NOS. 13-2190 & 13-2274

United States Court of Appeals for the First Circuit

PIUS AWUAH; ANTHONY GRAFFEO; MANUEL DA SILVA,
and all others similarly situated
Plaintiffs - Appellees/Cross-Appellants

PIUS AWUAH; DENISSE PINEDA; JAI PREM; RICHARD BARRIENTOS;
ANTHONY GRAFFEO; MANUEL DA SILVA, and all others similarly situated;
ALDIVAR BRANDAO; NILTON DOS SANTOS; GERALDO CORREIA;
PHILLIP BEITZ; MARIAN LEWIS; STANLEY STEWART;
BENECIRA CAVALCANTE
Plaintiffs/Cross-Appellants

v.

COVERALL NORTH AMERICA, INC.
Defendant - Appellant/Cross-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS, HON. WILLIAM G. YOUNG

BRIEF OF *AMICUS CURIAE*, MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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Dated: May 5, 2014

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae MassDLA hereby discloses that it is a non-profit organization, has no parent corporation, and that no publicly-traded corporation owns 10% or more of its stock.

Respectfully submitted,

Attorneys for *Amicus Curiae*

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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. MassDLA also 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.

Counsel for MassDLA has reviewed the briefing in this matter and believes that the 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 nor any legal issues relating to the trial. 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 the verdict, under Mass. Gen. Laws ch. 231, § 6C, is so excessive as to violate the Due Process Clause as applied.

STATEMENT OF THE CASE

MassDLA adopts by reference the Statement of the Case contained in the Appellate Brief of Defendant-Appellant Coverall North America, Inc. at pp. 4-8.

SUMMARY OF ARGUMENT

Rational basis review is the appropriate standard of scrutiny for a due process challenge to an economic statute not affecting fundamental rights (pp. 3-4). Mass. Gen. Laws ch. 231, § 6C provides for prejudgment interest in cases based on contractual obligations at a rate of twelve per cent (12%) per annum from the date of the breach or demand. The statute's purpose is exclusively to compensate plaintiffs for the loss of use or unlawful detention of money. Liberty Mut. Ins. Co. v. Greenwich Ins. Co., 417 F.3d 193, 201 (1st Cir. 2005) (pp. 6-14).

While prejudgment interest may serve this purpose, the 12% rate has no rational relation to the goal of compensation. Rather, adherence to a significantly above-market rate of 12% results in a windfall for plaintiffs and has no rational relation to their actual losses. Sec'y of Admin. & Fin. v. Labor Rel. Comm'n, 749 N.E.2d 137, 142 (2001) (pp. 15-23). A less arbitrary means (namely setting a

floating interest rate) of accomplishing the legislature's goal of providing compensation is obviously available. Blue Hills Cemetery, Inc. v. Bd. Of Registration in Embalming & Funeral Directing, 398 N.E.2d 471, 477 n.11 (1979) (pp. 23-25). This Court is well equipped to find that the 12 % interest rate is antiquated, no longer serves its purpose of just compensation to plaintiffs, and unconstitutional (pp. 25-26).

The 12 % rate is not only unconstitutional under rational basis review, but by analogy to decisions regarding punitive damages awards, also violates due process as an excessive punitive award. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996). If punitive damages awards at a rate of 10:1 (a double digit ratio) are so punitive to be unconstitutional, then prejudgment interest that is more than 100 times the going rate is so excessive as to violate due process (pp. 27-29).

ARGUMENT

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

Rational basis review is the appropriate standard of scrutiny for a due process challenge to an economic statute not affecting fundamental rights. Cook v. Gates, 528 F.3d 42, 49 n.3 (1st Cir. 2008) ("Where no protected liberty interest is implicated, substantive due process challenges are reviewed under the rational basis standard"). It is the same analysis as used in a determination based on the

equal protection clause. Medeiros v. Vincent, 431 F.3d 25, 33 (1st Cir. 2005); Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 976 n.7 (1st Cir. 1989) ("the type and kind of scrutiny applied, and the result, would be no different on either" due process or equal protection theories). Thus, for a statute to pass constitutional muster, it must be rationally related to a legitimate state interest. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985); see also Shell Oil Co. v. City of Revere, 383 Mass. 682, 686, 421 N.E.2d 1181, 1184 (1981). Rational basis review is traditionally deferential. Medeiros, 431 F.3d at 31. Challengers face a heavy burden, as they must "negate any and all conceivable bases upon which the challenged regulation might appropriately rest." Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 9 (1st Cir. 2011).[1]

[1] Using rational basis review, the Massachusetts Supreme Judicial Court ("SJC") has deemed unconstitutional certain economic regulations involving no fundamental rights. See, e.g., Aetna Cas. & Sur. Co. v. Comm'r of Ins., 358 Mass. 272, 281, 263 N.E.2d 698, 703 (1970)(holding that legislation fixed interest rates for automobile insurers so low that they were confiscatory and thus unconstitutional); Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 426, 204 N.E.2d 281, 289 (1965)(law prohibiting sale of wholesome food product was unconstitutional because it was not a reasonable means of preventing fraud or deception in selling misbranded or imitation dairy products); Mansfield Beauty Acad. v. Bd. of Registration of Hairdressers, 326 Mass. 624, 627, 96 N.E.2d 145, 146-47 (1951)(law prohibiting beauty schools from charging fees for funds spent on materials was unconstitutional because it had "no rational or reasonable bearing on cleanliness, sanitation, or the prevention of communicable diseases."); and Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 425, 30 N.E.2d 269, 278 (1940)(laws prohibiting issuance of trading stamp and restricting rights of retailers

Here, as argued *infra*, the only conceivable purpose of Massachusetts' prejudgment interest statute is to compensate a damaged party for funds that have been deemed wrongfully retained by another party. Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d 579, 584 (1st Cir. 1985) (quoting Perkins School for the Blind v. Rate Setting Commission, 383 Mass. 825, 835, 423 N.E.2d 765, 772 (1981)). However, the means adopted by the Commonwealth here (mandating 12% interest on verdicts) cannot rationally accomplish this purpose without overcompensating the plaintiffs and penalizing the defendant. When enacted in 1982, the provision for 12% interest may have appeared reasonable and rational, because the general public could receive a comparable rate of return on investments in the marketplace.[2] However, as a 12% rate of return on investments is no longer reasonably attainable in the current economic environment, this statutory interest rate no longer accomplishes the legislative goal of compensating plaintiffs for the loss of use of money. Particularly between the years of 2007 and 2013 during the

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to fix and change prices were unconstitutional because the law did nothing to further the state's purpose of preventing fraud upon retail gasoline purchasers). 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.

[2] See subsection III.A, *infra*, containing a brief historical discussion of interest rates.

time of this litigation, the most prudent investor could not reasonably attain anything near a 12% return on any investment.[3]

Simply put, if these plaintiffs are awarded prejudgment interest at a 12% rate as of the date of the entry of judgment in 2013, they are placed in an exceedingly more advantageous economical position (and made more than whole) than if they had suffered no wrongdoing and had access to the same amount of money in the same time frame. Thus, while the legislature's aim to compensate a plaintiff for the loss of use of money is legitimate, the extraordinarily high interest rate in place today does not rationally achieve that purpose.

