infra* p.16, and subsection III.A, *infra*, containing a brief historical discussion of interest rates. In 1991, the Annual Rate fell to 5.86%, less than half of 6B's 12% rate.

12% return on any investment.² Simply put, if plaintiffs here are awarded prejudgment interest at a 12% rate in 2016, they are placed in an exceedingly more advantageous economic position than if they had suffered no wrongdoing and had access to the same amount of money in the same time frame. As a result, 6B's current rate provides a windfall to plaintiffs, penalizes defendants and bears no rational relation to its sole permissible goal of fair compensation. See Sec'y of Admin. & Fin., 434 Mass. at 346.

Thus, while the Legislature's aim to compensate a plaintiff for loss of use of money may be legitimate, the extraordinarily high interest rate today does not rationally achieve that purpose. See id.

II. MASSACHUSETTS RECOGNIZES THAT THE SOLE PURPOSE OF PREJUDGMENT INTEREST IS TO COMPENSATE A DAMAGED PARTY FOR LOSS OF USE OR THE UNLAWFUL DETENTION OF MONEY

A. Compensation for loss of use or unlawful detention of money is the only purpose for prejudgment interest acknowledged by Massachusetts courts

Massachusetts courts have consistently recognized only one purpose of prejudgment interest: to

² See, generally, the chart and corresponding graph in Appendix A set forth in the Addendum and discussion in subsection III.A, *infra*.

compensate the damaged party for the loss of use or the unlawful detention of money. McEvoy Travel Bureau, 408 Mass. at 717; Conway v. Electro Switch Corp., 402 Mass. 385, 390 (1988); Mirageas v. Mass. Bay Transp. Auth., 391 Mass. 815, 821 (1984); Bernier v. Boston Edison Co., 380 Mass. 372, 388 (1980).³ This is the only recognized purpose addressed in case law, and courts have expressly rejected other conceivable purposes of the statute. See McEvoy Travel Bureau, 408 Mass. at 717 ("The purpose behind the prejudgment interest statute is not to penalize the wrongdoer, or to make the damaged party more than whole.") (internal citation omitted); Lou v. Otis Elevator Co., 77 Mass. App. Ct. 571, 586, review denied, 458 Mass. 1108 (2010) (finding that "the policy and purpose underlying the issue of prejudgment interest is one of compensation or loss distribution, rather than conduct regulation"). Further illustrating that compensation is the statute's sole purpose, courts have consistently declined to award interest on damages that are anything but compensatory. See Salvi v.

³ The purpose of postjudgment interest is also to compensate (not penalize) for delay. Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co., 405 Mass. 682, 684 (1989).

Suffolk County Sheriff's Dept., 67 Mass. App. Ct. 596, 608 (2006) (rejecting prejudgment interest award on punitive damages); McEvoy Travel Bureau, Inc., 408 Mass. at 717 (rejecting prejudgment interest award on multiple damages because “[t]o add prejudgment interest to these penal damages would compound the penalty and **would violate the purpose of G.L. c. 231, § 6B.**” (emphasis added); Conway, 402 Mass. at 390 (rejecting prejudgment interest award on front pay).

B. The MCAD’s attempt to argue other purposes for prejudgment interest is misplaced

Faced with this clear precedent, the MCAD tries to incorporate purposes from other Massachusetts statutes to justify its award of 12% and, in doing so, clearly demonstrates that a 12% prejudgment interest rate is only conceivably rational if one considers purposes beyond the limits of 6B’s sole purpose of fair compensation. For example, in its brief, the MCAD argues that a 12% rate compensates the victim “both for discriminatory acts *and* the additional loss of delayed recovery of compensatory damages.” (MCAD Br. 38.) (emphasis added). Although the MCAD couches both purported justifications in terms of compensation, only the second identified purpose—compensation for

the loss of delayed recovery—is a legitimate purpose under 6B. Rather, using interest to award to a victim based solely on the occurrence of “discriminatory acts” is in reality nothing more than punishing the defendant for engaging in those acts. See Stonehill Coll. v. Mass. Comm’n Against Discrimination, 441 Mass. 549, 563 (2004) (MCAD’s purpose is to reduce discrimination by *detering and punishing* instances of discrimination). Plainly, the MCAD can only attempt to justify a 12% prejudgment interest rate by relying on its statutory mandate in 151B—which contains deterrence and punishment purposes that this Court has explicitly recognized as beyond 6B’s sole legislative purpose of fair compensation. As such, the MCAD’s argument actually fortifies the conclusion that applying 6B to 151B exceeds 6B’s sole constitutional purpose of fair compensation for money wrongfully withheld. In other words, by applying 6B, a respondent is doubly punished.

The only purpose of 6B is to compensate for the loss of use of money, and not to redress any of the alleged harms that may have given rise to the verdict against the defendant. Lou, 77 Mass. App. Ct. at 586. Applying interest to a jury’s award compensates a

plaintiff for the loss of use of the amount of that award, "because he who pays \$1.00 tomorrow to discharge a debt of \$1.00 due and payable today, pays less than he owes. A zero rate of interest, for economic purposes, does not exist." United States v. Blankinship, 543 F.2d 1272, 1275 (9th Cir. 1976).

The MCAD argues that the appropriate rate of interest on a discrimination claim is 6B. To the extent 12% is high, the MCAD contends 12% is constitutionally permissible because it accomplishes deterrence and punishment purposes set forth in 151B. If this Court accepts the MCAD's argument that 12% has the effect of punishment and deterrence under 151B, then this Court is necessarily holding that 12% is punitive, which exceeds the constitutional scope of 6B. Thus, 12% would be unconstitutional as applied in non-discrimination tort claims also governed by 6B. Therefore, no matter which position this Court accepts— the MCAD's or MassDLA's—applying 12% under 6B is unconstitutional.

Moreover, to the extent the MCAD relies upon deterrence and punishment as purposes to justify 12%, the MCAD also ignores that these purposes are addressed in the MCAD's underlying damages award.

Here, by statute, the \$325,489 award compensates the victims of discrimination and deters future discriminatory acts. G.L. c. 151B, § 5. Damages awarded under 151B are, necessarily, intended to accomplish that statute's purpose. The interest rate set by 6B, however, should accomplish the sole purpose of fair compensation, which does not change merely because the judgment arises out of 151B claims.⁴

The MCAD asserts that 12% serves other legitimate purposes in the context of the MCAD's statutory mandate, such as encouraging settlement. However, the Legislature did not intend 6B to accomplish those purposes. See McEvoy Travel Bureau, 408 Mass. at 717. For example, the Legislature has chosen to deal with defendants who engage in dilatory settlement practices and delay injured plaintiffs from receipt of reasonable settlements through G.L. c. 93A and 176D,

⁴ The MCAD cannot have it both ways. If this Court accepts the MCAD's argument that 12% in MCAD matters is permissible because 12% deters and punishes discrimination, then 6B's statutory 12% rate necessarily exceeds its sole purpose of fair compensation and is therefore unconstitutional. Likewise, if this Court accepts MassDLA's position that 12% is not rationally related to fair compensation, then 6B is unconstitutional in non-MCAD matters. Thus, the two arguments before this Court are different routes to the same destination: 6B is unconstitutional.

rather than through 6B. Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 456-57 (2004).

To read a purpose of encouraging settlement into 6B runs counter to the statutory scheme designed by the Legislature to govern litigation in Massachusetts. The Legislature enacted 93A to impose settlement obligations upon certain non-insurers engaged in commerce once a proper demand is made. The Legislature enacted 176D to impose a duty upon and encourage settlement by insurers and others engaged in the business of insurance. Morrison, 441 Mass. at 456-57. In August 2004—after the Morrison decision—the Legislature amended 93A and chose not to add any additional language to encourage settlement among non-insurers. St. 2004, ch. 252, § 1. This Court has read 176D as the *only* provision of the General Laws that encourages or places a duty upon a defendant to settle a claim and has read 6B as intended solely to fairly compensate an injured party. See Morrison, 441 Mass. at 456-57; Bernier, 380 Mass. at 388 (interpreting 6B's sole purpose as compensation two years before 1982 amendment to 6B).

