COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT

PEERLESS INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AND OHIO CASUALTY INSURANCE COMPANY,
Plaintiffs,

vs.

JOHN ROONEY,
Defendant.

CIVIL ACTION NO.
2284 CV00652-BLS2

JOHN ROONEY'S OPPOSITION TO LIBERTY MUTUAL'S POST-TRIAL MOTION TO CHALLENGE THE CONSTITUTIONALITY OF STATUTORY DAMAGES UNDER CHAPTERS 93A AND 176D

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INTRODUCTION

When Liberty Mutual filed this action, it understood the stakes: If this Court found that it violated Chapters 93A and 176D by willfully or knowingly failing to make a prompt, fair, and equitable settlement to John Rooney after liability became reasonably clear, Liberty would be statutorily required to pay between $90,971,612 and $136,457,418—two to three times the amount of the underlying judgment. Throughout this litigation, Liberty tried to avoid that outcome by arguing that its conduct didn't violate the law and that, even if it did, its violation wasn't willful or knowing. But, after a ten-day trial, this Court correctly rejected those arguments and thus had no choice but to impose the bare minimum award required by the statutes: $90,971,612.

Now Liberty raises an entirely new argument. In its post-trial motion, Liberty asserts—for the first time—that even if Chapters 93A and 176D require it to pay a minimum of $90,971,612 for its willful violation, applying the statutes here would violate its constitutional right to due process. Liberty anchors this argument in an analogy to punitive damages awarded by juries. In that context, the U.S. Supreme Court has established a framework for analyzing when a jury's exercise of its "wide discretion" deprives the defendant of "fair notice" and risks "arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Liberty argues that the same framework should apply here—to a mandatory statutory formula administered by a judge—and that the formula is unconstitutional under that framework.

For three independent reasons, this Court should reject that argument.

***First*,** Liberty's challenge has not been preserved. Despite knowing the exact, minimum statutory award for a willful violation when it first filed suit—the same award this Court imposed, down to the last dollar—Liberty never raised a constitutional challenge at any point before the verdict. If Liberty had a "claim[] that the … application of [the statute] was unconstitutional, it was incumbent on [Liberty] to assert that contention at the time that the statute's application was

being decided." *Zora Enters., Inc. v. Burnett*, 61 Mass. App. Ct. 341, 345–46 (2004). Its "[f]ailure to do so waived the contention." *Id.* at 346. A post-trial motion is "not an appropriate avenue to raise" the claim that a statute central to the damages calculation "was unconstitutional as applied"—"an entirely new legal argument that was apparently overlooked during the course of the litigation." *M.B. Claff, Inc. v. Mass. Bay Transp. Auth.*, 441 Mass. 596, 603–04 (2004). Because Liberty "had ample opportunity … at trial" to challenge the constitutionality of the statute but failed to do so, its challenge is "properly treated [] as waived." *Ballerino v. Ballerino*, 436 Mass. 1005, 1005 (2002).

Liberty's only response (at 1 n.1) is that a challenge to the size of a jury's punitive damages award is "properly raised in post-trial motions." But that's because a jury has wide discretion to award punitive damages, so the constitutionality of its award can't be assessed until the jury exercises that discretion. Not so for Chapters 93A and 176D, which tightly fix damages to at least two times the amount of the underlying judgment—an amount known from the outset.

***Second*,** even if this court were inclined to overlook Liberty's waiver, its constitutional challenge would fail on the merits. Liberty doesn't argue that the legislature's judgment in mandating damages of at least two times the amount of the underlying judgment was obviously unreasonable—the standard for evaluating statutory penalties. Instead, it argues that application of the statutory formula here is unconstitutional under the framework for assessing jury awards. But, as the Supreme Judicial Court has explained, it is "unlikely" that the U.S. Supreme Court would "expand" its due-process framework for evaluating a jury's unbounded award of punitive damages to the scenario here, where damages are awarded "by a judge pursuant to a specific statutory formula, rather than by a jury." *Rhodes v. AIG Domestic Claims, Inc.*, 461 Mass. 486, 503 (2012). Liberty never addresses this point. It does not explain why expanding the framework would make any sense here, where "the award of punitive damages is significantly circumscribed." *Id.*