II. IN MASSACHUSETTS, THE 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 articulated by Massachusetts courts

Massachusetts courts have consistently recognized only one purpose of prejudgment interest: to compensate the damaged party for the loss of use or the unlawful detention of money.[4] Sterilite Corp. v. Continental Casualty Co., 397

[3] See, generally, the chart and corresponding graph set forth in the Addendum at Add. 1-2 and discussion in subsection III.A, *infra*.

[4] The Ninth Circuit explains that 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

Mass. 837, 841, 494 N.E.2d 1008, 1011 (1986) ("Sterilite"); see also McEvoy Travel Bureau, Inc., 563 N.E.2d at 196; Conway v. Electro Switch Corp., 402 Mass. 385, 390, 523 N.E.2d 255, 258 (1988); Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 821, 465 N.E.2d 232, 236 (1984).[5] Furthermore, in interpreting 6C, the First Circuit has adopted Massachusetts' rationale for prejudgment interest. Liberty Mut. Ins. Co. v. Greenwich Ins. Co., 417 F.3d 193, 201 (1st Cir. 2005) (quoting Sterilite, 494 N.E.2d at 1011); Boston Children's Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429, 442 (1st Cir. 1995) ("Interest is compensation fixed by law for the use of money or, alternatively, as damages for its detention."); Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d 579, 584 (1st Cir. 1985) ("The Massachusetts Supreme Judicial Court has ruled that section 6C 'is designed to compensate a damaged party for the loss of use or unlawful detention of money.'" (quoting Perkins School for the Blind, 423 N.E.2d at 772)).

In contrast, in Roy v. Star Chopper Co., Inc., 584 F.2d 1124 (1st Cir. 1978), the First Circuit found no due process violation with Rhode Island's prejudgment interest statute **because** Rhode Island Supreme Court had construed the statutory language as "evincing a legislative purpose to spur defendant to settlement." Id. at

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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).

[5] 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, 544 N.E.2d 584, 585 (1989).

1135-36 (citing Kastal v. Hickory House, Inc., 95 R.I. 366, 187 A.2d 262, 264-265 (1963)). Unlike Rhode Island, the Massachusetts Supreme Judicial Court has never held that the purpose of prejudgment interest is to incentivize settlement.[6]

In fact, not only has this Court accepted compensation as the only purpose of prejudgment interest, it has also held that an interest award resulting in a windfall would be "**in contravention** of the statute's purpose." Saint-Gobain Indus. Ceramics Inc., 246 F.3d at 72 (emphasis added), see also Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d at 585 (declining to award prejudgment interest from too early a date because "the windfall accorded to Liberty would amount to hundreds of thousands of dollars. Such a result would **defeat the purpose of section 6C**." (emphasis added)).

In other words, the First Circuit has specifically found that "[t]he purpose of prejudgment interest is to compensate a wronged party for the loss of the use of money, and **the award should reflect this purpose."** Concrete Sys., Inc. v. Pavestone Co., L.P., 112 F. App'x 67, 71 (1st Cir. 2004)[7] (citing Sterilite and affirming lower court's denial of prejudgment interest to avoid a windfall to

[6] Similarly, in Fratus v. Republic W. Ins. Co., 147 F.3d 25, 30-31 (1st Cir. 1998), the First Circuit only cites to Rhode Island case law in determining that prejudgment interest serves dual purposes of encouraging settlement and compensation.

[7] Per Fed. R. of App. P. 32.1 and First Circuit Rule 32.1.0., a copy of this unpublished opinion is attached hereto at Add. 64.

plaintiff). Like Massachusetts courts, the First Circuit in interpreting 6C has never found another applicable legislative purpose for the statute.[8]

The First Circuit in Liberty Mut. Ins. Co. v. Greenwich Ins. Co., 417 F.3d at 201, passed on the question of deciding whether the statutory interest award was too generous. Although the First Circuit declared that the rate of interest is a "legislative judgment," the Court never addressed any issue of constitutional challenge. Id. Nevertheless, it again cited Sterilite, finding that the "evident thrust" of 6C "is to compensate a contract claimant for the deprivation of amounts due under a contract from the time they were payable to the time at which judgment is entered." Id.

B. State and federal courts analyzing Massachusetts' prejudgment interest statutes have rejected other conceivable legislative purposes

Not only is compensation the only recognized purpose addressed in case law, both state and federal courts ruling on Massachusetts law have expressly rejected other conceivable purposes of the statute. See Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d at 584-85 (finding that prejudgment interest is not a

[8] The only other purpose of 6C noted by the First Circuit has no bearing on the issue of the interest rate itself. See Bushkin Associates, Inc. v. Raytheon Co., 906 F.2d 11, 14-15 (1st Cir. 1990)(finding that apart from the "primary" legislative purpose of compensation, the legislature also adopted 6C "to do away with the common law distinction between liquidated and unliquidated damages" for determining applicability of prejudgment interest).

penalty); Chiulli v. Newbury Fine Dining, Inc., CIV.A. 10-10488-JLT, 2013 WL 5494723 (D. Mass. Sept. 30, 2013) ("The purpose of prejudgment interest is *not* to make the plaintiff 'more than whole.' Likewise, the purpose of the section 'is not to penalize the wrongdoer.'"(quoting McEvoy Travel Bureau, Inc., 563 N.E.2d at 196)(emphasis in original)); Sterilite, 494 N.E.2d at 1011 ("No interest is due on sums when Sterilite was not deprived of the use of those sums. Any other rule would result in a windfall for Sterilite, **which the Legislature did not intend**" (emphasis added)). Further illustrating that compensation is the statute's sole purpose, state and federal courts have consistently declined to award interest on damages that are anything but compensatory. See Cummings v. Standard Register Co., 265 F.3d 56, 69 (1st Cir. 2001) (per 6B and 6C, affirming denial of prejudgment interest to award of front pay); Cahill v. TIG Premier Ins. Co., 47 F. Supp. 2d 87, 90-91 (D. Mass. 1999) (citing Sterlite and precluding a prejudgment interest award on a verdict that included both past and future damages, per the SJC's "admonishment to avoid windfalls"); McEvoy Travel Bureau, Inc., 563 N.E.2d at 196 (refusing to award prejudgment interest to multiple damages, reasoning that "[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)); Salvi v. Suffolk Cnty. Sheriff's Dep't, 67 Mass. App. Ct. 596, 608, 855 N.E.2d 777, 788 (2006) (refusing to award prejudgment interest to

punitive damages). Finally, federal courts applying the Massachusetts prejudgment interest statutes will decline to award interest when a plaintiff had not been deprived of the funds and thus need not be compensated for loss of use. See, e.g., Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P., 171 F.3d 52, 57 (1st Cir. 1999); Computer Sys. Eng'g, Inc. v. Qantel Corp., 571 F. Supp. 1379, 1383 (D. Mass. 1983) aff'd, 740 F.2d 59 (1st Cir. 1984) (declining to award prejudgment interest on an entire verdict to avoid any potential duplicative award).