Since the Legislature has amended both 6B and 93A without changing any aspect of the statute after these

decisions, it is apparent that the Legislature does not want to use 6B to encourage settlement. The principle that legislative approval can be derived from legislative silence carries its greatest force when the Legislature has reenacted or amended a statute without disturbing the judicial construction placed on it. Sheehan v. Weaver, 467 Mass. 734, 740-41 (2014). Thus, the inexorable conclusion is that the Legislature approves of the SJC's interpretations and does not want to use 6B to encourage settlement by a defendant or discourage that defendant from exercising his or her right to assert valid defenses at trial. In fact, if 6B were intended to encourage all tort defendants to settle, the provisions of 176D placing such a duty specifically on insurance companies would be rendered superfluous, in violation of the basic tenets of statutory construction. See Franklin Office Park Realty Corp. v. Comm'r Dep't Enviro. Prot., 466 Mass. 454, 464 (2013). Thus, to now read into 6B any purpose other than fair compensation would directly contradict the statutory scheme enacted by the Legislature and interpreted by this Court.

C. The MCAD's attempt to dismiss the economic impact of a 12% rate of return is unsupported and also misplaced

In the alternative, the MCAD argues that 12% is reasonable because some investors may be able to attain it at some point in time. Such an argument is not only unsupported but also misses the point. The MCAD breezily dismisses the economic impact of 12% by blindly asserting that "some investments have returns of 12% or more." (MCAD Br. 33). First, the MCAD provides no basis, support or citation to any such investment or other authority for such a claim. In fact, the MassDLA has been unable to find a single source to substantiate this allegation. Moreover, as the SJC has recognized and as the economic data set forth *infra* demonstrate, 12% constitutes "a significantly above-market interest rate" that results in a "windfall." Sec'y of Admin. & Fin., 434 Mass. at 36. Second, the question is not—and cannot rationally be—whether there exists some method of investment that may have a return of 12% or more. Rather, the Supreme Judicial Court has held that a rational basis analysis requires that the statute "bear a real and substantial relation" to its purpose. Goodridge, 440 Mass. at 330. Since the sole purpose of 6B is to fairly compensate

for loss of use of money, then the prejudgment interest rate must bear a "real and substantial" relationship to a reasonably attainable rate of return on investments in the current economic environment. See Sec'y of Admin. & Fin., 434 Mass. at 346-47.

MassDLA submits that Annual Rate⁵—used as the basis for judgment interest in other Massachusetts statutes—generally provides the most accurate measure of the reasonably attainable rate of return of money held for a period of time. See G.L. c. 231, §§ 6I, 6K. Since there is no fact or evidence supporting a reasonably attainable rate of return anywhere near 12% over the past 20 plus years, the MCAD's claim that 12% is reasonable fails as a matter of law.⁶

⁵ This rate corresponds to other Massachusetts interest rate statutes, such as G.L, c. 231, § 6I (contract actions against the state, discussed further *infra*) and G.L. c. 231, § 60K (medical malpractice cases), which calculate the interest by using the **weekly** average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of judgment ("Weekly Rate").

⁶ As set forth *supra*, the Annual Rate has only on one occasion risen above 6% since 1990, when it rose to 6.11% in 2000. and over the past seven years has stayed below 0.05%.

D. Other states with different purposes for prejudgment interest have drafted laws tailored to those goals

Some states have recognized that prejudgment can be awarded for other purposes, such as encourage settlements. The states that do so, however, have enacted specific rules and regulations to accomplish these goals. The Commonwealth cannot be grouped in with these states in order to justify a 12% statutory interest rate since it has enacted a wholly separate statutory scheme.

Pennsylvania, for example, has a rule governing prejudgment interest for tort claims expressly stating that its purposes are "(1) to alleviate delay in the courts, and (2) to encourage defendants to settle meritorious claims as soon as reasonably possible." Pa. R. Civ. P. 238 (Explanatory Comment, 1988). The Pennsylvania rule is also tailored to toll the calculation of interest if a defendant makes a reasonable settlement offer and if the offer is within 125% of the plaintiff's recovery. Pa. R. Civ. P. 238(b)(1)(i) and (b)(3).⁷

⁷ An older version of the Pennsylvania rule faced a constitutional challenge, whereupon the Pennsylvania Supreme Court concluded that certain provisions of the rule violated due process. Craig v. Magee Mem'l

Other states' statutes regarding interest rates are similarly tailored for the purpose of settlement and avoiding delay. For example, in Michigan, if a bona fide, reasonable written settlement offer is made and rejected, "the court shall order that interest is not allowed beyond the date the bona fide, reasonable written offer of settlement is filed with the court." MICH. COMP. LAWS § 600.6013. In Georgia, a claimant may recover prejudgment interest on unliquidated damages if the claimant makes a demand, the demand is refused, and the verdict is not less than the demand. GA. CODE ANN. § 51-12-14.⁸ New Mexico law permits a judge in his or her discretion to grant interest of up to 10% to the **defendant** if, for example, the plaintiff caused

Rehab. Ctr., 512 Pa. 60, 65, 515 A.2d 1350, 1353 (1986), superseded by statute as stated in Remy v. Michael D's Carpet Outlets, Pa. Super., March 12, 1990. In Craig, Pennsylvania's Supreme Court suspended those provisions until a new rule was promulgated. The new rule, enacted in 1988, not only addressed the Due Process issues identified in Craig, but also changed the interest rate "because of substantial fluctuations in the cost of money." Pa. R. Civ. P. 238 (Explanatory Comment, 1988). What was once a flat 10% rate was changed to a floating rate 1% above the prime rate as published in the Wall Street Journal. Pa. R. Civ. P. 238(a)(3).

⁸ Georgia sets a floating interest rate of 3% above the prime rate as published by the Board of Governors of the Federal Reserve System. GA. CODE ANN. § 51-12-14(c).

undue delay or the defendant made a reasonable and timely settlement offer. N.M. STAT. ANN. § 56-8-4(B).⁹ In contrast, the Massachusetts Legislature has gone out of its way to use other statutes such as G.L. c. 93A and 176D to codify the obligation of wrongdoers to make reasonable settlement offers, promptly and within a limited time.

Wisconsin law includes an offer of judgment provision, which allows for interest if the defendant declines the offer of settlement and the plaintiff recovers an amount greater than or equal to the offer. WIS. STAT. ANN. §§ 807.01, 814.04.¹⁰ Finally, Connecticut

⁹ New Mexico's legal interest rate is 8.75% or the rate provided for by contract, or 15% if judgment is "based on tortious conduct, bad faith or intentional or willful acts," demonstrating that the law also serves a punitive purpose. N.M. STAT. ANN. § 56-8-4(A)(2).

¹⁰ In 1991, the Wisconsin Appeals Court ruled that its interest rate statute applying 12% interest per year was constitutional. Zintek v. Perchik, 471 N.W.2d 522, 538 (Ct. App. 1991) overruled on other grounds by Steinberg v. Jensen, 534 N.W.2d 361 (1995). See also Heritage Farms, Inc. v. Markel Ins. Co., 810 N.W.2d 465, 483 (Wis. 2012) (rejecting constitutional challenge because argument was deficient, as it contained no bona fide constitutional analysis). However, as set forth above, unlike 6B, the Wisconsin statute is tailored to meet its goal of encouraging settlement and discouraging delay. Moreover, at the time of the Wisconsin Appeals Court Ruling, the Annual Rate was 5.86%. The Annual Rate at the time judgment entered in the case at bar was 0.12%. See Addendum at Appendix A. In any event, as discussed in footnote

also provides for offer of judgment interest that only applies if plaintiff recovers an amount equal or greater to his or her offer of compromise. CONN. GEN. STAT. ANN. § 52-192a.¹¹ Again, Massachusetts has chosen to address such issues through the Offer of Judgment mechanism in Massachusetts Rule of Civil Procedure 68. Thus, had the Legislature of this Commonwealth intended to accomplish goals other than compensation for loss of use of awarded damages, it could have easily done so.

In its brief, the MCAD supports 6B by citing to the Rhode Island prejudgment interest statute, which

no. 22 *infra*, Wisconsin has recently amended its interest rate statutes. Until 2011, Wisconsin's interest rate was 12%, but was changed to a floating rate of 1% above the prime rate. WIS. STAT. ANN. §§ 807.01, 814.04.

¹¹ The United States District Court in Connecticut also rejected a constitutional challenge to the offer of judgment interest statute. Izzarelli v. R.J. Reynolds Tobacco Co., 767 F. Supp. 2d 335, 339 (D. Conn. 2011). However, like Wisconsin, Connecticut law clearly provides that the purpose of its interest statute is to encourage settlement and to penalize parties that fail to accept a reasonable offer of settlement, unlike Massachusetts. Id. As stated in footnote 17, Connecticut has also recently changed its interest rate from 12% to 8%.

