

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
C.A. No. 1885CV01526A

_____	)
GATEHOUSE MEDIA, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WORCESTER,	)
	)
Defendant.	)
_____	)

**GATEHOUSE MEDIA, LLC’S MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION FOR PERMANENT INJUNCTION, ENTRY OF JUDGMENT,  
AND AWARD OF PUNITIVE DAMAGES**

INTRODUCTION

On June 2, 2021, this Court issued its Findings of Fact, Conclusions of Law, and Order (hereinafter, “Order”), directing the City of Worcester (the “City”) to provide Gatehouse Media, LLC (“Gatehouse”) with a copy of each of the public records that Gatehouse had requested from the City on June 6, 2018 under the Public Records Law, G.L. c. 66, § 10. By this motion, Gatehouse seeks additional orders and remedies authorized by the Public Records Law, as well as the entry of judgment.

Specifically, Gatehouse moves for: (1) an order permanently enjoining the City from asserting the incorrect claims of exemption that led to this litigation and otherwise violating the Public Records Law; (2) entry of judgment, and (3) an award of punitive damages. By separate motion, Gatehouse is requesting an award of its reasonable attorneys’ fees and costs in this action.

Proposed orders are attached hereto as Exhibits 1 and 2. In further support of this motion, Gatehouse states as follows.

## PROCEDURAL UPDATE

In its June 2, 2021 Order, the Court found that the City had failed to demonstrate that the primary public records exemptions it had relied upon, G.L. c. 4, § 7, cl. 26(c) and (d), permitted it to withhold any portion of the police misconduct records at issue. (Order, Paper No. 26). The Court further held that it could not determine the applicability of certain other exemptions claimed by the City without additional particularization of the issues. It therefore ordered the City to produce records to Gatehouse in redacted form, and to its counsel in unredacted form subject to a protective order, and directed the parties to confer and narrow their differences before making any further application for rulings. (Order at 33-34).

On the morning of July 1, 2021, the day before the City was required to produce the first set of documents pursuant to the Order, it filed an “emergency motion” to extend the deadlines set forth in the Court’s Order by 30 days. Gatehouse filed its opposition to the motion later that day. That afternoon, the City withdrew its motion. (Paper Nos. 28-31).

Also on July 1, 2021, the City filed a Notice of Appeal from the Court’s June 2, 2021 decision. That notice of appeal was premature because final judgment has not entered, and Gatehouse has claims remaining against the City. *ZVI Const. Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 418 (2016) (notice of appeal premature where there remain “unresolved claims . . . and there was no final judgment”). No appeal has been docketed in the Appeals Court.

On July 2, 2021, the day after filing its notice of appeal, the City provided Gatehouse with copies of “concise officer history” (“COH”) records, which were the subject of the Court’s Order at pages 28-29, in unredacted form. The City had insisted throughout trial that the complainant names reflected in the COHs are exempt under G.L. c. 4, § 7, cl. 26(a), (c), and (f), and that their release would damage the public interest. However, the City did not redact

complainant names or any other information from the COHs, and thus did not provide a version of those records that is subject to the protective order.

On August 2, 2021, pursuant to the Order, the City produced the twelve internal affairs investigation files at issue in this case. Eight of the files were produced wholly unredacted. The other four contain minimal redactions, consisting mostly of social security numbers. The City produced an unredacted copy of the four files for review by Gatehouse’s counsel, subject to the protective order. After reviewing the files, Gatehouse has determined that it has no need to further contest the minimal redactions in those four files.

### ARGUMENT

#### I. THE COURT SHOULD ENJOIN THE CITY FROM CONTINUING TO VIOLATE THE PUBLIC RECORDS LAW.

This Court may exercise “all remedies at law or in equity” to enforce the Public Records Law, and it has specific “jurisdiction to enjoin . . . municipal action.” G.L. c. 66, § 10A.

Gatehouse requests that the Court, pursuant to this authority, permanently enjoin the City from making the same erroneous claims of exemption that the Court rejected in its Order when responding to future public records requests from Gatehouse, and that it otherwise order the City to comply with the Public Records Law in the future.<sup>1</sup>

#### A. Injunctive Relief is Warranted Here.

The City’s conduct in this litigation demonstrates that permanent injunctive relief is warranted. As this Court has found, the City wrongfully withheld the “dispositions” sections of

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<sup>1</sup> Gatehouse is not required to demonstrate that it will suffer irreparable harm absent a permanent injunction. “When . . . a suit is brought either by the government or a citizen acting as a private attorney general to enforce a statute or a declared policy of the Legislature irreparable harm is not required.” *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999). Gatehouse need only show that “the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). “Moreover, where a statutory violation is alleged, the judge should specifically consider how the statutory violation affects the public interest.” *LeClair*, 430 Mass. at 331.

internal affairs investigations based on the “personnel” records exemption, despite the fact that a binding 2003 Appeals Court decision held that the City of Worcester was not permitted to use that exemption to withhold the determinations of internal affairs investigations. (Order at 30-31); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 55 Mass. App. Ct. 1, 9-10 (2003) (“*Worcester II*”). “The city was aware of *Worcester II* and should have applied it properly.”<sup>2</sup> (Order at 32).

