

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11179

SUFFOLK COUNTY

WILLIE EVANS,
AS EXECUTOR OF THE ESTATE OF MARIE R. EVANS,
PLAINTIFF-APPELLEE,

v.

LORILLARD TOBACCO COMPANY,
DEFENDANT-APPELLANT.

ON DIRECT APPELLATE REVIEW FROM THE APPEALS COURT

**BRIEF OF MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION
AS *AMICUS CURIAE* ON ISSUE OF CONSTITUTIONALITY OF
12% INTEREST RATE**

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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.

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.

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 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 the verdict, under Mass. Gen. Laws ch. 229, § 11 and Mass. Gen. Laws ch. 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 Lorillard Tobacco Company at pp. 2-4.

SUMMARY OF ARGUMENT

Mass. Gen. Laws ch. 229, § 11 provides for the addition of prejudgment interest at "the same rate of interest per annum as provided in section six B of chapter two hundred and thirty-one," on wrongful death

verdicts. The rate currently provided by Mass. Gen. Laws ch. 231, § 6B is twelve per cent (12%) per annum.

The purpose of prejudgment interest is recognized in Massachusetts law exclusively as to provide compensation for 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. 7-11). While adding some amount of interest to a judgment may serve this purpose, the 12% interest rate mandated by Mass. Gen. Laws ch. 229, § 11 and Mass. Gen. Laws ch. 231, § 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, would result in a windfall" for the plaintiff and has no rational relation to the plaintiff's actual losses. Sec'y of Admin. & Fin. v. Labor Relations Comm'n, 434 Mass. 340, 346 (2001) (pp. 23-25). 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 (pp. 15-30).

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. Gillespie v. City of Northampton, 460 Mass. 148, 153 (2011) (citing Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 330 (2003)). "For due process claims, rational 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 be rationally related to the achievement of that purpose. Shell Oil Co. v. Revere, 383 Mass. 682, 686 (1981).

While challengers face a heavy burden, rational basis review is not toothless. Using rational basis review, this Court 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 (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 (1965) (law prohibiting sale of wholesome food product was unconstitutional as applied); Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers, 326 Mass. 624, 627 (1951) (law prohibiting beauty schools from charging fees for funds spent on materials was unconstitutional); and 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 were 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.¹

¹ In Sperry & Hutchinson Co., 307 Mass. at 416-17, the court held that while the legislature was justified in aiming to "prevent fraud upon purchasers in the retail sale of gasoline," the law prohibiting issuance of trading stamps upon gasoline purchases did nothing to further that aim. Similarly, in Coffee-Rich, Inc., 348 Mass. at 423, the court held that the legislative goal of preventing fraud or deception by way of selling misbranded or imitation dairy products was legitimate, but prohibiting the sale of a

A statutory provision that 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. However, as argued infra, the means adopted by the Commonwealth here (mandating 12% interest on verdicts) cannot rationally accomplish this purpose without overcompensating the plaintiff 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 2008 and 2012, the

wholesome food product that was so explicitly labeled that there was no reasonable possibility of consumers mistaking the product for cream was not "a reasonable means of realizing this purpose." In Mansfield Beauty Academy, Inc., 326 Mass. at 627, the court held that the law had "no rational or reasonable bearing on cleanliness, sanitation, or the prevention of communicable diseases."

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

most prudent investor could not reasonably attain anything near a 12% return on any investment.³ Simply put, if the plaintiff here is awarded prejudgment interest at a 12% rate in 2012, he is placed in an exceedingly more advantageous economical position (and is made more than whole) than if he 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. MASSACHUSETTS RECOGNIZES THAT THE PURPOSE OF PREJUDGMENT INTEREST IS PURELY 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 compensate the damaged party for the loss of use or the unlawful detention of money. McEvoy Travel

³ See, generally, the chart and corresponding graph in Appendix A set forth in the Addendum and discussion in subsection III.A, infra.