Plaintiffs may assert that the 12% interest rate serves other legitimate purposes, but the legislature did not intend it to do so. See McEvoy Travel Bureau, Inc., 563 N.E.2d at 196. Rather, the legislature has chosen to deal with defendants who engage in dilatory settlement practices and otherwise delay injured plaintiffs from receipt of reasonable settlements through the enactment of Mass. Gen. Laws ch. 93A and 176D. Furthermore, as set forth *infra*, unlike Massachusetts, other states design their statutes to meet other specific goals.

C. Unlike Massachusetts, Other States That Allow For Prejudgment Interest For Alternative Purposes Have Drafted Rules And Statutes Tailored To Specific Goals

Should plaintiffs argue that the purpose of prejudgment interest is to encourage settlement by discouraging delay tactics, the highest court in Massachusetts has never recognized this as the legislative purpose of prejudgment interest. While certain other states award prejudgment interest for other purposes,

such as encouraging settlements, the states that do have enacted specific rules and regulations to accomplish these goals. As Massachusetts has not recognized any such other purpose for awarding prejudgment interest, and has not enacted a regulatory or statutory scheme to accomplish any such other purpose, the Commonwealth cannot be grouped in with these other states in order to justify its 12% statutory interest rate.

For example, the Pennsylvania rule governing prejudgment interest for tort claims expressly states 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 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).[9]

[9] 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 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).

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.[10] 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 undue delay or the defendant made a reasonable and timely settlement offer. N.M. Stat. § 56-8-4(B).[11] 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. See Wis. Stat. Ann. §§ 807.01 and 814.04.[12] Finally, Connecticut also provides for

[10] 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).

[11] 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. § 56-8-4(A)(2).

[12] 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

offer of judgment interest that only applies if plaintiff recovers an amount equal or greater to his or her offer of compromise. See Conn. Gen. Stat. § 52-192a.[13] 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.

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 Mass. Gen. Laws ch. 231, § 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 Federal Reserve's annual one-year constant maturity Treasury yield rate ("Annual Rate") was 5.86%. The Annual Rate at the time judgment entered in the case at bar was 0.18%. See Addendum at Add. 1. In any event, as discussed in footnote 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 and 814.04.

[13] 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 Mass. Gen. Laws ch. 231, § 6C on the basis that it violates due process as applied in the current economic times.

III. THE 12% INTEREST RATE IS NOT RATIONALLY RELATED TO THE FURTHERANCE OF THE LEGISLATIVE GOAL OF COMPENSATING THE DAMAGED PARTY FOR LOSS OF USE OR UNLAWFUL DETENTION OF MONEY

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

While it is commonly known that 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 Massachusetts statutory 12% interest rate is. Most notably, the operative statute setting the rate applied in this case, Mass. Gen. Laws ch. 231, § 6C, has been amended five times since 1968 and was even revised four times in a span of nine years, between 1973 and 1982. However, the rate has not changed in the past 30 years.

Mass. Gen. Laws ch. 231, § 6C ("6C") was first enacted on July 25, 1968. The statute mandated that interest be added in actions of contract upon a verdict, finding, or order for judgment at either the contract rate if established or a rate of 6% per annum. The date that interest accrues is either from the date of breach or demand if established, or from the date of the commencement of the action if the date of breach or demand is not established. Mass. Gen. Laws ch. 231, § 6C. The

legislature revised 6C[14] in May 16, 1974, and raised the interest rate to 8%. St. 1974, c. 224, § 1. By way of reference, as of that date in 1974, the Federal Reserve's annual one-year constant maturity Treasury yield rate ("Annual Rate")[15] was 8.2%. 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 30, 2014), attached hereto in the Addendum at Add. 1-2). 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%. See Add. 1. On June 28, 1982, the legislature approved raising the rate again, this time to 12%. St. 1982, c. 183, § 2; Morageas, 465 N.E.2d at 234. In 1982, the Annual Rate was 12.27%. See Add. 1. In support of his decision to declare the 1982 amendment an emergency, the Governor stated that "[i]t is in the public interest that the provisions of this Act be effective immediately in order that the two percent

[14] Mass. Gen. Laws ch. 231, § 6B ("6B") sets the prejudgment interest rate for tort claims and has had a similar evolution, culminating in interest rate increases from 8% to 10% to 12% at the same times and by the same laws as 6C.

[15] MassDLA references this rate specifically because it corresponds to other Massachusetts interest rate statutes, such as Mass. Gen. Laws ch. 231, § 6I (contract actions against the state, discussed further *infra*) and Mass. Gen. Laws ch. 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").

interest increase may be of benefit to the parties in certain actions of law." Mirageas, 465 N.E.2d at 235.[16]

It is clear from this statute's history that the interest rate was amended to keep pace with overall economic changes. However, the rate has not changed since 1982, when Ronald Reagan was in the White House. Since then, as demonstrated by the chart and corresponding graph as set forth in the Addendum at Add. 1-2, the Annual Rates have plummeted and have not exceeded 5% since 2001. The applicable Weekly Rate at the time the judgment was rendered in this case on September 16, 2013, was **0.13%** (nearly **one one-hundredth** of the 12% rate applied here).

Interest rates calculated by any measure have similarly varied, and states have taken numerous approaches towards applying interest to verdicts. Twenty-four states, plus federal district courts, use a floating prejudgment and/or postjudgment interest rate, which ties the applicable interest rate to a realistic economic benchmark and provides for adjustment.[17] Furthermore, thirty-one states

[16] 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.

[17] 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 (Fl. Stat. ch. 55.03), Georgia (Ga. Code Ann. §§ 7-4-12 and 51-12-14), Idaho (Idaho Code § 28-22-104) (postjudgment interest only), Iowa (Iowa Code §§ 535.3 and 668.13)(postjudgment interest and prejudgment interest in certain cases), Kansas (Kan. Stat. Ann. § 16-204)(postjudgment interest only), Louisiana (La. Civ. Code Ann. art. 2924 and La.

set a fixed prejudgment or postjudgment interest rate lower than Massachusetts.[18]

Additionally, the following states have recently reduced their prejudgment or

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Rev. Stat. Ann. § 13:4202 as amended by 2012 La. Sess. Law Serv. Act 825 (H.B. 1144)), Maine (Me. Rev. Stat. Ann. tit. 14 §§ 1602-B and 1602-C), Michigan (Mich. Comp. Laws § 600.6013), Minnesota (Minn. Stat. § 549.09)(for judgments less than $50,000), Missouri (Mo. Rev. Stat. § 408.040)(for tort cases), Nebraska (Neb. Rev. Stat. §§ 45-103 and 45-103.01)(postjudgment interest only) Nevada (Nev. Rev. Stat. 99.040 and 17.130), New Hampshire (N.H. Rev. Stat. Ann. § 336:1), New Jersey (N.J. Stat. Ann. § 4:42-11 and NJ R SUPER TAX SURR CTS CIV R. 4:42-11), North Dakota (N.D. Cent. Code § 28-20-34)(postjudgment only, since 2006), Oklahoma (Okla. Stat. tit. 12 §§ 727 and 727.1)(notably, the Oklahoma statute setting the interest rate has recently been found to violate the current state constitution provision prohibiting legislative logrolling, Douglas v. Cox Ret. Properties, Inc., 302 P.3d 789, 794 (2013)), 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)(postjudgment interest only), Texas (Tex. Fin. Code Ann. § 304.003)(postjudgment interest and prejudgment interest in certain cases), Utah (Utah Code Ann. § 15-1-4)(postjudgment interest only),West Virginia (W.Va. Code § 56-6-31), and Wisconsin (Wis. Stat. § 814.04 and § 807.01).

[18] Alabama (Ala. Code §§ 8-8-1 and 8-8-10), Arizona (Ariz. Rev. Stat. § 44.1201), Arkansas (Ark. Code Ann. § 16-65-114)(postjudgment interest only; notably, Arkansas' prejudgment interest rate is currently in flux as the provision setting the rate was repealed and not replaced. Missouri & N. Arkansas R.R. Co., Inc. v. Entergy Arkansas, Inc., 1:10-CV-8-DPM, 2013 WL 5442099 (E.D. Ark. Sept. 27, 2013)), California (Cal. Const. art. XV, § 1, Cal. Civ. § 3289, and Cal. Civ. Proc. § 685.010), Colorado (Colo. Rev. Stat. §§ 5-12-102 and 13-21-101), Connecticut (Conn. Gen. Stat. §§ 37-3a, 37-3b, and 52-192a), Hawaii (Haw. Rev. Stat. §§ 478-2 and 478-3), Illinois (815 Ill. Comp. Stat. 205/2 and 735 Ill. Comp. Stat. 5/2-1303), Indiana (Ind. Code §§ 24-4.6-1-101and 34-51-4-9), Iowa (Iowa Code § 535.2)(prejudgment interest in certain cases), Kansas (Kan. Stat. Ann. § 16-201)(prejudgment interest only), Kentucky (Ky. Rev. Stat. Ann. § 360.010)(prejudgment interest only), Maryland (MD. Code Ann., Com. Law, § 12-102 and MD. Code Ann., Cts. & Jud. Proc., § 11-107 check citation style), Minnesota (Minn. Stat. § 549.09)(for judgments $50,000 or greater), Mississippi (Miss. Code Ann. §§ 75-17-1 and 75-17-7)(fixed rate for contract cases, other cases rate is set by judge), Missouri (Mo. Rev. Stat. § 408.040)(for contract cases),

postjudgment interest rates from 12% to a lower and/or floating rate, or limited application of the former 12% rate to older cases: Alabama,[19] Connecticut,[20] Georgia,[21] New Jersey,[22] North Dakota,[23] South Carolina,[24] and Wisconsin.[25]

Montana (Mont. Code Ann. §§ 25-9-205 and 31-1-106), New York (N.Y.C.P.L.R. §§ 5001 and 5004 (Consol.)), North Carolina (N.C. Gen. Stat. §§ 24-1 and 24.5), North Dakota (N.D. Cent. Code § 47-14-05)(prejudgment only), Ohio (Ohio Rev. Code Ann. §§ 1343.03 and 5703.47), Oregon (Or. Rev. Stat. § 82.010), Pennsylvania (42 Pa. Cons. Stat. § 8101 and 41 Pa. Cons. Stat. § 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, and 54-3-16), Tennessee (Tenn. Code Ann. §§ 47-14-123)(prejudgment interest only), Texas (Tex. Fin. Code Ann. § 302.002)(prejudgment interest in certain cases); Utah (Utah Code Ann. § 15-1-1)(prejudgment interest only), Virginia (Va. Code Ann. §§ 6-2-302 and 8.01-382), and Wyoming (Wyo. Stat. Ann. §§ 1-16-102 and 40-14-106). Included in this calculation is West Virginia, which has a floating rate between fixed parameters of 7% and 11%. W. Va. Code Ann. § 56-6-31.

[19] See Ala. Code § 8-8-10 (postjudgment interest rate reduced from 12% to 7.5%. 2011 Alabama Laws Act 2011-521 (S.B. 207)).

[20] See Conn. Gen. Stat. § 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)).

[21] 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)).

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

[23] 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)).

Furthermore, the **only six states** that currently adhere to a fixed 12% interest rate for prejudgment or postjudgment interest, like Massachusetts, set that rate in 1982 or earlier and have not changed it since: Idaho (set in 1981),[26] Kentucky (set in 1982),[27] Nebraska (set in 1980),[28] Rhode Island (set in 1981),[29] Vermont (set in 1979),[30] and Washington (set in 1981).[31] The Annual Rates for the years when these 12% fixed rates were set varied from 10.65% to 14.8%. See Addendum at Add. 1-2. Notably, Idaho Senate Bill No. 1282, passed unanimously in the Idaho Senate in February 2014, proposes to change Idaho's prejudgment interest rate to match its floating postjudgment interest rate calculation. S. 1282, 62d Leg., 2d Reg. Sess. (Idaho 2014).

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[24] 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)).

[25] See Wis. Stat. § 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)).

[26] Idaho Code § 28-22-104 (prejudgment interest only; 12% rate established by 1981 Idaho Sess. Laws, ch. 157, § 1).

[27] Ky. Rev. Stat. Ann. § 360.040 (enacted in 1982)(postjudgment interest only).

[28] Neb.Rev.St. § 45-104 (prejudgment interest only).

[29] R.I. Gen. Laws Ann. § 9-21-10 (12% rate set by P.L. 1981, ch. 54, § 1).

[30] Vt. Stat. Ann. tit. 9, § 41A (12% rate set by its predecessor statute, 9 V.S.A. § 41, now repealed)

[31] Wash. Rev. Code Ann. § 19.52.010 (prejudgment and postjudgment interest on non-tort cases). 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.").

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, is one of a small minority of states that have not changed their prejudgment or postjudgment interest rates in over 30 years. As demonstrated above, Massachusetts' interest rate 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. Massachusetts' interest rate does not rationally serve to compensate plaintiffs fairly because, as the SJC has recognized, the 12% interest rate results in a "windfall" to plaintiffs and does not accurately reflect the value of money lost

Not only has the Massachusetts Supreme Judicial ("SJC") recognized that the 12% interest rate would confer a windfall (see Sec'y of Admin. & Fin., 749 N.E.2d at 142), the First Circuit has also made the same finding regarding the same rate (albeit set by Mass. Gen. Laws ch. 231, § 6H). Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 442 (1st Cir. 1996).

In Massachusetts, overcompensating a damaged party "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, Inc., 563 N.E.2d at 196. The current statute bestows a windfall upon the plaintiffs by virtue of its extraordinarily high interest rate in direct

contravention of its only recognized purpose. As a result, it cannot and does not rationally relate to that end. As the SJC recognized in Sec'y of Admin. & Fin., supra, and as the economic data clearly demonstrate, 12% interest exceeds any conceivable return a prudent investor would have obtained with the money in his or her possession during the period that plaintiffs here were wrongfully deprived of the funds.

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., 749 N.E.2d at 139, the SJC 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 Mass. Gen. Laws ch. 231, § 6I. The SJC found (in 2001, years before the recent economic crisis) 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 142 (emphasis added).