Early in this case, Gatehouse submitted a memorandum of law explaining why the City’s application of the personnel records exemption conflicted with *Worcester II*. (See Memo in Support of Motion for Preliminary Injunction, Paper No. 4.1, dated October 2, 2018, at 10-11). Nonetheless, the City stuck to its erroneous position for two more years of litigation, to the eve of trial. (See Order at 30; see also City’s Opp. to Motion for Summary Judgment, Paper No. 10.3, at 12 (asserting that exemption (c) “recognizes that the investigation disposition . . . [is] part of the core category of personnel information . . . .” (internal quotation omitted)). The City’s refusal to accept binding precedent needlessly increased the costs of this litigation.

In addition to its refusal to comply with caselaw, the City’s arguments have evinced a distinctly hostile attitude toward Gatehouse’s role in reporting on matters of public concern affecting the people of Worcester. In opposing preliminary injunctive relief, for example, the City characterized Gatehouse’s reporting and public records requests as nothing but a “continuation of [a] campaign” by private civil rights attorney Hector Piniero “to gain strategic advantage in litigation involving the Worcester police, to the detriment of the individual police officers and the City,” and asserted without basis that Gatehouse was advancing “an agenda.”

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<sup>2</sup> The City’s attorney, Janice Thompson, testified that she was familiar with *Worcester II* when she redacted the dispositions from Exhibits 30-32 and 45, and when she drafted a letter (Exhibit 6) stating that the redactions were based on the personnel records exemption. (Trial, Nov. 20, 3:19:00 through 3:20:35).

(Opposition to Motion for Preliminary Injunction, Paper No. 6, at 16-17). Likewise, in its summary judgment briefs, the City asserted that Gatehouse, “under the guise of its role as ‘watchdog,’” was reporting on misconduct allegations simply to advance Piniero’s interest in “maligning the WPD.” (City’s Reply to Plaintiff’s Opposition to Cross-Motion for Summary Judgment at 1-2 (emphasis supplied)).<sup>3</sup>

The City’s actions and rhetoric demonstrate that it is unlikely voluntarily to adhere to the legal determinations of this Court in response to future records requests by Gatehouse. Its conduct overcomes any presumption of regularity that would otherwise be afforded to a municipality, and demonstrates a need for permanent injunctive relief.

B. The Scope of the Requested Relief is Reasonable.

Gatehouse requests that the Court, in the exercise of its broad equitable powers, issue an order enjoining the City:

1. from withholding any record, or portion of a record, related to alleged police misconduct on the basis of exemption (c) to the Public Records Law, G.L. c. 4, § 7, cl. 26(c);
2. from withholding any record, or portion of a record, relating to alleged police misconduct on the basis of exemption (d) to the Public Records Law, G.L. c. 4, § 7, cl. 26(d), with the exception of attorney work product prepared in anticipation of litigation

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<sup>3</sup> The City repeated these insinuations in open court. *See* Brad Petrishen, “Judge Mulling T&G Lawsuit Over Police Records,” *Telegram & Gazette*, Oct. 17, 2018 (reporting that City’s counsel argued in preliminary injunction hearing that while generally “it doesn’t matter who the requester is for the public records,” in this case “it’s important because it - there can be no doubt that this request is related to pending litigation that’s certainly self-interested on Attorney Pineiro’s part and the *Telegram* is simply adopting those arguments that he makes in these lawsuits”); Brad Petrishen, “In Court, City Lawyer Challenges T&G Requests for Police Records,” *Telegram & Gazette*, Nov. 8, 2019 (reporting City’s assertion in oral argument on motions for summary judgment that “It seems to be the . . . the attorney and the reporter working hand-in-hand. . .”).

that is not a reasonably completed factual study, or information that otherwise relates to the development of policy positions; and

(c) from otherwise violating the Public Records Law.

A proposed form of order is attached hereto as **Exhibit 1**.