Bureau, Inc., 408 Mass. at 717; Conway v. Electro Switch Corp., 402 Mass. 385, 390 (1988); Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 821 (1984); Bernier v. Boston Edison Co., 380 Mass. 372, 388 (1980); Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 537, review denied, 458 Mass. 1111 (2010); Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 320-21 (1988).⁴ Not only is this the only recognized purpose addressed in case law, courts have expressly rejected other conceivable purposes of the statute. See McEvoy Travel Bureau, Inc., 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

⁴ 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).

purpose, courts have consistently declined to award interest on damages that are anything but compensatory. See Salvi v. Suffolk County Sheriff's Dept., 67 Mass. App. Ct. 596, 608 (2006) (refusing to award prejudgment interest to punitive damages); McEvoy Travel Bureau, Inc., 408 Mass. at 717 (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); Conway, 402 Mass. at 390 (refusing to apply prejudgment interest to future compensation; to wit, front pay).⁵

The plaintiff argues in his application for direct appellate review that the 12% interest rate furthers the legislative purpose of compensating plaintiff for loss of use or unlawful detention of money because "Lorillard caused enormous suffering in this case, for many years, yet has never paid

⁵ In the case at bar, the lower court applied interest on the jury's punitive damages award. However, as set forth above, Massachusetts law is well settled that such a ruling was erroneous and should be reversed by this Court. MassDLA incorporates herein the Defendant-Appellant's argument with respect to this issue, and further relies on the cases set forth above.

compensation for any of it." This is where the plaintiff misses the point. It is the role of the jury, not the clerk through the calculation of prejudgment interest, to compensate the plaintiff for any "enormous suffering" arising out of personal injuries, wrongful death, or emotional distress. As previously noted, in Massachusetts, the only purpose of the prejudgment interest statute is to compensate the plaintiff 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. 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 plaintiff 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., 408 Mass. at 717. 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.

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

Despite the plaintiff's assertion that the purpose of prejudgment interest is to encourage settlement by discouraging delay tactics (citing Harvey v. Essex Bancorp, Inc., 25 Mass. App. Ct. 323, 326 (1988)), this Court has never recognized this as the legislative purpose of prejudgment interest. While certain other states have recognized that prejudgment interest is awarded for other purposes, such as encouraging settlements, the states that do so 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).⁶

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

⁶ 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).

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. § 51-12-14.⁷ 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).⁸ 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 814.04.⁹ Finally, Connecticut

⁷ 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).

⁸ 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).

⁹ In 1991, the Wisconsin Appeals Court ruled that its interest rate statute applying 12% interest per

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. See Conn. Gen. Stat. § 52-192a.¹⁰ Thus, had the legislature of

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 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 Appendix A. 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.

¹⁰ 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, § 6B on the basis that it violates due process as applied in the current economic times.

this Commonwealth intended to accomplish goals other than compensation for loss of use of awarded damages, it could have easily done so.

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 statute setting the rate, Mass. Gen. Laws ch. 231, § 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.

Mass. Gen. Laws ch. 231, § 6B ("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 Mass. Gen. Laws ch. 107, § 3 governed. See Porter v. Clerk of Superior Court, 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). See also Sharpe v. Springfield Bus Terminal Corp., 406 Mass. 62, 64 (1989) and MacCuish v. Volkswagenwerk A.G., 22 Mass. App. Ct. 380, 399-400 (1986) aff'd, 400 Mass. 1003 (1987) (before wrongful death statute amended to include rate under 6B, rate was set by Mass. Gen. Laws ch. 107, § 3). 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 (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 6B¹¹ 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 Federal Reserve's annual one-year constant maturity Treasury yield rate ("Annual Rate")¹² 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 November 26, 2012), attached hereto at Appendix A as set forth in the Addendum. On June

¹¹ Though not directly applicable in this case, Mass. Gen. Laws ch. 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. Additionally, the postjudgment interest statute, Mass. Gen. Laws ch. 235, § 8, has applied the rate identified in 6B since 1983. St. 1983, c. 652, § 2.

¹² 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").

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 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%. See Addendum at Appendix A. 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 interest increase may be of benefit to the parties in certain actions of law.” Mirageas, 391 Mass. at 819-820.¹³

It is clear from this statute’s history that the interest rate was amended to keep up with economic times. However, the rate has not changed since 1982, when Ronald Reagan was in the White House. Since then, as demonstrated by Appendix A as set forth in the Addendum, the Annual Rates have plummeted and have not exceeded 5% since 2001. The applicable Weekly

¹³ 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.