***Third*,** even if the jury-award framework applied, "this award would pass constitutional muster" under it, for exactly the same reasons as in *Rhodes*. *Id.* As in *Rhodes*, Liberty's conduct was "sufficiently reprehensible" because the target (Mr. Rooney) was "financially vulnerable," Liberty repeatedly "failed to effectuate prompt settlement," and its violation of Chapters 93A and 176D was "wil[l]ful." *Id.* As in *Rhodes*, "the ratio between compensatory damages and punitive damages is not excessive" because "[t]he punitive award is two times the amount of the underlying [tort] judgment, which was a compensatory award for [Mr. Rooney's] injuries." *Id.* at 503–04. As in *Rhodes*, the insurer resists that conclusion, arguing that calculating the ratio based on the underlying judgment is "inappropriate" and results in a "grossly excessive" award—an argument that the SJC expressly rejected. *See id.* at 504 ("We disagree.") And, as in *Rhodes*, "[t]he statute puts insurers on notice that if they wil[l]fully fail to effectuate settlement on a case with high potential for a large judgment at trial, they are liable for up to treble damages based on that judgment amount." *Id.*

Thus, as in *Rhodes*, the statutory regime is constitutional. It fits within the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Campbell*, 538 U.S. at 425. That "legislative judgment[]" warrants "substantial deference" in any due-process analysis. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996). Liberty's motion should therefore be denied.

BACKGROUND

On August 4, 2021, a Middlesex County jury found that Liberty's insured—the White-Skanska-Consigli Joint Venture (the JV)—was entirely liable for Mr. Rooney's personal-injury claim after he fell off scaffolding at the JV's construction site and landed violently on a concrete

platform. *See* Dkt. No. 80, Order at 1; *id.* ¶¶ 43, 222.[1] The jury awarded Mr. Rooney $26.6 million in damages. *Id.* ¶ 222. After interest, judgment entered in the amount of $45.49 million. *Id.* ¶ 223.

Liberty then filed this lawsuit, seeking a declaratory judgment that it did not violate Chapters 93A or 176D in handling Mr. Rooney's claim against the JV. *See* Dkt. No. 1, Complaint. Despite recognizing that it could be held liable under the statutes, Liberty didn't claim that applying the statutory formula here would lead to an unconstitutional result. *Cf. id.* Mr. Rooney promptly counterclaimed, alleging that Liberty violated both laws by failing to adequately investigate the claim and failing to make a reasonable settlement offer even after the JV's liability became reasonably clear. *See* Dkt. No. 6, Counterclaim. His request for damages was plain—an award of "[e]ither double or treble the underlying judgment." *Id.* at 20. Yet Liberty never asserted an affirmative defense to that counterclaim based on constitutional due process.

After a ten-day trial that culminated in detailed factual findings and conclusions of law, this Court held that Liberty's failure to make a reasonable settlement offer violated the statutes. And it resolved that Liberty's violation was willful: "Liberty deliberately closed its eyes to known and available information, in order to hold fast to its premature, yet somehow cast in concrete, theory of the case." Dkt. No. 80, Order at 65.

As relevant here, this Court explained that Liberty's primary claims adjuster, Michael Ince, "included knowingly false information in his roundtable reports and failed to include important information that arguably constituted value changing information." *Id.* at 66. Liberty's other employees, including Ince's supervisors, failed to investigate or otherwise direct Ince to "investigate avenues where evidence was plainly lacking." *Id.* Instead, all of Liberty's employees "clung to their

[1] Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

initial view—repeated for years by Ince—that Rooney was responsible for the accident because he moved a plank, walked on a plank, fell from a plank, and was not allowed to be in the interior scaffolding." *Id.* That theory, the Court found, was illogical. *Id.* But more than that, it was also undermined by a "wealth of contradictory evidence," including "the undisputed evidence that the JV negligently created OSHA-violative scaffolding, the overwhelming evidence that the JV, with no documented records of any safety inspections, allowed the masons to use such scaffolding, and the overwhelming evidence that Rooney fell into a hole in that scaffolding causing him catastrophic injuries." *Id.* at 65–66; *see also id.* ¶¶ 155–77.