The requested injunction will be in the public interest, and will cause no cognizable harm to the City. The Public Records Law was enacted because “the public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner.” *Suffolk Const. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. 444, 453 (2007). The Legislature recently reinforced that purpose by amending exemption (c) so that it has no application to police misconduct records.<sup>4</sup> G.L. c. 4, § 7, cl. 26(c) (“personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation”) (emphasis supplied); *see also* Order at 32 n. 39. Similarly, exemption (d), as the Court has found, only applies to police misconduct investigations to the extent they relate to policy development, including attorney opinion work product, as held in *DaRosa v. City of New Bedford*, 471 Mass. 446 (2015). The proposed injunction will not only ensure the benefits of

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<sup>4</sup> The City may speculate that the Peace Officer Standards and Training (“POST”) Commission, established by Chapter 253 of the Acts of 2020 (“An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth”), will issue regulations concerning a database relative to police misconduct records, and these future regulations may conflict with the injunction requested. Such an assertion would be incorrect. The POST Commission has no jurisdiction to interpret the public records law. *Id.* The only provision of the police reform law that is remotely relevant here is the requirement that the commission “create and maintain a database containing information related to an officer’s . . . receipt of complaints” and related discipline. *Id.* Whatever the Commission decides to include in the database has no bearing on the City’s independent obligations under the Public Records Law.

public disclosure of records, but will conserve Court resources by deterring the City from attempting to re-litigate these issues in the future.

Consistent with the statutory purpose of transparency and accountability behind the Public Records Law, the City is required to apply exemptions narrowly and in good faith. It has not done so to date. The requested injunction will be one step toward ensuring the City follows its legal obligations in the future, serving the public interest in accountability and transparency.

## II. THE COURT SHOULD ENTER JUDGMENT.

The Court should enter judgment in this case. A proposed form of judgment is attached hereto as **Exhibit 2**. Judgment is appropriate because, once the Court rules on this motion and its separate motion for an award of attorneys' fees and costs, all pending legal issues will have been either decided or rendered moot in light of the City's provision of the records at issue with minimal redactions that Gatehouse chooses not to contest.

As noted above, the City has filed a premature notice of appeal, which is of no effect because judgment has not entered. *ZVI Const. Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 418 (2016). It is unclear whether the City actually means to prosecute its putative appeal.<sup>5</sup> The entry of judgment will expedite the conclusion of this litigation, at this stage or otherwise.

## III. THE COURT SHOULD AWARD PUNITIVE DAMAGES.

The Public Records Law provides that punitive damages may be awarded in any case where a public records requester obtains judgment and demonstrates that the municipality did not act in good faith. G.L. c. 66, § 10A(d)(4) ("If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality . . . did not act in good faith, the superior court may assess punitive damages. . . ."). As explained

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<sup>5</sup> The City commented to the *T&G* at the time it filed the notice: "At this point, there's been no decision to make an appeal." See Brad Petrishen, "City files notice of appeal in police case; 1st batch of disciplinary records expected today," *Telegram & Gazette*, July 2, 2021.

above and set forth in the Court’s Order, the City knowingly misapplied exemption (c) to the Public Records Law by withholding the determinations of internal affairs investigations as “personnel” files. (Order at 32). This conduct is sufficient, by itself, for the Court to find that “the defendant . . . municipality, in withholding or failing to timely furnish the requested record or any portion of the record . . . did not act in good faith.” G.L. c. 66, § 10A(d)(4); *see also* Plaintiff’s Proposed Findings of Fact and Rulings of Law at 38-40).

In addition, the Court should find that the City failed to act in good faith when it advanced its vastly overbroad, meritless, and constantly shifting “interpretation” of exemption (d). The reasons this finding is warranted are as follows:

- The City’s argument that exemption (d) applied to any records of whatever nature that the City deems “related” to ongoing litigation lacked any reasonable basis in the text of the exemption, and was contradicted by the Supreme Judicial Court’s *DaRosa* decision. (Order at 17 (holding that “the language of exemption (d) cannot be reconciled with the standard apparently applied by the city.”)).
- The records at issue in this case contain absolutely no information concerning the development of “policy positions,” an essential element of exemption (d). (Order at 19-20).
- In advancing its exemption (d) argument, the City relied on the fact that the Supervisor of Records does not issue determinations in cases involving litigation. However, the Supervisor’s practice derives entirely from a regulation that has nothing to do with exemption (d), and therefore was not a good faith basis for interpreting its statutory language. (Order at 18, n. 27).
- The Court did not credit the testimony of Janice Thompson that the City withheld records under exemption (d) based on the existence of protective orders. (Order at 9, n. 16).