Rate at the time the judgment was rendered in this case on December 2, 2011, was **.12%** (or **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-three 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.¹⁴ Furthermore, twenty-seven states set a

¹⁴ 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 only), 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)), Maine (Me. Rev. Stat. Ann. tit. 14 §§ 1602-B and 1602-C), Michigan (Mich. Comp. Laws § 600.6013), Minnesota (Minn. Stat. § 549.09), Missouri (Mo. Rev. Stat. § 408.040), 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), Oklahoma (Okla. Stat. tit. 12 §§ 727 and 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)(postjudgment interest only), Texas (Tex. Fin.

fixed prejudgment or postjudgment interest rate lower than Massachusetts.¹⁵ Additionally, 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

Code Ann. § 304.003), West Virginia (W.Va. Code § 56-6-31), and Wisconsin (Wis. Stat. § 814.04 and § 807.01).

¹⁵ 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), 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. §§ 478-3 and 662-2), Illinois (815 Ill. Comp. Stat. 205/2 and 735 Ill. Comp. Stat. 5/2-1303), Indiana (Ind. Code §§ 24-4.6-1-101, 24-4.6-1-103 and 34-51-4-9), Iowa (Iowa Code § 535.2)(prejudgment interest only), Kansas (Kan. Stat. Ann. § 16-201), Kentucky (Ky. Rev. Stat. Ann. § 360.010)(prejudgment interest only), Maryland (Md. Code Ann., Com. Law I §12-102 and Md. Code Ann., Cts. & Jud. Proc. §§ 11-301 and 11-107), Mississippi (Miss. Code Ann. §§ 75-17-1 and 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. § 24.5), North Dakota (N.D. Cent. Code §§ 28-20-34 and 47-14-05), Ohio (Ohio Rev. Code Ann. § 1343.03), 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 and 47-14-103), Utah (Utah Code Ann. §§ 15-1-1 and 15-1-4), Virginia (Va. Code Ann. §§ 6-2-302 and 8.01-382), and Wyoming (Wyo. Stat. Ann. §§ 1-16-102 and 40-14-106).

12% rate to older cases: Alabama,¹⁶ Connecticut,¹⁷ Georgia,¹⁸ New Jersey,¹⁹ North Dakota,²⁰ South Carolina,²¹ and Wisconsin.²²

Furthermore, 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

¹⁶ See Ala. Code § 8-8-10 (postjudgment interest rate reduced from 12% to 7.5%. 2011 Alabama Laws Act 2011-521 (S.B. 207)).

¹⁷ 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)).

¹⁸ 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)).

¹⁹ 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).

²⁰ 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)).

²¹ 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)).

²² 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)).

and have not changed it since: Idaho (set in 1981),²³ Kentucky (set in 1982),²⁴ Nebraska (set in 1980),²⁵ Rhode Island (set in 1981),²⁶ Vermont (set in 1979),²⁷ and Washington (set in 1981).²⁸ The Annual Rates for the years when these 12% fixed rates were set varied from 10.65% to 14.8%. See Addendum at Appendix A.

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 has no rational relationship to its legislative purpose

²³ Idaho Code § 28-22-104 (12% rate established by 1981 Idaho Sess. Laws, ch. 157, § 1).

²⁴ Ky. Rev. Stat. Ann. § 360.040 (enacted in 1982)(postjudgment interest only).

²⁵ Neb.Rev.St. § 45-104.

²⁶ R.I. Gen. Laws Ann. § 9-21-10 (12% rate set by P.L. 1981, ch. 54, § 1).

²⁷ Vt. Stat. Ann. tit. 9, § 41A (12% rate set by its predecessor statute, 9 V.S.A. § 41, now repealed)

²⁸ 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.").

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, 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**

As set forth above, the primary purpose of prejudgment interest is to compensate the damaged party for loss of use or unlawful detention of money. This Court has recognized that "[t]o give the damaged party more than that 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., 408 Mass. at 717. The current statute bestows a windfall upon the plaintiff by virtue of its extraordinarily high interest rate in direct contravention of its only recognized purpose of compensating a plaintiff for the loss of use of money. As a result, it cannot and does not rationally relate to that end. As this Court 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 the plaintiff here was wrongfully deprived of the funds.