MassDLA has been unable to find any case challenging the constitutionality of an interest rate statute with a similar purpose and rate as 6B on the basis that it violates due process as applied in the current economic times.

is also a fixed 12% rate. (MCAD Br. 37). However, contrary to Massachusetts, the Rhode Island Supreme Court has explicitly stated that its prejudgment interest rate serves the primary purpose of encouraging settlement and is "intended more as a spur to the defendant." Kastal v. Hickory House, Inc., 187 A.2d 262, 264 (R.I. 1963); see also Oden v. Schwartz, 71 A.3d 438, 457 (R.I. 2013) ("[t]he dual purpose of prejudgment interest is to encourage early settlement of claims and compensate an injured plaintiff") (emphasis added).¹² Not only has Massachusetts never recognized such a purpose for 6B, but also, as set forth above, the Legislature has explicitly chosen to encourage settlement through other rules and statutes, such as M.G.L. c. 93A and 176D. See Morrison, 441 Mass. at 458 (purpose of 176D is to encourage settlement of valid claims); Wolfberg v. Hunter, 385 Mass. 390, 398 (1981) (G.L. ch. 93A, § 9 intended to encourage out-of-court settlements).

¹² The MCAD filed a supplement on April 28, 2016, alerting this Court to Concord Gen. Mut. Ins. Co. v. Gritman, 2016 WL 1613950 (Vt. April 22, 2016). This decision is similarly inapplicable to 6B because the Vermont Supreme Court noted that encouraging settlement is a purpose of the Vermont prejudgment interest statute.

If a fixed rate of 12% can only be justified by, as the MCAD does, relying upon legislative purposes not recognized for prejudgment interest in Massachusetts and, in fact, accomplished through other legislation, then such a rate plainly is not rationally related to the statute's sole intended purpose of fair compensation. See McEvoy Travel Bureau, 408 Mass. at 717.

III. THE 12% INTEREST RATE IS OUTDATED AND RESULTS IN A WINDFALL

A. The 12% interest rate is outdated and does not reflect current economic conditions

The legislative history of 6B clearly demonstrates the Legislature's intent for the prejudgment interest rate to generally reflect the value of money in existing economic conditions. Although this country's economy has ebbed and flowed over the course of the past 30-40 years, examining the history of the statutes and specific statistical information provided *infra* illustrates how antiquated the current 12% interest rate is. 6B has been amended six times since 1946 and was even revised four times in a span of nine years, between 1973 and 1982.

However, it has not changed in over 30 years despite substantial changes in the economy.

6B was first enacted on April 15, 1946 and became operative on September 1, 1956. The statute mandated that interest be added to damages in tort verdicts rendered for personal injuries or for consequential damages, or damages to property. At this time (and prior to the 1974 amendment), the statute did not set the interest rate to be applied and thus, the legal rate (6%) set by G.L. c. 107, § 3 governed. Porter v. Clerk of Super. Ct., 368 Mass. 116, 119 (1975) (affirming clerk's decision to award 6% interest from the date of the writ to August 14, 1974 and 8% interest from August 15, 1974 on, as this was the effective date of the 1974 amendment). Additionally, prior to the statute's amendment in 1951, interest was added to a verdict by a jury after it first assessed the damage amount. D'Amico v. Cariglia, 330 Mass. 246, 247-48 (1953). After the statute was amended in 1951, interest was added by the clerk of court after a jury first rendered its verdict. Id.

The Legislature revised 6B¹³ three times prior to May 16, 1974, when it first included a specific rate of interest of 8%. St. 1974, c. 224, § 1. By way of reference, as of that date in 1974, the Annual Rate was 8.2%¹⁴. On June 19, 1980, the Legislature approved a measure raising the rate from 8 to 10%. St. 1980, c. 322, § 2. In 1980, the Annual Rate was 12%. (Addendum at Appendix A.) On June 28, 1982, the Legislature approved raising the rate again, this time to 12%. St. 1982, c. 183, § 2; Mirageas, 391 Mass. at 819. In 1982, the Annual Rate was 12.27%. (Addendum at Appendix A.) In support of his decision to declare the 1982 amendment an emergency, Governor Edward J. King stated that “[i]t is in the public interest that

¹³ Though not directly applicable in this case, G.L. c. 231, § 6C (“6C”), which sets the prejudgment interest rate for contract cases, has undergone a similar evolution, culminating in interest rate increases from 8% to 10% to 12% at the same times and by the same laws as 6B. While 6C is not the statute at issue here, it too sets an unconstitutionally excessive interest rate that has not been changed since 1982; as is the postjudgment interest statute, G.L. c. 235, § 8, which has applied the rate identified in 6B since 1983. St. 1983, c. 652, § 2.

¹⁴ Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year constant maturity, quoted on investment basis, as downloaded from <http://www.federalreserve.gov/releases/h15/data.htm> (last visited February 19, 2016), attached hereto at Appendix A as set forth in the Addendum.

the provisions of this Act be effective immediately in order that the two percent interest increase may be of benefit to the parties in certain actions of law.”

Mirageas, 391 Mass. at 819-20.¹⁵ Thus, 6B’s history shows that the interest rate was repeatedly amended to reflect existing economic conditions.

However, the rate has not changed since 1982, despite fundamental, long-standing changes in the economy. Since then, as demonstrated by Appendix A as set forth in the Addendum, the Annual Rate has plummeted and has not exceeded 5% since 2001 or .05% since 2009. The Weekly Rate at the time judgment was rendered in this case on December 10, 2014, was **0.15%** (or almost **one one-hundredth** of the 12% rate applied here). (Addendum at Appendix B.)

Interest rates calculated by any measure have similarly varied, and states have taken numerous approaches towards applying interest to verdicts. Twenty-four states and the federal district courts use a floating prejudgment and/or postjudgment interest rate, which ties the interest rate to a realistic

¹⁵ The fact that the Legislature has amended and revised the statute as often as it has in order to adjust to existing economic conditions is further evidence of its compensatory intent.

economic benchmark and provides for adjustment.¹⁶ Of the twenty-six states¹⁷ that set a fixed prejudgment or

¹⁶ 28 U.S.C.A. § 1961(a); Alaska (ALASKA STAT. §§ 09.30.070 and 45.45.010); Delaware (DEL. CODE ANN. tit. 6, § 2301); Florida (FLA. STAT. ANN. § 55.03); Georgia (GA. CODE ANN. §§ 7-4-12, 51-12-14); Idaho (IDAHO CODE ANN. § 28-22-104) (postjudgment interest only); Iowa (IOWA CODE ANN. §§ 535.3, 668.13)(postjudgment interest only); Kansas (KAN. STAT. ANN. § 16-204)(postjudgment interest only); Louisiana (LA. CIV. CODE ANN. art. 2924, LA. REV. STAT. ANN. § 13:4202(B)(1)); Maine (ME. REV. STAT. ANN. tit. 14 §§ 1602-B, 1602-C); Michigan (MICH. COMP. LAWS ANN. § 600.6013); Minnesota (MINN. STAT. ANN. § 549.09); Missouri (MO. ANN. STAT. § 408.040); Nebraska (NEB. REV. STAT. §§ 45-103, 45-103.01)(postjudgment interest only); Nevada (NEV. REV. STAT. ANN. §§ 99.040, 17.130); New Hampshire (N.H. REV. STAT. ANN. § 336:1(II)); New Jersey (N.J. STAT. ANN. § 4:42-11, N.J. R. SUPER. TAX SURR. CTS CIV. R. 4:42-11); Ohio (OHIO REV. CODE ANN. § 1343.03(A)); Oklahoma (OKLA. STAT. ANN. tit. 12 §§ 727, 727.1); Pennsylvania (Pa. R. Civ. P. 238(a)(3))(prejudgment interest only); South Carolina (S.C. CODE ANN. § 34-31-20)(postjudgment interest only); Tennessee (TENN. CODE ANN. §§ 47-14-121, 47-14-123)(prejudgment awarded at discretion of court or jury as equity requires and not to exceed 10%); Texas (TEX. FIN. CODE ANN. § 304.003)(postjudgment tort rate same as prejudgment rate pursuant to TEX. FIN. CODE ANN. § 304.103); West Virginia (W.VA. CODE § 56-6-31); Wisconsin (WIS. STAT. ANN. §§ 814.04, 807.01).