For these reasons, this Court concluded that "Liberty was obligated to offer $4.5 million to Rooney to settle the case before trial and no later than the end of June 2021." *Id.* at 67. "Its failure to do so stemmed from its willful and knowing failure to properly investigate the Underlying Case and recognize that liability was reasonably clear at that time." *Id.* Based on these findings, the Court explained, it was required "at a minimum, to double the judgment in the Underlying Case." *Id.* That wasn't a matter of discretion—it was dictated by "the statute and controlling precedent." *Id.* Applying this well-settled, binding authority, the Court held that Liberty's willful failure to make a reasonable settlement offer even after the JV's liability became reasonably clear entitled Mr. Rooney to $90,971,612 in statutory damages. *Id.* at 67–68.

ARGUMENT

I. Liberty waived its constitutional challenge to Chapters 93A and 176D by failing to raise it at any point before the verdict.

1. The sole claim pressed in Liberty's post-trial motion is that the Court's application of the mandatory statutory formula leads to an unconstitutional result. But that motion is the first and only time that Liberty has ever asserted such an argument, which has been available to it from the start. Liberty cannot overcome its failure to raise the argument at any earlier stage of the litigation.

To be sure, a party may ordinarily challenge the size of a jury's damages award, including on constitutional grounds, for the first time after trial. *See Clifton v. Mass. Bay Trans. Auth.*, 445 Mass. 611, 623 (2005). Although Liberty styles its motion as such a challenge (at 1 n.1), its claim here is different: It necessarily attacks the statutory damages formula itself—because the amount imposed is the minimum the statute allows. That challenge could have (and should have) been raised earlier.

Unlike discretionary punitive damages awarded by a jury—which cannot be evaluated until the jury has exercised its considerable discretion and the court knows what the award actually is—the statutory formula here is both "well known" and "significantly circumscribed." *Rhodes*, 461 Mass. at 494, 503. And, contrary to Liberty's suggestions (at 2, 6–7), the Court's finding that "Liberty was obligated to offer $4.5 million to Rooney to settle the case before trial" has no bearing on that formula. Dkt. No. 80, Order at 67. The plain text of the statute makes clear that, "if a defendant commits a wil[l]ful or knowing c. 93A violation that finds its roots in an event or a transaction that has given rise to a judgment in favor of the plaintiff, then the damages for the c. 93A violation are calculated by multiplying the amount of *that* judgment." *Rhodes*, 461 Mass. at 499 (emphasis added) (citing G.L. c. 93A, § 9(3)). Liberty knew the exact amount of that judgment (and therefore, the exact range of statutory damages) from the moment it initiated this lawsuit. It filed its complaint only after the $45.49 million judgment had entered in the underlying case, and its complaint alleged that the very statutes whose application it now challenges control the case. *See* Dkt. No. 1, Complaint, ¶ 1 (citing General Laws Chapters 93A and 176D).

So Liberty could have raised its constitutional challenge to the statutory regime in its complaint. It didn't. Nor did it make the argument in its answer to Mr. Rooney's counterclaim, where it expressly acknowledged the $45.49 million judgment entered in the underlying case. *See* Dkt. No. 7, Answer to Counterclaim, ¶ 99. Nor did Liberty include the claim in its motion for leave to submit partial summary judgment, where it conceded that Mr. Rooney could be "entitled to up

to $136 million" in statutory damages. *See* Dkt. No. 36, Motion for Leave at 5. And despite multiple other opportunities, Liberty consistently failed to even mention the constitutional challenge at any point before the verdict, which this Court reached only after holding a ten-day bench trial, during which it heard testimony from seven witnesses and admitted 172 exhibits into evidence without once considering any constitutional claim. *See* Dkt. No. 80, Order at 1–2.