More importantly, this Court 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 Mass. Gen. Laws ch. 231, § 6I. This Court 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 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").

As this Court has correctly recognized, the 12% interest rate itself is not rationally related to the legislative goal of compensation because it does not compensate at a rate that accurately reflects the value of plaintiff's loss. 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 n.11

(1979) (citing Coffee-Rich, Inc. v. Commissioner of Pub. Health, 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 this Court. 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., 434 Mass. at 344 (per Mass. Gen. Laws ch. 231, § 6C).

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 for both the compensatory and the punitive award²⁹ is \$104,400,000.³⁰ In other words, the prejudgment interest **alone** exceeds the punitive damages amount by over \$23 million. Alternatively, if the trial court applied what this Court 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 2, 2011, which was 0.12%³¹ or **one one-hundredth of the 12%**

²⁹ As set forth in footnote 5, supra, the lower court erroneously applied prejudgment interest to the punitive damages award. However, the calculations here are based on the lower court's ruling as it stands.

³⁰ This figure was calculated by using the simple interest equation $P \times R \times T = I$, where P is the principal amount, R is the rate, and T is the time in years (here, from June 2004 to December 2011 is approximately 7.5 years), with I representing the total interest. For the compensatory damages, $\$35,000,000 \times 0.12 \times 7.5 = \$31,500,000$. For the punitive damages, $\$81,000,000 \times 0.12 \times 7.5 = \$72,900,000$. The total amount of prejudgment interest applied to this award is $\$31,500,000 + \$72,900,000 = \$104,400,000$.

³¹ Per M.G.L. c. 231, § 6I, the Weekly Rate for the week ending November 25, 2011 was 0.12%. See Board of Governors of the Federal Reserve System, Market yield on U.S. Treasury securities at 1-year

rate at issue here. Instead of interest totaling over \$104 million, the interest would be \$1.04 million.³² At the 12% rate, the total judgment against the defendant with prejudgment interest included would be \$220,400,000, while at the 6I floating rate, the total judgment would be \$117,044,000. Adding one year of postjudgment interest to these awards yields a total judgment of \$246,848,000 at the 12% rate and \$117,184,453 at the 6I floating rate.³³

In other words, as the statutes are applied today, a verdict against a private entity would accrue **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

constant maturity, quoted on investment basis, as downloaded from <http://www.federalreserve.gov/releases/h15/data.htm> (last visited November 26, 2012), pertinent parts attached hereto at Appendix B as set forth in the Addendum.

³² This figure was calculated by using the simple interest equation $P \times R \times T = I$. For the compensatory damages, $\$35,000,000 \times 0.0012 \times 7.5 = \$315,000$. For the punitive damages, $\$81,000,000 \times 0.0012 \times 7.5 = \$729,000$. The total amount of prejudgment interest would be $\$315,000 + \$729,000 = \$1,044,000$.

³³ 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).

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

This Court is well-equipped to evaluate the constitutionality of the 12% interest rate in light of the varying economic circumstances, as it is 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 v. Com. decision, this Court 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 to 10% retroactive. 394 Mass. 633, 641 (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"). 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 6B and Mass. Gen. Laws ch. 229, § 11 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.

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). 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. The three main factors that should be considered 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 v. Hutchins & Wheeler, 424 Mass. 813, 826-27 (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 (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, by analogy a similar analysis can be made. As the degree of reprehensibility of the defendant's conduct is already captured in the punitive damages award, more than doubling the punishment by adding \$104 million of interest is unconstitutionally excessive. Furthermore, the ratio between the amount of interest that plaintiff receives by virtue of the 12% interest rate and the amount that would actually compensate the plaintiff for the true value of that award is upwards of 100:1. As stated above, this Court 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 0.12%, the ratio between the additional amount awarded to the plaintiff by virtue of the 12% interest rate and the amount this Court has determined would have been sufficient compensation is 100:1. Even if this Court applied the average of the corresponding Annual Rates for the years 2004 to 2011 (approximately 2.22%)³⁴ 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 more than 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

³⁴ The corresponding Annual Rates for the relevant years have been as follows: 2004 - 1.89, 2005 - 3.62, 2006 - 4.94, 2007 - 4.53, 2008 - 1.83, 2009 - 0.47, 2010 - 0.32 and 2011 - 0.18. See Addendum at Appendix A.