¹⁷ Alabama (ALA. CODE §§ 8-8-1, 8-8-10); Arizona (ARIZ. REV. STAT. ANN. § 44-1201)(lower of 10% or prime plus 1%); Arkansas (ARK. CODE ANN. § 16-65-114)(postjudgment interest only); California (CAL. CONST. art. XV, § 1, CAL. CIV. § 3289, and CAL. CIV. PROC. § 685.010); Colorado (COLO. REV. STAT. ANN. §§ 5-12-102, 13-21-101); Connecticut (CONN. GEN. STAT. ANN. §§ 37-3a, 37-3b, 52-192a); Hawaii (HAW. REV. STAT. §§ 478-3, 662-2); Illinois (815 ILL. COMP. STAT. ANN. 205/2, 735 Ill. Comp. Stat. 5/2-1303); Indiana (IND. CODE ANN. §§ 24-4.6-1-101, 24-4.6-1-103, 34-51-4-9); Iowa (IOWA CODE ANN. § 535.2)(prejudgment interest only); Kansas (KAN. STAT. ANN. § 16-201); Kentucky (KY. REV. STAT. ANN.

postjudgment interest rate, twenty are lower than Massachusetts. The following states have recently reduced their prejudgment or postjudgment interest rates from 12% to a lower and/or floating rate, or limited application of the former 12% rate to older cases: Alabama,¹⁸ Connecticut,¹⁹ Georgia,²⁰ New Jersey,²¹

§ 360.010)(prejudgment interest only); Maryland (MD. CODE ANN., COM. LAW I §12-102, MD. CODE ANN., CTS. & JUD. PROC. §§ 11-301, 11-107); Mississippi (MISS. CODE ANN. §§ 75-17-1, 75-17-7); Montana (MONT. CODE ANN. §§ 25-9-205 and 31-1-106); New York (N.Y.C.P.L.R. § 5004 (Consol.)); North Carolina (N.C. GEN. STAT. ANN. § 24.5); North Dakota (N.D. CENT. CODE §§ 28-20-34, 47-14-05); Oregon (OR. REV. STAT. ANN. § 82.010); Pennsylvania (42 PA. CONS. STAT. ANN. § 8101, 41 PA. CONS. STAT. ANN. § 202)(postjudgment interest only); South Carolina (S.C. CODE ANN. § 34-31-20)(prejudgment interest only); South Dakota (S.D. CODIFIED LAWS §§ 21-1-13-1, 54-3-5.1, 54-3-16); Tennessee (TENN. CODE ANN. §§ 47-14-123, 47-14-103); Utah (UTAH CODE ANN. §§ 15-1-1, 15-1-4); Virginia (VA. CODE ANN. §§ 6-2-302, 8.01-382); Wyoming (WYO. STAT. ANN. §§ 1-16-102, 40-14-106).

¹⁸ See ALA. CODE § 8-8-10 (postjudgment interest rate reduced from 12% to 7.5%. 2011 Alabama Laws Act 2011-521 (S.B. 207)).

¹⁹ See CONN. GEN. STAT. ANN. § 52-192a (amended in 2005 to reduce interest rate applied after an offer of judgment is rejected from 12% to 8%, 2005 Conn. Legis. Serv. P.A. 05-275 (S.S.B. 1052)).

²⁰ See GA. CODE ANN. § 7-4-12 and § 51-12-14 (postjudgment and prejudgment interest rates, respectively, changed from 12% to 3% above prime rate. 2003 Georgia Laws Act 363 (H.B. 792)).

²¹ See NJ R SUPER TAX SURR CTS CIV R. 4:42-11 (prejudgment and postjudgment interest rate of 12% applicable to periods prior to January 1, 1988 and January 2, 1986, respectively, otherwise calculated either as equal or 2% above the average rate of return

North Dakota,²² South Carolina,²³ and Wisconsin.²⁴ The **only six states** that currently adhere to a fixed 12% interest rate for prejudgment or postjudgment interest set that rate in 1982 or earlier and have not changed it since: Idaho (set in 1981),²⁵ Kentucky (set in 1982),²⁶ Nebraska (set in 1980),²⁷ Rhode Island (set in 1981),²⁸ Vermont (set in 1979),²⁹ and Washington (set in

of the State of New Jersey Cash Management Fund, depending on the size of the judgment).

²² See N.D. CENT. CODE § 28-20-34 (postjudgment interest rate changed for judgments entered on or after January 1, 2006 from 12% to 3% above prime rate. 2005 North Dakota Laws Ch. 283 (S.B. 2302)).

²³ See S.C. CODE ANN. § 34-31-20 (postjudgment interest rate changed from 12% to 4% above prime rate. 2005 South Carolina Laws Act 27 (H.B. 3008)).

²⁴ See WIS. STAT. ANN. § 814.04(4) and § 807.01(4) (interest rates changed from 12% to 1% above prime rate. 2011-2012 Wisc. Legis. Serv. Act 69 (2011 S.B. 14)).

²⁵ IDAHO CODE ANN. § 28-22-104 (12% rate established by 1981 Idaho Sess. Laws, ch. 157, § 1).

²⁶ KY. REV. STAT. ANN. § 360.040 (enacted in 1982)(postjudgment interest only).

²⁷ NEB. REV. ST. § 45-104.

²⁸ R.I. GEN. LAWS ANN. § 9-21-10 (12% rate set by P.L. 1981, ch. 54, § 1).

²⁹ VT. STAT. ANN. tit. 9, § 41A (12% rate set by its predecessor statute, 9 V.S.A. § 41, now repealed).

1981).³⁰ The Annual Rate for the years when these 12% fixed rates were set varied from 10.65% to 14.8%. See Addendum at Appendix A. As set forth above, however, not all such state statutes have the same limited purpose as 6B. See, e.g., Kastal, 187 A.2d at 264 (prejudgment interest "intended more as a spur to the defendant.")

To summarize, the vast majority of states award prejudgment and postjudgment interest either at a lower fixed rate or at a floating rate that automatically adjusts to the economic climate. Massachusetts, however, still clings to pre- and postjudgment interest rates that have not changed in over 30 years, despite drastic and longstanding changes to the economy in that time. Massachusetts courts frequently look to trends among the majority of other jurisdictions to determine the best approach for Massachusetts. See Vasallo v. Baxter Healthcare Corp., 428 Mass. 1, 20-23 (1998) (revising Massachusetts law to relieve defendant of liability

³⁰ WASH. REV. CODE ANN. § 19.52.010. See Boardman v. Dorsett, 38 Wash. App. 338, 342, 685 P.2d 615, 618 (1984) ("RCW 19.52.010(1) was not amended to impose a 12 percent per annum interest rate until 1981. Laws of 1981, ch. 80, § 1.").

for failure to warn or provide instructions of risks not reasonably foreseeable at time of sale); Houle v. Low, 407 Mass. 810, 821 (1990) (Massachusetts joins majority of courts allowing special litigation committees to determine viability of shareholder derivative suit). As demonstrated above, Massachusetts' interest rate has no rational relationship to its legislative purpose and is archaic in light of the current economic conditions and as compared to other states that have endeavored to keep up with economic times.

B. The interest rate does not rationally serve to compensate plaintiffs fairly because the 12% interest rate results in a "windfall"

The Supreme Judicial Court has recognized that "[t]o give the damaged party more than [fair compensation] would go beyond the purpose of the statute. The purpose behind the prejudgment interest statute is not to penalize the wrongdoer, or to make the damaged party more than whole." McEvoy Travel Bureau, 408 Mass. at 717. The current statute bestows a windfall upon a plaintiff by virtue of its extraordinarily high interest rate. As a result, it does not rationally relate to that sole purpose since

12% is "a significantly above-market interest rate" that creates a "windfall" for plaintiffs. Sec'y of Admin. & Fin., 434 Mass. at 341-42.