- The City applied its interpretation of exemption (d) as a broad “litigation” exemption to the Concise Officer History of Officer Nathan Reando, even though Officer Reando was not a defendant in any lawsuit at the time the City responded to Gatehouse’s request. (Trial, Nov. 20, 12:46:00-12:48:40; Ex. 8, p. 27 (citing *Paris* litigation to justify invocation of Exemption (d) as to Reando); Ex. 22 (*Paris* docket (stating that action not filed until October 14, 2018))).
- The City used exemption (d) as a backstop to justify its continued withholding of the determinations of misconduct investigations, in place of the “personnel” records exemption. To achieve this result, the City expanded its interpretation of exemption (d) to cover not only investigations into incidents that are at issue in pending litigation, but also to include any records that so much as mention any officer who happens to be a party to some other lawsuit. (Order at 10). There was no basis in the narrow text of exemption (d) or its caselaw for this “interpretation.”

In short, the City failed to act in good faith in its application of both the “personnel” exemption and the “policy positions” exemption. Accordingly, the Court should award punitive damages.

**IV. THE COURT SHOULD AWARD PUNITIVE DAMAGES FOR EACH RECORD AND PORTION OF A RECORD THAT THE CITY WITHHELD IN BAD FAITH.**

The Public Records Law provides that punitive damages may be assessed whenever “the requested record” as to which judgment is obtained was withheld in bad faith:

If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than \$1,000 nor more than \$5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

G.L. c. 66, § 10A(d)(4). The legislature intentionally used the singular form of “record”—“*the* requested record or any portion of *the* record”—in defining the punitive damages provision. Accordingly, the law provides that whenever a plaintiff obtains a judgment as to any record or a portion of a record, the Court may assess punitive damages based on the withholding of “the record” or portion of “the record,” regardless of how many other records are at issue in the same litigation. The Court may therefore issue a separate punitive damages award for each record or record portion (1) as to which the judgment applies, and (2) which the defendant withheld other than in good faith.

Applying statute in this manner is consistent with the purpose of punitive damages. “Punitive damages operate as private fines intended to punish the defendant and to deter future wrongdoing.” *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399 (2021) (internal quotations and citations omitted). “They are aimed at deterrence and retribution, and thus serve a public interest.” *Id.* (internal quotations and citations omitted). “A proper punitive damage award in this case would be a sufficient amount to send a clear message to the [City] of condemnation for its reprehensible behavior and of warning that it must put an end” to its conduct.<sup>6</sup> *Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 624 (2005). By contrast, to construe the statute to authorize a maximum award of \$5,000 in each lawsuit, no matter how many records the

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<sup>6</sup> The Court should not stay its hand based on the concern, expressed in some cases, that “an award of punitive damages against a municipality punishes only the taxpayers, who took no part in the wrongful conduct, but who nevertheless may incur an increase in taxes or a reduction in public services as a result of the award.” *M. O'Connor Contracting, Inc. v. City Of Brockton*, 61 Mass. App. Ct. 278, 285 (2004). Here, a punitive award would go entirely to the state’s Public Records Assistance Fund, under which amounts may be expended by the Commonwealth’s “chief information officer, without further appropriation, to provide grants to municipalities to support the information technology capabilities of municipalities to foster best practices for increasing access to public records and facilitating compliance with” the Public Records Law. G.L. c. 10, § 35DDD.

defendant withheld in bad faith, would run counter to the deterrence and punishment purposes of punitive damage awards.

The City withheld four (4) “dispositions” portions of investigation records in bad faith, based on the personnel records exemption contained in G.L. c. 4, § 7, cl. 26(c). (Order at 32). The City’s bad faith withholding of records based on exemption (d) applied to the eight (8) investigation records withheld in their entirety, and the 17 concise officer histories, also withheld in their entirety. Accordingly, the Court should impose separate awards of punitive damages as to each record withheld in this case.

Gatehouse requests that the Court impose the maximum punitive award of \$5,000 for each of the four instances in which the City withheld the “conclusions” portions of investigation records based on the “personnel” exemption. It is difficult to imagine a clearer case of the absence of good faith than this one, where the defendant itself lost a seminal public records case that held that an exemption does not apply to the records at issue, but then continued to insist that it did. (Ex. 6). Municipalities cannot insist that “up is down” and claim to be acting in good faith.

As for the remaining 25 records wrongfully withheld on the basis of exemption (d) (the eight investigation files and 17 COHs), the Court should impose punitive damages of \$3,000 per record withheld. An award at the midpoint of the statutory range would account for the slight differences between the City’s bad faith interpretation of *Worcester II* and its bad faith interpretation of exemption (d) and *DaRosa*.

In total, and for the reasons set forth above, Gatehouse requests that the Court impose punitive damages pursuant to G.L. c. 66, § 10A(d)(4) in the amount of \$95,000.

CONCLUSION

For the foregoing reasons, Gatehouse requests that the Court enter a permanent injunction and judgment as set forth in the proposed orders at Exhibits 1 and 2, and that it award punitive damages in the amount of \$95,000.

Respectfully Submitted,

GATEHOUSE MEDIA, LLC

By its attorneys,

/s/ Jeffrey J. Pyle

Jeffrey J. Pyle (BBO #647438)

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Date: October 6, 2021

CERTIFICATE OF SERVICE

I, Jeffrey J. Pyle, hereby certify that I served the foregoing document on the City of Worcester by email on October 6, 2021.

Wendy L. Quinn

Assistant City Solicitor

City Hall, Room 301

455 Main Street

Worcester, MA 01608

(508) 799-1161

[quinnWL@worcesterma.gov](mailto:quinnWL@worcesterma.gov)

/s/ Jeffrey J. Pyle

Jeffrey J. Pyle

# EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
C.A. No. 1885CV01526A

_____	)
GATEHOUSE MEDIA, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WORCESTER,	)
	)
Defendant.	)
_____	)

**[PROPOSED] ORDER ON MOTION FOR PERMANENT INJUNCTION**

This matter having been adjudicated by this Court, and this Court having issued its Order dated June 2, 2021, directing Defendant City of Worcester to provide public records to Plaintiff Gatehouse Media, LLC (“Gatehouse”), and after hearing with notice given to all parties on Gatehouse’s Motion for a Permanent Injunction, it is hereby ORDERED and ADJUDGED that the defendant City of Worcester is RESTRAINED AND ENJOINED as follows:

1. The City of Worcester is permanently restrained and enjoined from withholding from Gatehouse or its managers, members, assigns, affiliated persons and entities, parents, subsidiaries, or employees (the “Gatehouse Parties”) any record related to alleged police misconduct requested by the Gatehouse Parties pursuant to the Public Records Law, G.L. c. 66, § 10, or any portion of such requested record, on the basis of exemption (c) to the Public Records Law, G.L. c. 4, § 7, cl. 26(c).
2. The City of Worcester is permanently restrained and enjoined from withholding from the Gatehouse Parties any record related to alleged police misconduct requested by the Gatehouse Parties pursuant to the Public Records Law, G.L. c. 66, § 10, or any

portion of such requested record, on the basis of exemption (d) to the Public Records Law, G.L. c. 4, § 7, cl. 26(d), with the exception of attorney work product prepared in anticipation of litigation that is not a reasonably completed factual study, or information that otherwise concerns the development of policy positions.

3. The City of Worcester is permanently restrained and enjoined from violating the Public Records Law, G.L. c. 66, § 10, in response to any request under said Public Records Law by the Gatehouse Parties.

BY THE COURT

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Kenton-Walker, J.  
Associate Justice  
Massachusetts Superior Court

Entered this \_\_\_\_ day of \_\_\_\_\_, 2021

# EXHIBIT 2



COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
C.A. No. 1885CV01526A

_____	)
GATEHOUSE MEDIA, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WORCESTER,	)
	)
Defendant.	)
_____	)

**[PROPOSED] JUDGMENT**

This matter having been adjudicated by this Court, and this Court having issued an Order dated June 2, 2021, requiring Defendant City of Worcester to provide public records to Plaintiff Gatehouse Media, LLC, and all remaining issues having been rendered moot by Defendant City of Worcester’s compliance with said Order, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Judgment shall, and hereby does, enter in favor of the Plaintiff, Gatehouse Media, LLC, on Counts I and II of its Complaint.
2. Pursuant to G.L. c. 66, § 10A(d)(2), the Court orders the Defendant City of Worcester to pay the amount of \$217,695.05 to Prince Lobel Tye, LLP, as attorneys for Gatehouse Media, LLC, in satisfaction of Plaintiff’s motion for an award of attorneys’ fees and costs.
3. Pursuant to G.L. c. 66, § 10A(d)(4), the Court orders the Defendant City of Worcester to pay the amount of \$95,000 in punitive damages to the Public Records Assistance Fund established by G.L. c. 10, § 35DDD.

4. Such other relief afforded to the Plaintiff shall be as set forth in this Court's Findings of Fact, Conclusions of Law, and Order of June 2, 2021, and the Court's Order on Plaintiff's Motion for a Permanent Injunction.

BY THE COURT

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Hon. Janet Kenton-Walker  
Associate Justice  
Massachusetts Superior Court

Entered this \_\_\_\_ day of \_\_\_\_\_, 2021