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, as in the case of Verrochi, 394 Mass. at 641, to determine a fair rate of interest for this case that meets constitutional muster and fairly compensates the plaintiff for his loss without unconstitutionally penalizing the defendant or bestowing a windfall on the plaintiff. In doing so, this Court could take one of several approaches. See Porter, 368 Mass. at 119 (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). If this Court finds the 12% rate unconstitutional, then the 6% rate in Mass. Gen. Laws ch. 107, § 3 would likely govern: "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 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), referenced supra, is used for cases under Mass. Gen. Laws ch. 231, §§ 6I (adding no percentage points) and 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 Rates over the course of this case (2004-2011), as set forth in footnote 34, vary from 0.18% to 4.94% with an average of approximately 2.22%.³⁵

Additionally, many other states use the Federal Reserve discount rate as a guide.³⁶ Since February 2010, the current effective discount rate is 0.75% for primary credit and 1.25% for secondary credit. States

³⁵ See Addendum at Appendix A. Other states that use the Annual or Weekly Rates to calculate interest rates are Idaho (Idaho Code § 28-22-104) (postjudgment interest only), Iowa (Iowa Code § 535.3, and 668-13)(postjudgment interest only), Maine (Me. Rev. Stat. Ann. tit. 14 §§ 1602-B and 1602-C), Minnesota (Minn. Stat. § 549.09), Nebraska (Neb. Rev. Stat. §§ 45-103 and 45-103.01)(postjudgment interest only), and Oklahoma (Okla. Stat. tit. 12 §§ 727 and 727.1).

³⁶ 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 November 26, 2012), attached hereto as Appendix C as set forth in the Addendum.

that use this as a benchmark apply it as is or add up to 5 percentage points above it.³⁷ 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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Dated: November 29, 2012

³⁷ 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).