2. If Liberty had raised its due-process arguments when it should have, that trial might have proceeded differently. Mr. Rooney could have gone on the stand and testified to Liberty's reprehensibility—making clear, for example, that the "the harm caused by [Liberty] was physical as opposed to economic," that Liberty "evinced an indifference to, or a reckless disregard of, [his] health and safety," and that Liberty targeted him on account of his "financial vulnerability." *Cf.* Mot. at 10. He also could have introduced other evidence to underscore that Liberty's "conduct involved repeated actions, rather than an isolated incident," and "the harm was the result of intentional malice, trickery, or deceit—as opposed to a mere accident." *Id.* Liberty's waiver was therefore prejudicial to both Mr. Rooney and this Court, which was also denied the benefit of any factual or legal presentation on the constitutional defense that Liberty now advances.

In addition, Mr. Rooney could have introduced his medical records from the underlying case to demonstrate the harm (and pain and suffering) the jury was responding to. That would have further demonstrated to the Court why the jury reached its $26.6 million verdict—and why that verdict was a "compensatory award for [Mr. Rooney's] injuries." *Rhodes*, 461 Mass. at 504. By the same token, if Liberty wanted to argue the opposite—that the jury's compensatory damages award was unsupported by the evidence and therefore unlawfully excessive (a true "runaway jury verdict," in this Court's words (at 67 n.26))—it was incumbent on Liberty to at least put on evidence to that effect at trial. By failing to do so, Liberty waived any such contention.

For that reason, too, this Court should reject—as waived—Liberty's "eleventh-hour" motion to unravel the "many months of work on the part of the attorneys and the court" to arrive at the verdict. *Wilkins v. United States*, 598 U.S. 152, 157 (2023); *see also Hall v. Gus Const. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988) ("When the constitutionality of a statute is raised for the first time in a postjudgment motion, the trial court is correct in not considering the issue."). If Liberty had a "claim[] that the … application of [the statute] was unconstitutional, it was incumbent on [Liberty] to assert that contention at the time that the statute's application was being decided"—that is, at any point *before* trial. *Burnett*, 61 Mass. App. Ct. at 345–46. Overlooking Liberty's failure to preserve its constitutional challenge now "would tear the fabric of our well-established waiver jurisprudence … and … defeat the core purposes of the waiver doctrine: to protect society's interest in the finality of its judicial decisions, and to promote judicial efficiency." *Commonwealth v. Robinson*, 480 Mass. 146, 151 (2018).

3. Even setting aside the significant prejudice to Mr. Rooney, Liberty's last-ditch maneuver to evade the damages award independently fails on procedural grounds. None of the avenues that Liberty invokes—not Rule 52(b) or Rule 59(a) or Rule 59(e) or Rule 60(b)(6)—may be used to introduce a constitutional challenge that could have been raised well before the verdict.

Start with Rule 52(b). It states, in relevant part, that "the court may amend its findings [of fact] or make additional findings and may amend the judgment accordingly." Mass. R. Civ. P. 52(b). But Rule 52(b) "does not authorize challenges to or amendments to conclusions of law." *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 435 Mass. 66, 79 (2001). And Liberty doesn't meaningfully challenge any of this Court's factual findings; the closest it gets is a passing remark in a parenthetical (at 10) that it "respectfully disagrees" with this Court's conclusion that its conduct was willful. Liberty's constitutional challenge therefore fails under Rule 52(b).

So too with Rule 59(a). It provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues … in an action tried without a jury." Mass. R. Civ. P. 59(a). Given the "public interest in the finality of judgments," the SJC has long maintained that "a motion for a new trial should not be granted when the issues raised therein could have been addressed during the trial." *Wojcicki v. Caragher*, 447 Mass. 200, 215 (2006); *see Madden v. Bos. Elevated Ry.*, 284 Mass. 490, 495 (1933) ("It is … well settled that matters open at the trial will not support grounds of objection not then raised but presented for the first time on motion for new trial."). The appeals courts have agreed. *See, e.g.*, *Arrow Paper Corp. v. Boylston Foods, Inc.*, 1 Mass. App. Ct. 808, 809 (1973) ("Questions of law which might have been raised at the trial cannot be raised as of right on a motion for a new trial."); *Eva-Lee, Inc. v. Thomson Gen. Corp.*, 5 Mass. App. Ct. 823, 823, (1977) (holding that a motion for a new trial "may not be used as a vehicle to compel a judge to rule on questions of law which could have been raised at trial but were not"). Because Liberty's constitutional arguments "might have been, but were not, raised at the trial," they are "properly denied" as part of its motion for a new trial. *Burak v. S. Mass. Broad., Inc.*, 350 Mass. 759, 759 (1965).