More importantly, the SJC has ruled previously that 12% interest does not reasonably reflect the current value of money. In Sec'y of Admin. & Fin., 434 Mass. at 341-342, this Court reversed a decision of the Labor Relations Commission to award interest on its judgment using the 12% rate provided in 6B and remanded for a calculation of interest pursuant to G.L. c. 231, § 6I. In 2001, when the Annual Rate was 3.49%, the SJC found that "[g]iven fluctuating economic conditions, adherence to what may be, and in this decade has been, **a significantly above-market interest rate, i.e. a flat twelve percent rate, would result in a windfall**" for the plaintiffs, while using the floating rate would yield "a figure more akin to [plaintiffs'] actual losses." Id. at 346 (emphasis added); see also Lawrence Sav. Bank v. Levenson, 59 Mass. App. Ct. 699, 712 (2003) (vacating award of prejudgment interest because a bank's operating costs, as damages, already included a cost of value component, and noting that "the value of prejudgment interest, computed at the rate of twelve per cent, far

exceeded the interest charged by the bank on either of the loans").

Now, the Annual Rate is only 3/100 of the 3.49% interest reasonably attainable in 2001 when Sec'y of Admin. & Fin. was decided. (Addendum at Appendix A.) Yet, the fixed 12% rate of 6B is still in force. If 12% was a windfall when the Annual Rate was 3.49%, there is no doubt it is a windfall today. Plainly, then, the 12% interest rate has not been rationally related to the sole permissible legislative goal of fair compensation for decades because it does not compensate at a rate that accurately reflects the value of a plaintiff's loss.

C. A less arbitrary means of accomplishing the Legislature's goal of providing compensation is obviously available and thus the 12% interest rate is unconstitutional

Courts consider the "obvious availability of a less arbitrary means of accomplishing a given legislative end" and invite those challenging a statute to "point to the Legislature's failure to choose such an alternative as part of their proof that the necessary nexus between the actual statutory means and the purported legislative end fails to exist." Blue Hills Cemetery, Inc. v. Bd. of Registration in

Embalming & Funeral Directing, 379 Mass. 368, 375 n.11 (1979) (citing Coffee-Rich, 348 Mass. at 424-425). As stated above, there are several less arbitrary options that rationally serve the legislative purpose of fairly compensating a plaintiff. For instance, other states set a floating rate of interest, or have recently changed their 12% interest rates to accurately reflect the current state of financial markets.

In fact, a less arbitrary approach of realizing the legislative purpose already exists in Massachusetts law and has been recognized as a superior approach by the SJC. G.L. c. 231, § 6I ("6I") was enacted in 1993 and provides for interest to be paid by the Commonwealth to parties prevailing against it. Instead of a flat rate, 6I requires that the Commonwealth pay interest calculated at the Weekly Rate set on the calendar week preceding the date of the judgment ("the 6I floating rate"). The statute also caps interest at 10% per annum, whereas previously judgment against the Commonwealth accrued at 12%. Sec'y of Admin. & Fin., 434 Mass. at 344.

To illustrate the stark contrast between these two statutory rates, if this Court were to uphold the

12% interest as applied by the trial court, the total amount of prejudgment interest would be \$390,586.80³¹ on a principal compensatory amount of \$325,489.00³². (Hagopian Br. 11-12.) Alternatively, if the trial court applied what the SJC has recognized as "yield[ing] a figure more akin to the [plaintiff's] actual losses," it would use the 6I floating rate for the week preceding December 10, 2014, which was 0.15%³³ or almost one one-hundredth of the 12% rate set by 6B. Instead of interest totaling \$390,586.80, the interest would be \$5,858.50.³⁴ Thus, the total judgment would be \$330,371.34. Adding one year of postjudgment interest to the judgment yields a total of \$755,720.36

³¹ $\$234,586.80 + \$96,000 + \$60,000 = \$390,586.80$

³² $\$195,489 + \$80,000 + \$50,000 = \$325,489.00$

³³ Per G.L. c. 231, § 6I, the Weekly Rate for the week ending December 5, 2014 was 0.15%. See Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year constant maturity, quoted on investment basis, as downloaded from <http://www.federalreserve.gov/releases/h15/data.htm> (last visited April 13, 2016), pertinent parts attached hereto at Appendix B as set forth in the Addendum.

³⁴ This figure was calculated by using the simple interest equation $\text{Principal (P)} \times \text{Rate (R)} \times \text{Time (T)} = \text{I}$.

at the 12% rate and \$330,866.90 at the 6I floating rate.³⁵

In other words, as the statutes are applied today, a verdict against a private entity would accrue at almost **one hundred times the amount of interest** as an identical verdict against the Commonwealth. Even though, as the SJC recognized, a judgment against the Commonwealth raises public policy concerns not presented in a judgment against a private defendant, the staggering difference between these two statutes, especially when both statutes purport to serve the purpose of fair compensation for loss of use of awarded damages, illustrates how disproportionate a 12% interest rate is in this economy.

D. In other contexts, courts have found that an interest rate that was constitutional at the time it was set had subsequently become unconstitutional due to changing economic conditions

Despite the MCAD's protestations to the contrary, this Court is well-equipped to evaluate the constitutionality of the 12% interest rate in light of

³⁵ Postjudgment interest is calculated on the total amount of the award, including prejudgment interest. City Coal Co. of Springfield, Inc. v. Noonan, 424 Mass. 693, 695 (1997).

the varying economic circumstances, as appellate courts are called upon to do so in other contexts. For instance, courts are charged with determining the sufficiency of interest rates to ensure that a party receives just compensation for governmental takings. See Verrochi v. Commonwealth, 394 Mass. 633, 641 (1985). In 1985, the SJC found that the 6% interest rate in effect during most of the relevant time period between the time a taking occurred and the time plaintiffs were paid would not provide the just compensation to which plaintiffs were constitutionally entitled, and thus the Legislature intended to make the statutory amendment increasing the rate to 10% retroactive. Verrochi, 394 Mass. at 641 (1985)(citing Miller v. United States, 620 F.2d 812, 837-38 (Ct. Cl. 1980) (finding a 6% interest rate ceiling would be "constitutionally infirm" considering economic conditions in years between taking and payment)); see also Tektronix, Inc. v. United States, 552 F.2d 343, 353 opinion modified on denial of reh'g, 557 F.2d 265 (Ct. Cl. 1977) (applying series of interest rates dictated by court to government taking of intellectual property and finding "[t]he old 4% rate is now hopelessly antiquated").

Courts are no strangers to evaluating the constitutionality of interest rates in view of the surrounding economic circumstances, and this Court is well-equipped to determine that the 12% interest rate set by 6B and G.L. c. 229, § 11 is antiquated and no longer rationally related to its sole purpose of providing just compensation to a plaintiff. If the SJC can rely upon Miller to rule that a 6% interest rate is "constitutionally infirm" because it was too low in 1985, then this Court can rely on the same analysis to hold that 12% is too high. Moreover, in light of recent Supreme Court jurisprudence, this Court has the ability to determine that the interest award is outright excessive. See Verrochi, 394 Mass. at 641 (1985).

In its brief, the MCAD argues at different points that this Court lacks authority to strike down 6B because (1) the Legislature has deemed the rate reasonable and refused to amend it in recent years and (2) this Court should not "tinker" with a matter "uniquely within the province of the Legislature." (MCAD Br. 38-39). However, both such arguments are misdirected. First, the Legislature has not addressed the issue of prejudgment interest in 30 years and

there is no evidence before this Court that the Legislature considered and rejected a lower or floating rate. Second, the SJC has already rejected the MCAD's characterization of rational basis review. The SJC has ruled that it is the function of the courts to determine whether the Legislature's act meets constitutional criteria and does not exceed constitutional limits. Goodridge, 440 Mass. at 338. Even if the Legislature itself believes it acted rationally, such a belief is immaterial to the question, and to hold otherwise would reduce rational basis to a rubber stamp of any legislative action, regardless of whether that action is in fact rationally related to a legitimate government purpose. See id. Under the MCAD's proposed approach, neither this Court nor any other court would ever strike down any legislation, yet the SJC has done exactly that on multiple occasions.

Moreover, the MCAD's claim that this Court recently "endorsed" the use of a 12% interest rate is a blatant misrepresentation of this Court's reasoning. See City of Marlborough v. Marlborough Pub. Works Equip. Operators Ass'n, 2015 WL 1725139 at *1 (Mass. App. Ct., April 16, 2015). The Marlborough court

upheld an arbitrator's award of 12% interest in a dispute over back pay. Id. In doing so, however, this Court noted that the City raised "compelling general policy arguments" against such an award because it provided a windfall to the plaintiff. Id. This Court was "concerned" about this windfall but felt "constrained" to uphold the award because the policy raised by the City was "not sufficiently well defined or dominant." Id. The City did not challenge the constitutionality of 6B, and the question was not before the Appeals Court. If this, then, is a judicial endorsement, one wonders what the MCAD would consider a criticism. Moreover, prior to oral argument in Evans v. Lorillard, 465 Mass. 411 (2013), the SJC solicited amici curiae specifically addressing whether 6B is constitutional. If this question were beyond the scope of an appellate court's authority, the SJC would not have solicited briefs addressing this precise issue.