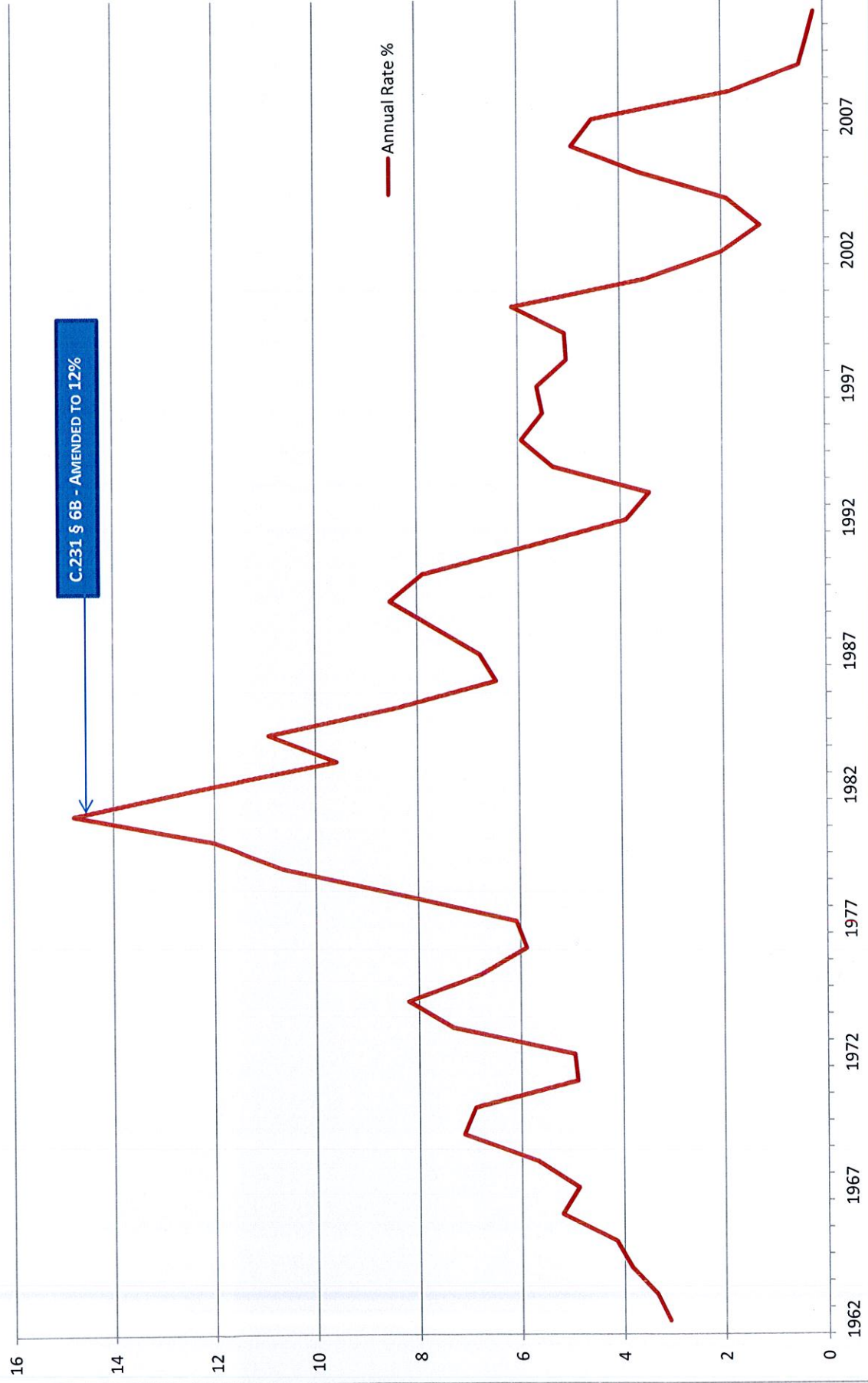
ADDENDUM

APPENDIX A

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

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



APPENDIX B

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.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

5/6/2011	0.2
5/13/2011	0.18
5/20/2011	0.19
5/27/2011	0.19
6/3/2011	0.18
6/10/2011	0.18
6/17/2011	0.18
6/24/2011	0.17
7/1/2011	0.19
7/8/2011	0.19
7/15/2011	0.16
7/22/2011	0.18
7/29/2011	0.21
8/5/2011	0.16
8/12/2011	0.11
8/19/2011	0.11
8/26/2011	0.1
9/2/2011	0.1
9/9/2011	0.12
9/16/2011	0.1
9/23/2011	0.1
9/30/2011	0.11
10/7/2011	0.11
10/14/2011	0.11
10/21/2011	0.12
10/28/2011	0.12
11/4/2011	0.12
11/11/2011	0.1
11/18/2011	0.11
11/25/2011	0.12
12/2/2011	0.13
12/9/2011	0.11
12/16/2011	0.11
12/23/2011	0.12
12/30/2011	0.12
1/6/2012	0.12
1/13/2012	0.11
1/20/2012	0.11
1/27/2012	0.12
2/3/2012	0.13
2/10/2012	0.15
2/17/2012	0.17
2/24/2012	0.17
3/2/2012	0.18
3/9/2012	0.18
3/16/2012	0.2
3/23/2012	0.2

3/30/2012	0.18
4/6/2012	0.19
4/13/2012	0.18
4/20/2012	0.18
4/27/2012	0.18
5/4/2012	0.19
5/11/2012	0.18
5/18/2012	0.2
5/25/2012	0.21
6/1/2012	0.19
6/8/2012	0.18
6/15/2012	0.18
6/22/2012	0.19
6/29/2012	0.21
7/6/2012	0.2
7/13/2012	0.2
7/20/2012	0.18
7/27/2012	0.17
8/3/2012	0.17
8/10/2012	0.18
8/17/2012	0.19
8/24/2012	0.19
8/31/2012	0.17
9/7/2012	0.17
9/14/2012	0.18
9/21/2012	0.18
9/28/2012	0.17
10/5/2012	0.17
10/12/2012	0.18
10/19/2012	0.18
10/26/2012	0.19
11/2/2012	0.18
11/9/2012	0.19
11/16/2012	0.17