Liberty's challenge also fails under Rule 59(e), which permits the court to "alter or amend the judgment." Mass. R. Civ. P. 59. As with Rule 59(a), "[p]arties may not raise arguments that could have been made prior to judgment for the first time in a rule 59(e) motion." *Blackinton Commons v. Dep't of Env't Prot.*, 81 Mass. App. Ct. 1131, 2012 WL 1448854 at *3 n.4 (2012); *accord Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997) (interpreting the analogous Federal Rule of Civil Procedure 59(e) and holding that "Rule 59(e) … certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."). *Ballerino* is illustrative. The defendant there filed a motion under Rules 52(b) and 59(e), asserting "for the first time" that the statute at the heart of the case was unconstitutional on due-process grounds. 436 Mass. at 1005. The SJC held that "[t]he judge acted

well within his discretion in denying the defendant's posttrial motion." *Id.* Because no constitutional challenge "was raised at the trial or prior to the entry of judgment" and the underlying legal issues were "not novel" (such that "the defendant had ample opportunity to raise the constitutional issues at trial"), "the judge properly treated them as waived." *Id.* Those same principles counsel in favor of waiver here.

Finally, Liberty's challenge is especially weak under Rule 60(b)(6). That rule allows the court to grant relief for "any other reason justifying relief from the operation of the judgment." Mass. R. Civ. P. 60(b)(6). "In the interest of finality of judgments," relief under its "catchall provision" is warranted only in "extraordinary circumstances." *Sahin v. Sahin*, 435 Mass. 396, 406 (2001). "[T]he rule should not be used as an instrument for relief from deliberate choices which did not work out." *Freitas v. Freitas*, 26 Mass. App. Ct. 196, 198 (1988). Nor is "Rule 60(b)(6) to be used as an alternative vehicle to raise issues which should have been timely raised" through other procedural avenues. *Artco, Inc. v. DiFruscia*, 5 Mass. App. Ct. 513, 517 (1977). But that's exactly what Liberty aims to do here.

The SJC's decision in *Claff* proves the point. Like Liberty, the plaintiff in that case argued that a statute central to the damages calculation—the statute setting the interest rate for judgments in eminent domain cases—was unconstitutional as applied to him. *See* 441 Mass. at 596–97. And like Liberty, the plaintiff raised this constitutional challenge for the first time in a Rule 60 motion after trial. *See id.* The Appeals Court held that the plaintiff waived the claim by failing to give notice of its intent to pursue it, and by failing to present any evidence on the issue at trial. *See id.* at 599. The SJC agreed that the plaintiff could not raise the challenge for the first time under Rule 60, though it declined to "specify precisely when and by what means a plaintiff must make a constitutionally based claim" for a different interest rate. *Id.* at 602. Citing the rule that "[a] judge does not abuse his discretion in denying rule 60(b)(6) relief to a claimant advancing an entirely new

legal argument that was apparently overlooked during the course of the litigation," the Court emphasized that the plaintiff "identified no extraordinary circumstance justifying relief." *Id.* at 603. Because the plaintiff's Rule 60 motion "was not an appropriate avenue to raise its claim that [the statutory] interest rate was unconstitutional as applied," the Court declined to address the merits of the plaintiff's constitutional challenge. *Id.* at 604.

This Court should follow that same approach here. Liberty is a sophisticated national insurer that chose to initiate this case with full knowledge that its minimum statutory exposure was $90,971,612. Liberty waived its constitutional challenge to the statutory regime by failing to raise it before trial, and none of the procedural rules that Liberty now invokes may be used to introduce arguments that could have been made well before the verdict.

II. Waiver aside, Liberty's constitutional challenge fails on the merits because the framework for evaluating discretionary punitive damages awards by juries doesn't apply to mandatory statutory damages awarded by judges.

Even if this Court were inclined to overlook Liberty's waiver, its constitutional challenge would fail on the merits. In challenging the constitutionality of the statutory formula, Liberty relies on two U.S. Supreme Court cases: *Campbell* and *Gore*. These cases recognized that, although "[e]lementary notions of fairness … dictate that a person receive fair notice … of the severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574, "[j]ury instructions typically leave the jury with wide discretion in choosing amounts," *Campbell*, 538 U.S. at 417. To address the risk of grossly excessive or arbitrary punishments, the Court devised a framework for courts to apply in reviewing a jury's punitive damages award. Under this framework (sometimes referred to as the *Campbell-Gore* guideposts), courts consider three factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

As the SJC correctly pointed out in *Rhodes*, however, the U.S. Supreme Court has never suggested that this framework extends to "punitive damages awarded, as here, by a judge pursuant to a specific statutory formula, rather than by a jury." 461 Mass. at 503. To the contrary, the Supreme Court has described the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Campbell*, 538 U.S. at 425; *accord Gore*, 517 U.S. at 581 ("Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages."). As a matter of due process, these "legislative judgments concerning appropriate sanctions for the conduct at issue" are entitled to "substantial deference." *Gore*, 517 U.S. at 583.

Indeed, Liberty cannot identify a single state or federal appellate decision from any jurisdiction—nor are we aware of any—invalidating a judge's award of statutory damages under *Campbell* or *Gore*. If anything, the SJC in *Rhodes* explained why it would make no sense to apply the framework to damages awarded under the exact statute at issue in this case: "Under c. 93A, the award of punitive damages is significantly circumscribed." 461 Mass. at 503. "The judge may only award them if the defendant acted wil[l]fully or knowingly, and the award must be between two and three times compensatory damages included in a judgment on any claim arising from the same and underlying transaction or occurrence." *Id.* The concerns animating *Campbell* and *Gore*, in other words, aren't present here. *See* Daniel R. LeCours, *Steering Clear of the "Road to Nowhere": Why the* BMW *Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 Rutgers L. Rev. 327, 330 (2010) (explaining that "the fundamental differences between statutory penalty awards and punitive damages renders the application of the *BMW* guideposts both unworkable and judicially impermissible" to statutory damages). As a result, there's no risk of an unbounded jury verdict—the insurer has clear notice of the statutory regime's mandated penalties, and the judge has only limited discretion to set the award above two times the underlying judgment.

III. Even assuming that the jury-award framework applied to a mandatory statutory penalty, the damages award here would still be constitutional.

Even assuming that the *Campbell-Gore* framework applied to this case, this Court should still reject Liberty's constitutional challenge because it is foreclosed by *Rhodes*. And this Court's detailed factual findings—which Liberty does not seriously contest—only confirm that the damages award here would "pass constitutional muster." *Rhodes*, 461 Mass. at 503.

First, like the insurer in *Rhodes*, Liberty engaged in conduct that was "sufficiently reprehensible to merit the award of punitive damages." *Id.* "The target of the conduct … was financially vulnerable." *Id.* Mr. Rooney, after all, was unable to continue working after the accident that led to this litigation, and he underwent nine surgeries by the time of the trial in the underlying case. Dkt. No. 80, Order, ¶ 41. Liberty's conduct "involved repeated actions over several years." *Rhodes*, 461 Mass. at 503. It consistently "failed to effectuate prompt settlement." *Id.*; *see* Dkt. No. 80, Order at 54–64. And its violation of Chapters 93A and 176D was willful. *See Rhodes*, 461 Mass. at 503. "Liberty deliberately closed its eyes to known and available information, in order to hold fast to its premature, yet somehow cast in concrete, theory of the case." Dkt. No. 80, Order at 65.

Second, as in *Rhodes*, "the ratio between compensatory and punitive damages is not excessive." 461 Mass. at 503. The damages award here is "two times the amount of the underlying [tort] judgment," *id.* at 503–04, which compensated Mr. Rooney for his medical damages, lost income, and pain and suffering, plus prejudgment interest. *See* Dkt. No. 80, Order, ¶ 222. To the extent Liberty suggests (at 2, 6–7) that the "actual damages" should instead be the interest that Mr. Rooney would have earned on a settlement offer Liberty never made, that argument was made and rejected in *Rhodes*. As the SJC explained, the plain text of the statute makes clear: "[I]f a defendant commits a wil[l]ful or knowing c. 93A violation that finds its roots in an event or a transaction that has given rise to a judgment in favor of the plaintiff, then the damages for the c.