The First Circuit has also previously found that the rate set by 6C or its equivalent would result in a windfall. Boston Children's Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429, 442 (1st Cir. 1995) (floating U.S. Treasury bill rate is the appropriate measure of loss-of-use value; application of fixed rate under

Massachusetts law "would have resulted in a windfall" to plaintiff). See also Interstate Brands Corp. v. Lily Transp. Corp., 256 F. Supp. 2d 58, 62 (D. Mass. 2003) (quoting Sterilite, 494 N.E.2d at 1011, recognizing the common law's concern with the "'possibility that a liberal award of prejudgment interest could result in a windfall for plaintiffs amounting, in essence, to an award of punitive damages'" and finding that "'[t]here is nothing in G.L. c. 231, § 6C, indicating that the Legislature intended to abandon this long-standing concern.'"). In fact, as mentioned *supra*, the difference between the prejudgment interest rate and the current Annual Rate or other measures of value is staggering, not a mere percentage point or two.

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 will consider the "obvious availability of a less arbitrary means of accomplishing a given legislative end" and invites 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, 398 N.E.2d 471, 477 n.11 (1979)(citing Coffee-Rich, Inc. v. Commissioner of Pub. Health, 204 N.E.2d at 288). 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. Mass. Gen. Laws ch. 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. "Prior to 1993, judgments against the Commonwealth accrued prejudgment interest at the rate of twelve percent interest per annum." Sec'y of Admin. & Fin., 749 N.E.2d at 140 (per Mass. Gen. Laws ch. 231, § 6C).

To illustrate the stark contrast between these two statutory rates, the 12% interest as applied by the trial court totals $1,424,240.06. 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 September 16, 2013, which was 0.13%[32] or nearly **one one-hundredth of the 12%**

[32] Per Mass. Gen.Laws ch. 231, § 6I, the Weekly Rate for the week ending September 16, 2013 was 0.13%. See Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year constant maturity,

rate at issue here. In other words, as 6C and 6I are applied today, a verdict against a private entity would accrue nearly **one hundred times the amount of interest** as an identical verdict against the Commonwealth. The staggering difference between these two statutes, both of which purport to serve the purpose of compensation for loss of use of awarded damages, illustrates perfectly how a 12% interest rate in this economy is nothing short of irrational and thus unconstitutional.

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

Courts are well-equipped to evaluate the constitutionality of the 12% interest rate in light of the varying economic circumstances, as they 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. In the 1985 Verrochi decision, the SJC found that the 6% interest rate that was effective during most of the relevant time period (between the time the taking occurred and the time plaintiff was paid) would not provide the just compensation to which plaintiffs were constitutionally entitled, and thus the legislature must have intended to make the statutory amendment increasing the rate

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quoted on investment basis, as downloaded from http://www.federalreserve.gov/releases/h15/data.htm (last visited May 1, 2014), pertinent parts attached hereto the Addendum at Add. 3-61.

to 10% retroactive. Verrochi v. Com., 394 Mass. 633, 641, 477 N.E.2d 366, 371 (1985), citing Miller v. U. S., 620 F.2d 812, 837-38 (Ct. Cl. 1980) (finding that a 6% interest rate ceiling would be "constitutionally infirm" considering the economic conditions in the years between the taking and the 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 a series of interest rates dictated by the court to a government taking of intellectual property, and finding that "[t]he old 4% rate is now hopelessly antiquated").[33]

As courts are no strangers to evaluating the constitutionality of interest rates in view of the surrounding economic circumstances, this Court is also well-equipped to determine that the 12% interest rate set by 6C is now antiquated and no longer sufficient to serve its purpose of providing just compensation to a plaintiff. Moreover, in light of recent Supreme Court jurisprudence, this Court has the ability to determine that the interest award is outright excessive.

[33] In another context, at least one federal appellate judge has suggested that even if a statute was rational at the time it was enacted, changed circumstances may render legislation constitutionally infirm. United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995) (concur) (suggesting that a law regarding sentencing enhancements, rational at the time of enactment, could head toward unconstitutionality because of changed circumstances).

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 deem 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). For example, the United States Supreme Court has held that "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Id. at 416-17 (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001); 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.

In BMW of N. Am., Inc., the United States Supreme Court introduced guideposts for courts to use in determining whether a punitive award is so excessive as to violate due process. Factors considered in this analysis include "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 v. Hutchins & Wheeler, 424 Mass. 813, 826-27, 678 N.E.2d 853, 862 (1997) (quoting BMW of N. Am., Inc., 517 U.S. at 574).

Typically, single digit ratios (e.g. 1:1, 2:1, etc.) "are more likely to comport with due process." State Farm Mut. Auto. Ins. Co., 538 U.S. at 425. Massachusetts courts have followed the reasoning of the Supreme Court when determining whether damages are unconstitutionally excessive. See Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 503-04, 961 N.E.2d 1067, 1081 (2012) (upholding a 2:1 punitive damages award); compare Brown v. Office of Com'r of Prob., CIV.A. 07-03552-A, 2011 WL 3612284 (Mass. Super. July 5, 2011) at *4 (Mass. Super. July 5, 2011) (reducing an 83:1 punitive damages award).

Here, by analogy a similar analysis can be made. The ratio between the amount of interest that plaintiffs receive by virtue of the 12% interest rate and the amount that would actually compensate the 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., 749 N.E.2d at 142. As the 6I floating rate at the time judgment entered was 0.13%, the ratio between the additional amount awarded to the plaintiffs by virtue of the 12% interest rate and the amount the SJC has determined would have been sufficient compensation is nearly 100:1. Even if this Court

applied the average of the corresponding Annual Rates for the years 2007 to 2012 (approximately 1.25%)[34] the ratio would still be about 10:1.

If punitive damages awarded by a jury at a rate of ten to one (a double-digit ratio) is so punitive to be found unconstitutional by the United States Supreme Court, then interest applied automatically by statute that is more than one hundred times the going rate has to be so grossly excessive as to violate due process. State Farm Mut. Auto. Ins. Co., 538 U.S. at 425. 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.

CONCLUSION

Since the 12% interest rate is unconstitutional as applied, it is the role of this Court, to determine a fair rate of interest for this case that meets constitutional muster and fairly compensates plaintiffs for their loss without unconstitutionally penalizing the defendant or bestowing a windfall on plaintiffs. See Concrete Sys., Inc., 112 F. App'x at 71 (Add. 64) ("The Supreme Judicial Court has interpreted

[34] The corresponding Annual Rates for the relevant years have been as follows: 2007 - 4.53, 2008 - 1.83, 2009 - 0.47, 2010 - 0.32,2011 - 0.18, and 2012 – 0.17. See Add. 2.

[6C] to grant courts discretion to assure that interest awards do not result in windfalls." quoting Sterilite, 494 N.E.2d at 1011).

In doing so, this Court could take one of several approaches. First, having invalidated the law, this Court could apply the applicable federal rate of interest. Second, the Court could look to Mass. Gen. Laws ch. 107, § 3, which provides as follows: "If there is no agreement or provision of law for a different rate, the interest of money shall be at the rate of six dollars on each hundred for a year." However, if the true purpose of the statute is to compensate the plaintiffs for loss of use only, then the appropriate rate should be floating in order to fluctuate with the changing economic times.

Finally, since this Court has the discretion to fashion an appropriate interest rate, it could use the Federal Reserve discount rate as a guide, as many other states have done.[35] 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

[35] See 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 May 1, 2014), attached hereto in the Addendum at Add. 62-63.

apply it as is or add up to 5 percentage points above it.[36] Regardless of which of these measures the Court uses, they are all significantly lower than 12% and rationally relate to the legislative purpose of fairly compensating the plaintiff.

Respectfully submitted,
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[36] Alaska (Alaska Stat. §§ 09.30.070 and 45.45.010), Delaware (Del. Code Ann. tit. 6, § 2301), Florida (Fl. Stat. ch. 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).

ADDENDUM

ADDENDUM TABLE OF CONTENTS

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.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

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

10/5/1962	2.98
10/12/1962	2.99
10/19/1962	2.96
10/26/1962	2.98
11/2/1962	2.98
11/9/1962	2.98
11/16/1962	2.99
11/23/1962	3.01
11/30/1962	3.03
12/7/1962	3.02
12/14/1962	2.99
12/21/1962	3
12/28/1962	3.01
1/4/1963	3.04
1/11/1963	3.03
1/18/1963	3.01
1/25/1963	3.06
2/1/1963	3.05
2/8/1963	3
2/15/1963	3
2/22/1963	3.01
3/1/1963	3.03
3/8/1963	2.99
3/15/1963	3
3/22/1963	3.05
3/29/1963	3.1
4/5/1963	3.08
4/12/1963	3.1
4/19/1963	3.14
4/26/1963	3.13
5/3/1963	3.11
5/10/1963	3.09
5/17/1963	3.09
5/24/1963	3.12
5/31/1963	3.19
6/7/1963	3.23
6/14/1963	3.18
6/21/1963	3.19
6/28/1963	3.19
7/5/1963	3.29
7/12/1963	3.5
7/19/1963	3.55
7/26/1963	3.51
8/2/1963	3.49
8/9/1963	3.5
8/16/1963	3.53
8/23/1963	3.55

8/30/1963	3.58
9/6/1963	3.58
9/13/1963	3.57
9/20/1963	3.58
9/27/1963	3.56
10/4/1963	3.59
10/11/1963	3.61
10/18/1963	3.64
10/25/1963	3.69
11/1/1963	3.68
11/8/1963	3.75
11/15/1963	3.77
11/22/1963	3.73
11/29/1963	3.73
12/6/1963	3.78
12/13/1963	3.8
12/20/1963	3.83
12/27/1963	3.84
1/3/1964	3.84
1/10/1964	3.81
1/17/1964	3.79
1/24/1964	3.77
1/31/1964	3.78
2/7/1964	3.74
2/14/1964	3.75
2/21/1964	3.78
2/28/1964	3.86
3/6/1964	3.91
3/13/1964	3.9
3/20/1964	3.9
3/27/1964	3.94
4/3/1964	3.95
4/10/1964	3.93
4/17/1964	3.93
4/24/1964	3.89
5/1/1964	3.85
5/8/1964	3.86
5/15/1964	3.82
5/22/1964	3.84
5/29/1964	3.84
6/5/1964	3.84
6/12/1964	3.85
6/19/1964	3.85
6/26/1964	3.82
7/3/1964	3.79
7/10/1964	3.75
7/17/1964	3.67

7/24/1964	3.71
7/31/1964	3.7
8/7/1964	3.7
8/14/1964	3.74
8/21/1964	3.75
8/28/1964	3.77
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6/29/2007	4.94
7/6/2007	4.99
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7/20/2007	4.99
7/27/2007	4.91
8/3/2007	4.83
8/10/2007	4.78
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9/14/2007	4.15
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10/12/2007	4.24

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10/26/2007	3.97
11/2/2007	3.93
11/9/2007	3.72
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11/23/2007	3.3
11/30/2007	3.25
12/7/2007	3.17
12/14/2007	3.2
12/21/2007	3.28
12/28/2007	3.42
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2/29/2008	1.98
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3/14/2008	1.52
3/21/2008	1.35
3/28/2008	1.6
4/4/2008	1.63
4/11/2008	1.63
4/18/2008	1.67
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6/20/2008	2.57
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7/18/2008	2.21
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1/31/2014	0.11

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4/11/2014	0.1
4/18/2014	0.11
4/25/2014	0.11

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Current Discount Rates

District	Primary Credit Rate	Secondary Credit Rate	Effective Date
Boston	0.75%	1.25%	02-19-2010
New York	0.75%	1.25%	02-19-2010
Philadelphia	0.75%	1.25%	02-19-2010
Cleveland	0.75%	1.25%	02-19-2010
Richmond	0.75%	1.25%	02-19-2010
Atlanta	0.75%	1.25%	02-19-2010
Chicago	0.75%	1.25%	02-19-2010
St. Louis	0.75%	1.25%	02-19-2010
Minneapolis	0.75%	1.25%	02-19-2010
Kansas City	0.75%	1.25%	02-19-2010
Dallas	0.75%	1.25%	02-19-2010
San Francisco	0.75%	1.25%	02-19-2010

Current Interest Rates	
Primary Credit	0.75%
Secondary Credit	1.25%
Seasonal Credit	0.20%
Fed Funds Target	0 - 0.25%

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Rate Type		Effective Date											
Primary* Credit	Secondary** Credit	1 Boston	2 New York	3 Philadelphia	4 Cleveland	5 Richmond	6 Atlanta	7 Chicago	8 St. Louis	9 Minneapolis	10 Kansas City	11 Dallas	12 San Francisco
0.75%	1.25%	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%	1.00%	17-Dec-08	16-Dec-08	16-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%	1.75%	29-Oct-08	29-Oct-08	30-Oct-08	29-Oct-08	30-Oct-08	31-Oct-08	29-Oct-08	30-Oct-08	30-Oct-08	29-Oct-08	30-Oct-08	29-Oct-08
1.75%	2.25%	08-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08	09-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08	08-Oct-08
2.25%	2.75%	01-May-08	30-Apr-08	01-May-08	30-Apr-08	01-May-08	30-Apr-08	30-Apr-08	01-May-08	01-May-08	30-Apr-08	01-May-08	30-Apr-08
2.50%	3.00%	18-Mar-08	18-Mar-08	20-Mar-08	18-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%	3.75%	17-Mar-08	17-Mar-08	N/A	17-Mar-08	17-Mar-08	N/A	17-Mar-08	N/A	17-Mar-08	17-Mar-08	N/A	17-Mar-08
3.50%	4.00%	30-Jan-08	30-Jan-08	30-Jan-08	30-Jan-08	31-Jan-08	30-Jan-08	30-Jan-08	31-Jan-08	31-Jan-08	30-Jan-08	31-Jan-08	30-Jan-08
4.00%	4.50%	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%	5.25%	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%	5.50%	01-Nov-07	31-Oct-07	01-Nov-07	01-Nov-07	31-Oct-07	31-Oct-07	31-Oct-07	01-Nov-07	01-Nov-07	01-Nov-07	01-Nov-07	31-Oct-07
5.25%	5.75%	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% ^	6.25% ^	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%	6.75%	29-Jun-06	29-Jun-06	29-Jun-06	29-Jun-06	29-Jun-06	29-Jun-06	29-Jun-06	30-Jun-06	29-Jun-06	06-Jul-06	29-Jun-06	29-Jun-06
6.00%	6.50%	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%	6.25%	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%	6.00%	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%	5.75%	13-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05	14-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05	13-Dec-05
5.00%	5.50%	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%	5.25%	20-Sep-05	20-Sep-05	20-Sep-05	22-Sep-05	20-Sep-05	22-Sep-05	20-Sep-05	21-Sep-05	20-Sep-05	20-Sep-05	22-Sep-05	20-Sep-05
4.50%	5.00%	09-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05	10-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05	09-Aug-05
4.25%	4.75%	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%	4.50%	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%	4.25%	22-Mar-05	22-Mar-05	22-Mar-05	22-Mar-05	22-Mar-05	22-Mar-05	22-Mar-05	23-Mar-05	22-Mar-05	23-Mar-05	24-Mar-05	22-Mar-05
3.50%	4.00%	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%	3.75%	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%	3.50%	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%	3.25%	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%	3.00%	10-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04	11-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04	10-Aug-04
2.25%	2.75%	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%	2.50%	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%	2.75%	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.