IV. THE 12% INTEREST RATE IS NOT ONLY UNCONSTITUTIONAL UNDER RATIONAL BASIS REVIEW, BUT ALSO VIOLATES DUE PROCESS AS AN EXCESSIVE PUNITIVE AWARD

This Court may also find the 12% interest rate applied here as violating due process if it determines that the award is grossly excessive. State Farm Mut.

Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003). The United States Supreme Court has held that “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” Id. at 416-17 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996)). In other words, the Supreme Court has found that courts have the ability to determine that certain damages are so excessive that they are unconstitutional.

Massachusetts has adopted the analysis set forth by the United States Supreme Court to determine whether a punitive award is so excessive as to violate due process. Labonte v. Hutchins & Wheeler, 424 Mass. 813, 826-27 (1997) (citing BMW of N. Am., 517 U.S. at 562). The three main factors are “‘the degree of reprehensibility of the defendant’s conduct,’ the ratio of the punitive damage award to the ‘actual harm inflicted on the plaintiff,’ with a comparison of ‘the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.’” Labonte, 424 Mass. at 826-27.

Typically, single digit ratios (e.g. 1:1, 2:1, etc.) “are more likely to comport with due process.”

Campbell, 538 U.S. at 425. Massachusetts courts have followed the reasoning of the Supreme Court when determining whether punitive damages are unconstitutionally excessive. See Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 503-04 (2012) (upholding a 2:1 punitive damages award); compare Brown v. Office of Com'r of Prob., 2011 WL 3612284 at *4 (Mass. Super. July 5, 2011) (reducing an 83:1 punitive damages award).

Here, a similar analysis can be made. The ratio between the interest that plaintiffs receive by virtue of the 12% interest rate and the amount that would actually compensate plaintiffs for the true value of that award is upwards of 100:1. As stated above, the SJC has found that the 6I floating rate is an appropriate measure to determine a plaintiff's actual losses. Sec'y of Admin. & Fin., 434 Mass. at 346. As the 6I floating rate at the time judgment entered was 0.15%, the ratio between the additional amount awarded to a plaintiff by virtue of the 12% interest rate and the amount the SJC has determined is sufficient compensation is nearly 100:1. Even if this Court applied the average of the corresponding Annual Rate

for the years 2005 to 2014 (approximately 1.63%)³⁶ the ratio would still be nearly 10:1.

If punitive damages awarded by a jury at a rate of ten to one is so punitive to be found unconstitutional by the United States Supreme Court, then interest applied automatically by statute that is almost one hundred times the going rate has to be so grossly excessive as to violate due process. This is especially true since the purpose of punitive damages is to **punish** a defendant whereas the purpose of the interest statute at issue is to award **just compensation** for the loss of use of the plaintiff's damages. Therefore, not only is the statutory 12% interest rate unconstitutional as applied under rational basis review, but it is also so excessive that it violates due process under recent Supreme Court jurisprudence.

³⁶ The corresponding Annual Rates for the relevant years have been as follows: 2005 - 3.62, 2006 - 4.94, 2007 - 4.53, 2008 - 1.83, 2009 - 0.47, 2010 - 0.32, 2011 - 0.18, 2012 - 0.17, 2013 - 0.13, 2014 - 0.12. (Addendum at Appendix A.)

CONCLUSION

The 12% interest rate must be struck down as unconstitutional because it exceeds the sole legitimate purpose of fairly compensating an injured party and has the effect of punishing defendants and providing a windfall to plaintiffs. In determining a fair rate of interest, this Court could choose from any of several rational approaches as described above. Alternatively, this Court could strike down 6B and allow the 6% rate of G.L. c. 107, § 3 to govern until the Legislature adopts a new approach.

However, if the true purpose of the statute is to compensate the plaintiff for loss of use only, then the appropriate rate should be floating in order to fluctuate with the changing economic times. Again, the Weekly Rate (or the corresponding Annual Rate) is used for cases under G.L. c. 231, §§ 6I (adding no percentage points), 60K (which added 4% at the time of this judgment but has since been amended to add only 2% for actions commenced after November 4, 2012). The corresponding Annual Rate over the course of this case

(2005-2014) vary from 0.12% to 4.94% with an average of approximately 1.63%.³⁷

Additionally, many other states use the Federal Reserve discount rate as a guide.³⁸ Since February 2010, the current effective discount rate is 0.75% for primary credit and 1.25% for secondary credit. States that use this as a benchmark apply it as is or add up to 5 percentage points above it.³⁹ Regardless of which of these measures the Court uses, they are all

³⁷ See Addendum at Appendix A. Other states that use the Annual or Weekly Rates to calculate interest rates are Idaho (IDAHO CODE ANN. § 28-22-104) (postjudgment interest only), Iowa (IOWA CODE ANN. § 535.3, and 668-13)(postjudgment interest only), Maine (ME. REV. STAT. ANN. tit. 14 §§ 1602-B and 1602-C), Minnesota (MINN. STAT. ANN. § 549.09), Nebraska (NEB. REV. STAT. §§ 45-103 and 45-103.01)(postjudgment interest only), and Oklahoma (OKLA. STAT. ANN. tit. 12 §§ 727 and 727.1).

³⁸ See Board of Governors of the Federal Reserve System, Current and Historical Discount Rates, found via <http://www.federalreserve.gov/monetarypolicy/discountwindow/discountwindow.htm> at <http://www.frbdiscountwindow.org/currentdiscountwindow/currentdiscountwindow.cfm?hdrID=20&dtlID> and <http://www.frbdiscountwindow.org/historicalrates.cfm?hdrID=20&dtlID=52> (Last visited April 26, 2016), attached hereto as Appendix C as set forth in the Addendum.

³⁹ Alaska (ALASKA STAT. §§ 09.30.070 and 45.45.010), Delaware (DEL. CODE ANN. tit. 6, § 2301), Florida (FLA. STAT. ANN. § 55.03), Kansas (KAN. STAT. ANN. § 16-204) (postjudgment interest only), Louisiana (LA. CIV. CODE ANN. art. 2924 and LA. REV. STAT. ANN. § 13:4202 as amended by 2012 La. Sess. Law Serv. Act 825 (H.B. 1144)), and West Virginia (W.VA. CODE § 56-6-31).

significantly lower than 12% and rationally relate to the legislative purpose of fairly compensating the plaintiff.

Respectfully submitted,
THE MASSACHUSETTS DEFENSE
LAWYERS ASSOCIATION

By its attorneys,

/s/ Emily G. Coughlin

Emily G. Coughlin
BBO #554526
Andrew R. Ferguson
BBO #649301
Matthew J. Lynch
BBO #689363
Coughlin Betke LLP
175 Federal Street
Boston, Massachusetts 02110
(617) 988-8050
ecoughlin@coughlinbetke.com
aferguson@coughlinbetke.com
mlynch@coughlinbetke.com

Dated: April 29, 2016

ADDENDUM

ADDENDUM TABLE OF CONTENTS

APPENDIX A - Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year constant maturity, quoted on investment basis, as downloaded from <http://www.federalreserve.gov/releases/h15/data.htm> (last visited February 19, 2016)

APPENDIX B - Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year constant maturity, quoted on investment basis, as downloaded from <http://www.federalreserve.gov/releases/h15/data.htm> (last visited April 13, 2016)

APPENDIX C - Board of Governors of the Federal Reserve System, Current and Historical Discount Rates, found via <http://www.federalreserve.gov/monetarypolicy/discountrate.htm> at <http://www.frbdiscountwindow.org/currentdiscountrates.cfm?hdrID=20&dtlID> and <http://www.frbdiscountwindow.org/historicalrates.cfm?hdrID=20&dtlID=52> (Last visited April 26, 2016)

APPENDIX A

Market yield on U.S. Treasury securities at 1-year constant maturity, quoted on investment basis

Series Description

Unit:

Percent:_Per_Year

Multiplier:

1

Currency:

NA

Unique Identifier:

H15/H15/RIFLGFCY01_N.A

Time Period

RIFLGFCY01_N.A

| | |
|------|-------|
| 1962 | 3.1 |
| 1963 | 3.36 |
| 1964 | 3.85 |
| 1965 | 4.15 |
| 1966 | 5.2 |
| 1967 | 4.88 |
| 1968 | 5.69 |
| 1969 | 7.12 |
| 1970 | 6.9 |
| 1971 | 4.89 |
| 1972 | 4.95 |
| 1973 | 7.32 |
| 1974 | 8.2 |
| 1975 | 6.78 |
| 1976 | 5.88 |
| 1977 | 6.08 |
| 1978 | 8.34 |
| 1979 | 10.65 |
| 1980 | 12 |
| 1981 | 14.8 |
| 1982 | 12.27 |
| 1983 | 9.58 |
| 1984 | 10.91 |
| 1985 | 8.42 |
| 1986 | 6.45 |
| 1987 | 6.77 |
| 1988 | 7.65 |
| 1989 | 8.53 |
| 1990 | 7.89 |
| 1991 | 5.86 |
| 1992 | 3.89 |
| 1993 | 3.43 |
| 1994 | 5.32 |
| 1995 | 5.94 |
| 1996 | 5.52 |
| 1997 | 5.63 |
| 1998 | 5.05 |
| 1999 | 5.08 |
| 2000 | 6.11 |

| | |
|------|------|
| 2001 | 3.49 |
| 2002 | 2 |
| 2003 | 1.24 |
| 2004 | 1.89 |
| 2005 | 3.62 |
| 2006 | 4.94 |
| 2007 | 4.53 |
| 2008 | 1.83 |
| 2009 | 0.47 |
| 2010 | 0.32 |
| 2011 | 0.18 |
| 2012 | 0.17 |
| 2013 | 0.13 |
| 2014 | 0.12 |
| 2015 | 0.32 |

The Federal Reserve's Annual One-Year Constant Maturity Treasury Yield Rate



APPENDIX B

Series Description Market yield on U.S. Treasury securities at 1-year constant maturity,
 quoted on investment basis
 Unit: Percent:_Per_Year
 Multiplier: 1
 Currency: NA
 Unique Identifier: H15/H15/RIFLGFCY01_N.WF
 Time Period RIFLGFCY01_N.WF

| | |
|-----------|------|
| 1/5/1962 | 3.24 |
| 1/12/1962 | 3.32 |
| 1/19/1962 | 3.29 |
| 1/26/1962 | 3.26 |
| 2/2/1962 | 3.29 |
| 2/9/1962 | 3.29 |
| 2/16/1962 | 3.31 |
| 2/23/1962 | 3.29 |
| 3/2/1962 | 3.2 |
| 3/9/1962 | 3.15 |
| 3/16/1962 | 3.1 |
| 3/23/1962 | 2.99 |
| 3/30/1962 | 2.96 |
| 4/6/1962 | 2.91 |
| 4/13/1962 | 2.97 |
| 4/20/1962 | 3 |
| 4/27/1962 | 3.06 |
| 5/4/1962 | 3.06 |
| 5/11/1962 | 3.01 |
| 5/18/1962 | 3.04 |
| 5/25/1962 | 3.03 |
| 6/1/1962 | 2.98 |
| 6/8/1962 | 2.96 |
| 6/15/1962 | 2.97 |
| 6/22/1962 | 3.04 |
| 6/29/1962 | 3.16 |
| 7/6/1962 | 3.22 |
| 7/13/1962 | 3.27 |
| 7/20/1962 | 3.33 |
| 7/27/1962 | 3.32 |
| 8/3/1962 | 3.3 |
| 8/10/1962 | 3.28 |
| 8/17/1962 | 3.21 |
| 8/24/1962 | 3.15 |
| 8/31/1962 | 3.11 |
| 9/7/1962 | 3.13 |
| 9/14/1962 | 3.06 |
| 9/21/1962 | 3.04 |
| 9/28/1962 | 3.03 |

| | |
|------------|------|
| 1/2/2015 | 0.25 |
| 1/9/2015 | 0.24 |
| 1/16/2015 | 0.18 |
| 1/23/2015 | 0.17 |
| 1/30/2015 | 0.17 |
| 2/6/2015 | 0.21 |
| 2/13/2015 | 0.24 |
| 2/20/2015 | 0.24 |
| 2/27/2015 | 0.22 |
| 3/6/2015 | 0.25 |
| 3/13/2015 | 0.25 |
| 3/20/2015 | 0.25 |
| 3/27/2015 | 0.26 |
| 4/3/2015 | 0.25 |
| 4/10/2015 | 0.22 |
| 4/17/2015 | 0.23 |
| 4/24/2015 | 0.24 |
| 5/1/2015 | 0.25 |
| 5/8/2015 | 0.24 |
| 5/15/2015 | 0.24 |
| 5/22/2015 | 0.23 |
| 5/29/2015 | 0.26 |
| 6/5/2015 | 0.27 |
| 6/12/2015 | 0.28 |
| 6/19/2015 | 0.27 |
| 6/26/2015 | 0.29 |
| 7/3/2015 | 0.27 |
| 7/10/2015 | 0.26 |
| 7/17/2015 | 0.28 |
| 7/24/2015 | 0.33 |
| 7/31/2015 | 0.33 |
| 8/7/2015 | 0.36 |
| 8/14/2015 | 0.39 |
| 8/21/2015 | 0.39 |
| 8/28/2015 | 0.36 |
| 9/4/2015 | 0.37 |
| 9/11/2015 | 0.39 |
| 9/18/2015 | 0.41 |
| 9/25/2015 | 0.34 |
| 10/2/2015 | 0.31 |
| 10/9/2015 | 0.27 |
| 10/16/2015 | 0.23 |
| 10/23/2015 | 0.23 |
| 10/30/2015 | 0.31 |
| 11/6/2015 | 0.41 |
| 11/13/2015 | 0.5 |
| 11/20/2015 | 0.49 |

| | |
|------------|------|
| 11/27/2015 | 0.51 |
| 12/4/2015 | 0.54 |
| 12/11/2015 | 0.71 |
| 12/18/2015 | 0.69 |
| 12/25/2015 | 0.65 |
| 1/1/2016 | 0.66 |
| 1/8/2016 | 0.65 |
| 1/15/2016 | 0.58 |
| 1/22/2016 | 0.46 |
| 1/29/2016 | 0.47 |
| 2/5/2016 | 0.52 |
| 2/12/2016 | 0.51 |
| 2/19/2016 | 0.53 |
| 2/26/2016 | 0.56 |
| 3/4/2016 | 0.66 |
| 3/11/2016 | 0.68 |
| 3/18/2016 | 0.67 |
| 3/25/2016 | 0.64 |
| 4/1/2016 | 0.62 |
| 4/8/2016 | 0.55 |
| 4/15/2016 | 0.54 |
| 4/22/2016 | 0.54 |

APPENDIX C

Federal Reserve
DISCOUNT WINDOW | PAYMENT SYSTEM RISK

| | | | | | | |
|----------------------------|-------------------|-------------------|-----------------------|-------------------|----------------------------|------------------------|
| General Information | Guidelines | Agreements | Discount Rates | Collateral | Payment System Risk | Select Your FRB |
|----------------------------|-------------------|-------------------|-----------------------|-------------------|----------------------------|------------------------|

Discount Rates

[Current Discount Rates](#)

[Historical Discount Rates](#)

| Current Discount Rates | | | |
|-------------------------------|---------------------|-----------------------|----------------|
| District | Primary Credit Rate | Secondary Credit Rate | Effective Date |
| Boston | 1.00% | 1.50% | 12-17-2015 |
| New York | 1.00% | 1.50% | 12-17-2015 |
| Philadelphia | 1.00% | 1.50% | 12-17-2015 |
| Cleveland | 1.00% | 1.50% | 12-17-2015 |
| Richmond | 1.00% | 1.50% | 12-17-2015 |
| Atlanta | 1.00% | 1.50% | 12-17-2015 |
| Chicago | 1.00% | 1.50% | 12-17-2015 |
| St. Louis | 1.00% | 1.50% | 12-17-2015 |
| Minneapolis | 1.00% | 1.50% | 12-17-2015 |
| Kansas City | 1.00% | 1.50% | 12-17-2015 |
| Dallas | 1.00% | 1.50% | 12-17-2015 |
| San Francisco | 1.00% | 1.50% | 12-17-2015 |