93A violation are calculated by multiplying the amount of *that* judgment." *Rhodes*, 461 Mass. at 499 (emphasis added). Although Liberty suggests (at 4, 11) that the ratio is something other than two-to-one, that argument was also made and rejected in *Rhodes*. The SJC didn't calculate a 49:1 ratio based on the $22 million in statutory damages and the $448,250 in interest the plaintiffs would have earned on a timely settlement offer. *Cf. id.* at 494, 506. Instead, it made clear that the ratio was two to one because the statute *required*, at minimum, awarding twice the "actual compensatory damages" of the "underlying [] judgment." *Id.* at 504. In so holding, the SJC expressly rejected the insurer's argument that calculating the ratio based on the amount of the underlying judgment would be "inappropriate because there is no relationship whatsoever with the actual compensatory damages caused by the [insurer's] unfair or deceptive trade practice." *See id.* ("We disagree.").

To be sure, the statute is strong medicine. It requires Liberty to pay an "enormous sum," *Rhodes*, 461 Mass. at 506, that may even strike some as "grossly excessive" as a policy matter. *See* Mot. at 2. But that is a consequence of the legislature's deliberate decision to enact the statutory regime; it doesn't rise to the level of a constitutional violation. If the legislature "wish[es] to [re]consider" this regime in light of this case—an invitation that it declined after *Rhodes*, *see* 461 Mass. at 506—it is free to do so. But that policy choice is for the legislature to make, not the courts.

The SJC in *Rhodes* recognized exactly that. It explained that, although reasonable people can disagree about the wisdom of the statute as a policy matter, the legislature made its decision, and that legislative judgment is constitutional: "In a case like this one, where a plaintiff suffers catastrophic injuries, the failure to effectuate a prompt settlement is particularly harmful to the claimant because high unpaid medical expenses make the prompt receipt of insurance funds extremely important." *Id.* at 504. "[T]he unfair settlement practice," in other words, "is intimately bound up with the underlying [tort] judgment." *Id.* By ensuring that insurers "who engage[] in bad faith settlement practices must pay multiples of the amount of the underlying judgment," the

statutory formula thus "fulfills the important public policy of encouraging the fair and efficient resolution of business disputes." *Granger*, 435 Mass. at 83–84. It "puts insurers on notice that if they wil[l]fully fail to effectuate settlement on a case with high potential for a large judgment at trial, they are liable for up to treble damages based on that judgment amount." *Rhodes*, 461 Mass. at 504. And so, just like the insurer in *Rhodes*, Liberty could have easily "avoided the imposition of any punitive damages": It simply shouldn't have "acted wil[l]fully and unreasonably in refusing to settle the case." *Id.*

Finally, turning to the third *Campbell-Gore* guidepost, the disparity between the damages award and the civil penalties authorized in comparable cases "is not enough, on its own, to find that the award of punitive damages is excessive." *Id.*

For all these reasons, and for the reasons explained in *Rhodes*, the award of statutory damages in this case "is not so 'grossly excessive' as to violate [Liberty's] due process protections." *Id.* It fits within the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Campbell*, 538 U.S. at 425. As a matter of due process, that "legislative judgment[]" warrants "substantial deference." *Gore*, 517 U.S. at 583. Despite having the burden to do so, Liberty provides no authority that would allow this Court to hold that the legislature abused its substantial deference and acted unconstitutionally. Liberty's motion should therefore be denied for this reason as well.

CONCLUSION

Mr. Rooney respectfully requests that the Court deny Liberty's post-trial motion to challenge the constitutionality of statutory damages under Chapters 93A and 176D.

Respectfully submitted,

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Dated: January 30, 2026

CERTIFICATE OF SERVICE

I, Andrew M. Abraham, herby certify that on January 30, 2026, a true copy of the above document was served upon the attorney of record for each party via email to:

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