112 Fed.Appx. 67
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also First Circuit Rule 32.1.0. (Find CTA1 Rule 32.1)
United States Court of Appeals,
First Circuit.

CONCRETE SYSTEMS, INC., Plaintiff,
Appellant/Cross-Appellee,
v.
PAVESTONE COMPANY, L.P., and Pavestone General Inc., Defendants,
Appellees/Cross-Appellants.

Nos. 04-1010, 04-1011. | Sept. 29, 2004.

Synopsis
Background: Vendor sued purchaser following failure of a land sale, asserting that the purchaser breached its obligation to purchase the property, committed acts on the property that resulted in a rezoning of the property which reduced its value, and failed to return the property to its pre-existing condition or to return certain equipment that it removed from the property after it decided not to close. The United States District Court for the District of Massachusetts, George A. O'Toole, Jr., J., granted summary judgment for the purchaser on the rezoning claims, entered judgment for the vendor on the failure-to-close claims, but subsequently granted the purchaser's post-judgment motion and entered an amended judgment reducing the award. Vendor appealed.

Holdings: The Court of Appeals, Per Curiam, held that:

[1] purchaser's exercise of its contractual right to work on the property prior to closing could not constitute a waiver or estop it from asserting its rights under a liquidated damages clause of the same contract;

[2] vendor failed to prove that purchaser's conduct was the proximate cause of the rezoning decision; and

[3] lower court acted within its discretion in reducing the damage award by the actual amount of interest earned by the vendor on deposited funds during the prejudgment period.

Affirmed.

*68 Appeals from the United States District Court for the District of Massachusetts, George A. O'Toole, Jr., U.S. District Judge.

Attorneys and Law Firms

Evan Slavitt with whom Richard P. O'Neil and Bodoff & Slavitt LLP were on brief, for appellant.

Scott J. Tucker with whom Scott H. Kremer and Tucker, Heifetz & Saltzman, LLP were on brief, for appellees.
Before SELYA, DYK,* and HOWARD, Circuit Judges.

* Of the Federal Circuit, sitting by designation.

Opinion

PER CURIAM.

This diversity case stems from a failed real estate transaction between Concrete Systems Inc. ("CSI") and Pavestone Co. ("Pavestone"). CSI owned a parcel of land on Pierce Avenue in Lakeville, Massachusetts ("the property"), that was equipped to operate as a concrete plant. Pavestone, a Texas company, wished to purchase the property so that it could increase its concrete business in the region, but after placing a $50,000 deposit and signing a purchase and sale agreement, Pavestone decided that it could not proceed with the closing.

After the sale fell through, CSI sued Pavestone on three theories: (1) Pavestone breached its obligation to purchase the property ("failure-to-close claims"); (2) Pavestone committed acts on the property that resulted in Lakeville's rezoning the property from industrial to residential, thereby reducing its value ("rezoning claims"); and (3) Pavestone failed to return the property to its pre-existing condition and failed to return certain equipment that it removed from the property after it decided not to close ("condition-of-the-property claims"). The second and third theories relate to Pavestone's work on the property during the pre-closing period-a period in which Pavestone was authorized under the purchase and sale agreement to perform work on the property.

In a series of separate rulings, the district court dismissed

the failure-to-close claims, to the extent that they sought damages in excess of Pavestone's $50,000 deposit, because the purchase and sale agreement contained a liquidated damages clause limiting the damages for failing to close to the deposit amount; granted summary judgment on the rezoning claims because CSI could not establish that Pavestone's pre-closing work on the property had caused Lakeville to rezone the property; and dismissed the condition-of-the-property claims because of CSI's discovery violations. As a result of these rulings, the case went to trial only on the failure-to-close claims with a damage cap of $50,000. After a short jury trial, CSI prevailed.

The district court subsequently entered judgment for CSI in the amount of $50,000 plus 12 percent prejudgment interest pursuant to Mass. Gen. L. ch. 231, § 6C. Pavestone then moved to amend this judgment, arguing that it was excessive because CSI had earned interest on the $50,000 deposit during the prejudgment period. The court agreed and entered an amended judgment reducing the award by the actual amount of interest earned by CSI. CSI timely appealed and now challenges the district court's rulings limiting the available damages on the failure-to-close claims, granting summary judgment on the rezoning claims, and reducing the ***69** amount of prejudgment interest. We consider these challenges in turn.

[1] CSI contends that the district court erred in granting Pavestone's motion to dismiss the failure-to-close claims to the extent that they sought damages in excess of $50,000. CSI asserts that this ruling was inappropriate because the liquidated damages clause was an affirmative defense, and a court "may not delve into the merits of possible defenses" at the motion to dismiss stage. It further claims that, even if the court could grant such a motion, it was wrong to do so in this case. Our review is de novo. *See Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir.2004).

"[A]n affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16 (1st Cir.2003); *see also Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (1st Cir.2001); *Cavanagh v. Cavanagh*, 396 Mass. 836, 489 N.E.2d 671, 673 (1986). So long as the facts establishing the defense appear on the face of the complaint and the court's review leaves "no doubt" that the plaintiff's claim is barred by the asserted defense, granting a motion to dismiss is appropriate. *Blackstone Realty*, 244 F.3d at 197.

The operative complaint included the text of the liquidated damages clause and had attached to it a copy of the purchase and sale agreement containing the clause. *See Stein v. Royal Bank of Canada*, 239 F.3d 389, 392 (1st Cir.2001) (stating that documents attached to the complaint may be considered on a motion to dismiss). The facts establishing the existence and scope of the liquidated damages clause were thus apparent from the face of the complaint. CSI contends, however, that the second *Blackstone Realty* precondition-certitude that the defense bars the plaintiff's claim-was not satisfied. *See Blackstone Realty*, 244 F.3d at 197. According to CSI, the facts in the complaint were sufficient to support an argument that Pavestone had waived or was estopped from asserting the liquidated damages clause as a defense. CSI argues that the pre-closing work that Pavestone performed on the property was so extensive that it represented a decision by Pavestone "to close by ... conduct." Thus, the argument continues, Pavestone's conduct stripped it of "the right to walk away for $50,000."

The purchase and sale agreement specifically provided Pavestone with pre-closing access to the property to make improvements. While the agreement listed certain contemplated improvements, it provided that Pavestone could perform pre-closing work "without limitation." The pre-closing work performed by Pavestone was thus expressly contemplated by the parties' agreement. Pavestone's exercise of its contractual right to work on the property, a right expressly granted by the purchase and sale agreement, cannot constitute a waiver or estop it from asserting its right under the liquidated damages clause of the same agreement. Thus, the merit of Pavestone's affirmative defense was obvious at the motion to dismiss stage.[1]

[1] CSI also claims that the district court mistakenly relied on the liquidated damages clause to dismiss the condition-of-the-property claims. As we understand the record, only the failure-to-close claims in excess of $50,000 were dismissed because of the liquidated damages clause. The remaining claims were disposed of on other grounds. *See supra* at 68-69.

We turn next to the grant of summary judgment on the rezoning claims. We examine the summary judgment record in the light most favorable to the non-moving ***70** party and review the district court's ruling de novo. *See Alberty-Velez v. Corporacion de P.R. Para La Difusion Publica*, 361 F.3d 1, 5-6 (1st Cir.2004).

CSI argues that the district court erroneously granted summary judgment on the rezoning claims by ruling that

Massachusetts law precludes causes of action requiring proof of the legislative motive for the enactment of a municipal ordinance. We are not so sure that this was the district court's rationale. The court had before it Pavestone's motion for summary judgment, which challenged CSI's rezoning claim as both legally and factually insufficient. The basis for the district court's ruling is not obvious. We may affirm, however, for any reason apparent from the record. *See id.* at 6.

[2] CSI focuses on the legal issue presented by Pavestone's motion: whether a claim which requires proof of the legislative motivation for an enactment may ever be viable under Massachusetts law. We will assume *arguendo* that such a claim is theoretically viable. Nevertheless, we affirm because CSI failed to present sufficient evidence from which a trier of fact could conclude that Pavestone's conduct was the proximate cause of the town's rezoning decision.

CSI presented the following evidence in opposition to Pavestone's motion: that Pavestone performed heavy work at the property without warning abutting landowners; that Pavestone received complaints from neighbors about work being performed at night and on Sundays, and about heavy truck traffic on residential streets; that some Lakeville residents led a campaign opposing Pavestone's presence in the community; that some Lakeville residents filed a petition with the Board of Selectmen seeking to rezone the property; that the Planning Board subsequently held a meeting to address the possibility of rezoning the property, and that some local residents spoke negatively about Pavestone at that meeting; and that nine days later, at the town meeting, the residents of Lakeville voted 88 to 40 to rezone the property. There was no evidence, however, as to who actually voted at the town meeting or what motivated voters to approve the zoning change. We do not know, for instance, whether any of the attendees of the Planning Board meeting actually participated in the vote. Nor do we know whether any of the residents who complained about Pavestone's activities actually voted.

Under Massachusetts law, courts must be circumspect in attempting to ascertain the legislators' rationale for enacting a particular piece of legislation. As the Supreme Judicial Court recently explained, such an inquiry is complicated by "[t]he diverse character of [the legislators'] motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth." *Durand v. IDC Bellingham, LLC,* 440 Mass. 45, 793 N.E.2d 359, 365 (2003) (quoting *Boston v. Talbot,* 206 Mass. 82, 91 N.E. 1014, 1016-17 (1910)); *see also United States v. O'Brien,* 391 U.S. 367, 383-84, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) ("Inquiries into [legislative] motives ... are a hazardous matter.... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."). The Massachusetts Appeals Court also has cautioned that the pre-enactment history of a town ordinance that does not *clearly* indicate the motives of the voters is insufficient to establish the town's rationale for enacting the ordinance. *Southern New England Conference Ass'n of Seventh-Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 490 N.E.2d 451, 456 (1986).

As stated above, CSI's evidence could permit a trier of fact to conclude that the *71 rezoning change was made after Pavestone worked on the property and some members of the community complained about Pavestone's conduct. CSI presented no evidence, however, connecting Pavestone's conduct or the citizen complaints to the actual motivations of the voters who voted to rezone the property. Massachusetts courts recognize that voters often cast their ballots based on "irrelevant considerations," or at least for reasons other than those at the forefront of pre-balloting discussions. *Id.* Given the Massachusetts courts' reluctance to engage in surmise over legislative motivation, CSI's anecdotal evidence identifying the concerns of some community members (who may not have even voted at the town meeting) is insufficient proof from which a trier of fact could conclude that the proximate cause of the voters' decision to rezone the property was Pavestone's allegedly wrongful conduct. *Cf. Pheasant Ridge Assocs. Ltd. v. Burlington,* 399 Mass. 771, 506 N.E.2d 1152, 1156 (1987) (affirming judicial determination that town's exercise of its eminent domain power was in bad faith because the evidence of bad faith was essentially undisputed, but noting that courts "should not easily attribute ... motives to a town, and to its citizens voting at town meeting").

[3] Finally, we consider CSI's challenge to the district court's decision reducing the prejudgment interest award to exclude the interest that CSI actually earned on the $50,000 deposit during the prejudgment period. CSI argues that the district court erred by reducing the prejudgment interest award because "Massachusetts courts have almost no discretion" to make such reductions.[2]

2 Before discussing the merits of this argument, we dispose of CSI's assertion that the district court lacked jurisdiction to consider this issue because Pavestone's motion to alter or amend the judgment was untimely. A party has ten days to file a motion to alter or amend judgment under Fed.R.Civ.P. 59(e), and this period

may not be extended. *See generally García-Velazquez v. Frito Lay Snacks Caribbean*, 358 F.3d 6, 8-9 (1st Cir.2004). The ten-day period does not include weekends and holidays. *See* Fed.R.Civ.P. 6(a). Judgment entered on November 14, 2003, and Pavestone filed its motion on November 25, 2003. Not including weekends, Pavestone's motion was filed within ten days after judgment entered and was therefore timely.

Under the Massachusetts interest statute, prejudgment interest in a contract action is usually computed at the contract rate, if established, or otherwise at 12 percent. *See* Mass. Gen. L. ch. 231, § 6C. The Supreme Judicial Court has interpreted the statute to grant courts discretion to assure that interest awards do not result in "windfall[s] for plaintiffs." *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 494 N.E.2d 1008, 1011 (1986). The purpose of prejudgment interest is to compensate a wronged party for the loss of the use of money, and the award should reflect this purpose. *Id.*

Here, CSI earned interest on the $50,000 award during the prejudgment period because it held the deposit in an interest-bearing account. If CSI were able to retain this interest and receive the entire 12 percent interest award available under the statute, it would receive a windfall because it was able to benefit from the $50,000 deposit during the prejudgment period. The district court acted within the wide ambit of its discretion in tailoring the interest award so as to avoid bestowing a windfall upon CSI.

Affirmed.

Parallel Citations

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief is in 14-point Times New Roman font.

/s/ Emily G. Coughlin
Emily G. Coughlin

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system on May 5, 2014, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Emily G. Coughlin
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