Current Interest Rates

| | |
|------------------|------------|
| Primary Credit | 1.00% |
| Secondary Credit | 1.50% |
| Seasonal Credit | 0.45% |
| Fed Funds Target | 0.25-0.50% |

Getting Started

Pledging Collateral

Borrowing

Collateral Margins Table

Business Continuity

Federal Reserve Websites

Site Map

Frequently Asked Questions

| Rate Type | Effective Date | | | | | | | | | | | |
|------------------------------------|----------------|-----------|--------------|-----------|-----------|-----------|-----------|-----------|-------------|-------------|-----------|---------------|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| Primary** Secondary** Credit | Boston | New York | Philadelphia | Cleveland | Richmond | Atlanta | Chicago | St. Louis | Minneapolis | Kansas City | Dallas | San Francisco |
| 1.00% | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 | 17-Dec-15 |
| 0.75% | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 | 19-Feb-10 |
| 0.50% | 17-Dec-08 | 16-Dec-08 | 18-Dec-08 | 16-Dec-08 | 16-Dec-08 | 16-Dec-08 | 16-Dec-08 | 17-Dec-08 | 16-Dec-08 | 16-Dec-08 | 17-Dec-08 | 16-Dec-08 |
| 1.25% | 29-Oct-08 | 29-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 30-Oct-08 | 29-Oct-08 |
| 1.75% | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 | 08-Oct-08 |
| 2.25% | 01-May-08 | 30-Apr-08 | 01-May-08 | 30-Apr-08 | 01-May-08 | 30-Apr-08 | 01-May-08 | 01-May-08 | 01-May-08 | 01-May-08 | 01-May-08 | 30-Apr-08 |
| 2.50% | 18-Mar-08 | 18-Mar-08 | 20-Mar-08 | 19-Mar-08 | 19-Mar-08 | 19-Mar-08 | 18-Mar-08 | 19-Mar-08 | 19-Mar-08 | 18-Mar-08 | 18-Mar-08 | 18-Mar-08 |
| 3.25% | 17-Mar-08 | 17-Mar-08 | N/A | 17-Mar-08 | N/A | 17-Mar-08 | 17-Mar-08 | N/A | 17-Mar-08 | 17-Mar-08 | N/A | 17-Mar-08 |
| 3.50% | 30-Jan-08 | 30-Jan-08 | 30-Jan-08 | 30-Jan-08 | 30-Jan-08 | 30-Jan-08 | 30-Jan-08 | 31-Jan-08 | 30-Jan-08 | 30-Jan-08 | 31-Jan-08 | 30-Jan-08 |
| 4.00% | 22-Jan-08 | 22-Jan-08 | 22-Jan-08 | 22-Jan-08 | 22-Jan-08 | 24-Jan-08 | 22-Jan-08 | 23-Jan-08 | 22-Jan-08 | 24-Jan-08 | 22-Jan-08 | 22-Jan-08 |
| 4.75% | 12-Dec-07 | 11-Dec-07 | 11-Dec-07 | 11-Dec-07 | 11-Dec-07 | 11-Dec-07 | 11-Dec-07 | 12-Dec-07 | 12-Dec-07 | 13-Dec-07 | 12-Dec-07 | 11-Dec-07 |
| 5.00% | 01-Nov-07 | 31-Oct-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 01-Nov-07 | 31-Oct-07 |
| 5.25% | 18-Sep-07 | 18-Sep-07 | 20-Sep-07 | 18-Sep-07 | 19-Sep-07 | 19-Sep-07 | 20-Sep-07 | 19-Sep-07 | 18-Sep-07 | 18-Sep-07 | 19-Sep-07 | 20-Sep-07 |
| 5.75% ^ | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 20-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 | 17-Aug-07 |
| 6.25% | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 29-Jun-06 | 06-Jul-06 | 29-Jun-06 | 29-Jun-06 |
| 6.00% | 10-May-06 | 10-May-06 | 10-May-06 | 10-May-06 | 10-May-06 | 10-May-06 | 10-May-06 | 11-May-06 | 10-May-06 | 11-May-06 | 10-May-06 | 10-May-06 |
| 5.75% | 28-Mar-06 | 28-Mar-06 | 28-Mar-06 | 28-Mar-06 | 28-Mar-06 | 28-Mar-06 | 28-Mar-06 | 29-Mar-06 | 28-Mar-06 | 30-Mar-06 | 28-Mar-06 | 28-Mar-06 |
| 5.50% | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 | 01-Feb-06 | 02-Feb-06 | 31-Jan-06 | 31-Jan-06 | 31-Jan-06 |
| 5.25% | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 | 13-Dec-05 |
| 5.00% | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 02-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 | 01-Nov-05 |
| 4.75% | 20-Sep-05 | 20-Sep-05 | 20-Sep-05 | 20-Sep-05 | 20-Sep-05 | 20-Sep-05 | 20-Sep-05 | 21-Sep-05 | 20-Sep-05 | 20-Sep-05 | 22-Sep-05 | 20-Sep-05 |
| 4.50% | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 | 09-Aug-05 |
| 4.25% | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 01-Jul-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 | 30-Jun-05 |
| 4.00% | 03-May-05 | 03-May-05 | 03-May-05 | 03-May-05 | 03-May-05 | 03-May-05 | 03-May-05 | 04-May-05 | 03-May-05 | 03-May-05 | 03-May-05 | 03-May-05 |
| 3.75% | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 22-Mar-05 | 23-Mar-05 | 24-Mar-05 | 22-Mar-05 |
| 3.50% | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 03-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 | 02-Feb-05 |
| 3.25% | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 15-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 | 14-Dec-04 |
| 3.00% | 10-Nov-04 | 10-Nov-04 | 10-Nov-04 | 10-Nov-04 | 10-Nov-04 | 10-Nov-04 | 10-Nov-04 | 12-Nov-04 | 10-Nov-04 | 10-Nov-04 | 12-Nov-04 | 10-Nov-04 |
| 2.75% | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 22-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 | 21-Sep-04 |
| 2.50% | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 | 10-Aug-04 |
| 2.25% | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 01-Jul-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 | 30-Jun-04 |
| 2.00% | 25-Jun-03 | 25-Jun-03 | 26-Jun-03 | 26-Jun-03 | 26-Jun-03 | 26-Jun-03 | 26-Jun-03 | 26-Jun-03 | 26-Jun-03 | 25-Jun-03 | 26-Jun-03 | 25-Jun-03 |
| 2.25% | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 | 09-Jan-03 |

*Primary credit is available to generally sound depository institutions on a very short-term basis, typically overnight, at a rate above the Federal Open Market Committee's target rate for federal funds. Depository institutions are not required to seek alternative sources of funds before requesting occasional short-term advances of primary credit. The Federal Reserve expects that, given the above-market pricing of primary credit, institutions will use the discount window as a backup rather than a regular source of funding.

**Secondary credit is available to depository institutions not eligible for primary credit. It is extended on a very short-term basis, typically overnight, at a rate that is above the primary credit rate. Secondary credit is available to meet backup liquidity needs when its use is consistent with a timely return to a reliance on market sources of funding or the orderly resolution of a troubled institution. Secondary credit may not be used to fund an expansion of the borrower's assets.

^ On August 17, 2007, the primary credit program was temporarily changed to allow primary credit loans for terms of up to 30 days, rather than overnight or for very short terms as before. Also, the spread of the primary credit rate over the FOMC's target federal funds rate has been reduced to 50 basis points. These changes will remain until the Federal Reserve determines that market liquidity has improved.

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Emily G. Coughlin

Emily G. Coughlin

No. 2015-P-0685

NUBAR HAGOPIAN AND NEWBURY GUEST HOUSE, INC.
D/B/A HAGOPIAN HOTELS,
PLAINTIFFS-APPELLANTS,

v.

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION,
DEFENDANT-APPELLANT,

FRANCIS CROKEN AND JOHN TAMAYO,
INTERVENORS-APPELLEES.

ON APPEAL FROM JUDGMENT OF THE SUFFOLK SUPERIOR COURT

***AMICUS CURIAE* BRIEF FOR
THE MASSACHUSETTS DEFENSE
LAWYERS ASSOCIATION**