APPENDIX C

Federal Reserve

DISCOUNT WINDOW | PAYMENT SYSTEM RISK

Search

<p>Discount Rates</p> <p>Current Discount Rates</p> <p>Historical Discount Rates</p>	<h3>Current Discount Rates</h3> <table border="1"> <thead> <tr> <th>District</th> <th>Primary Credit Rate</th> <th>Secondary Credit Rate</th> <th>Effective Date</th> </tr> </thead> <tbody> <tr> <td>Boston</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>New York</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Philadelphia</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Cleveland</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Richmond</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Atlanta</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Chicago</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>St. Louis</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Minneapolis</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Kansas City</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>Dallas</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> <tr> <td>San Francisco</td> <td>0.75%</td> <td>1.25%</td> <td>02-19-2010</td> </tr> </tbody> </table>	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	<h3>Current Interest Rates</h3> <table border="1"> <tr> <td>Primary Credit</td> <td>0.75%</td> </tr> <tr> <td>Secondary Credit</td> <td>1.25%</td> </tr> <tr> <td>Seasonal Credit</td> <td>0.20%</td> </tr> <tr> <td>Fed Funds Target</td> <td>0 - 0.25%</td> </tr> </table> <ul style="list-style-type: none"> Getting Started Pledging Collateral Borrowing Collateral Margins Table Business Continuity Federal Reserve Websites Site Map Frequently Asked Questions 	Primary Credit	0.75%	Secondary Credit	1.25%	Seasonal Credit	0.20%	Fed Funds Target	0 - 0.25%
District	Primary Credit Rate	Secondary Credit Rate	Effective Date																																																											
Boston	0.75%	1.25%	02-19-2010																																																											
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Seasonal Credit	0.20%																																																													
Fed Funds Target	0 - 0.25%																																																													

Rate Type	Effective Date											
	1	2	3	4	5	6	7	8	9	10	11	12
Primary* Credit	Boston	New York	Philadelphia	Cleveland	Richmond	Atlanta	Chicago	St. Louis	Minneapolis	Kansas City	Dallas	San Francisco
Secondary** Credit	Boston	New York	Philadelphia	Cleveland	Richmond	Atlanta	Chicago	St. Louis	Minneapolis	Kansas City	Dallas	San Francisco
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
1.00%	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	17-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	31-Oct-08	29-Oct-08	30-Oct-08	30-Oct-08	29-Oct-08	29-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	30-Apr-08	01-May-08	30-Apr-08	01-May-08	30-Apr-08	01-May-08	30-Apr-08	30-Apr-08
2.50%	18-Mar-08	18-Mar-08	20-Mar-08	18-Mar-08	19-Mar-08	18-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	17-Mar-08	N/A	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	30-Jan-08	30-Jan-08	30-Jan-08	30-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	11-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	31-Oct-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%	18-Sep-07	18-Sep-07	20-Sep-07	18-Sep-07	19-Sep-07	18-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	30-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	31-Jan-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	14-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	10-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	23-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	11-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.

PROOF OF SERVICE

I, Emily Coughlin, counsel for the Massachusetts Defense Lawyers Association, hereby certify that on November 29, 2012, two (2) copies of this **BRIEF OF AMICUS CURIAE MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION** were hand delivered to counsel of record:

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12/ Emily G. Coughlin

Emily G. Coughlin

CERTIFICATE OF RULE 16(K) COMPLIANCE

I, Emily G. Coughlin, do hereby certify that the foregoing Brief of Amicus Curiae Massachusetts Defense Lawyer's Association complies with the Rules of Court that pertain to the filing of appellate briefs, including, but not limited to, Mass. R. App. P. 16(a), 16(e), 16(f) 16(h), 18 and 20.

/s/ Emily G. Coughlin

Emily G. Coughlin

No. SJC-11179

WILLIE EVANS,
AS EXECUTOR OF THE ESTATE OF MARIE R. EVANS,
PLAINTIFF-APPELLEE,

v.

LORILLARD TOBACCO COMPANY,
DEFENDANT-APPELLANT.

ON DIRECT APPELLATE REVIEW FROM THE APPEALS COURT

**BRIEF OF MASSACHUSETTS DEFENSE LAWYERS
ASSOCIATION AS *AMICUS CURIAE* ON ISSUE OF
CONSTITUTIONALITY OF 12% INTEREST RATE**

SUFFOLK COUNTY

BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS