MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Docket No. 09-BPA-00597

[redacted]

Complainant

v.

The R.O.S.E. Fund, Inc.,

Respondent

OPENING BRIEF FOR RESPONDENT

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I. QUESTION PRESENTED

Whether The R.O.S.E. Fund, Inc., a small nonprofit organization entirely dependent on private discretionary charitable donations, may continue to pursue its mission to promote the development of female victims of domestic violence by facilitating free or reduced cost facial reconstructive surgery to select candidates, or whether M.G.L. c. 272, § 92A requires The R.O.S.E. Fund, Inc. to change its mission to also serve men?

II. STATEMENT OF THE CASE

A. Factual Summary

The R.O.S.E. Fund, Inc. ("R.O.S.E.") is a nonprofit organization formed pursuant to Section 501 (c)(3) of the Internal Revenue Code, and operated exclusively for charitable and educational purposes to assist women who are confronted with survival needs that result from assault, molestation, eating disorders and/or abuse. *See* Joint Stipulation, May 10, 2013, ¶ 3 [hereinafter "Stipulation"]. Established in 1992, R.O.S.E. is an umbrella organization that raises funds and awareness for "women who have the extraordinary strength and courage to break the cycle of domestic violence." Stipulation, ¶ 4. R.O.S.E. sponsors several programs in pursuit of its mission, one of which is The Reconstructive Surgery Program. Stipulation, ¶ ¶ 4-6. Through this program, which is completely donor dependent, R.O.S.E. refers female survivors of domestic violence who meet very specific criteria to participating medical providers and their affiliates to provide such women with free or reduced cost medical and dental reconstructive procedures in order to help them regain their self-esteem. Stipulation ¶ 6. In order for an applicant to be eligible for this unique scholarship opportunity, the applicant must meet distinct criteria

established by R.O.S.E. to ensure the candidate furthers the narrow mission and limited purpose of the fund. *See* Stipulation, Exhibit 2.

On or about November 2008, Stacie Nichols, a domestic violence advocate at New Hope, Inc., contacted R.O.S.E. on behalf of her client, Complainant [redacted], a 44 year-old male survivor of domestic violence in need of facial reconstructive surgery. Stipulation ¶¶ 1, 9. R.O.S.E. informed Ms. Nichols that R.O.S.E. was only for female survivors of domestic violence, which discouraged Mr. [redacted] from applying for The Reconstructive Surgery Program.

B. Procedural History

On March 4, 2009, [redacted] ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against R.O.S.E. alleging sex and sexual orientation discrimination in violation of M.G.L. c. 272, §§ 92A, 98. On June 9, 2009, Complainant filed a Motion to Amend to include an allegation that R.O.S.E. also violated M.G.L. c. 151B, §4 (14). Following an investigation, the MCAD initially issued a finding of Lack of Jurisdiction regarding the charge of sex discrimination in violation of M.G.L. c. 272, §§92A, 98. The Investigator ruled that R.O.S.E. was exempt from §92A because R.O.S.E. was formed pursuant to Section 501(c)(3) of the Internal Revenue Code and was therefore an entity "authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex . . .." M.G.L. c. 272, §92A (10).

On appeal by the Complainant, the MCAD reversed the finding of Lack of Jurisdiction and issued a finding of Probable Cause concerning the allegation of discrimination in a place of public accommodation on the basis of sex. Finding absolutely no evidence that R.O.S.E. discriminates on the basis of sexual orientation, the MCAD issued a finding of Lack of Probable

Cause regarding Complainant's allegation that he was discriminated against on the basis of his sexual orientation. Thus, the allegation that R.O.S.E. discriminates on the basis of sexual orientation is no longer at issue in this case. Because there are no disputes of material fact germane to the jurisdictional issue, the parties, through joint agreement, provided a Stipulation of Facts in lieu of a public hearing and opted to certify the case to the full Commission for a decision on the issue of jurisdiction.

III. SUMMARY OF THE ARGUMENT

Massachusetts prohibits discrimination in a place of public accommodation on the basis of sex. R.O.S.E., like many other private non-profit charitable organizations, focuses its mission and its services on women. However, the single sex focus of R.O.S.E. is not in conflict with Massachusetts law. Rather, it is entirely consistent with M.G.L. c. 272, §92A because, as a small non-profit with a very selective criteria for eligibility for services, it is not a public accommodation within the meaning of the law. Even if it could arguably be considered a place of public accommodation, it is not subject to the prohibition on discrimination on the basis of sex because M.G.L. c. 272, §92A provides an express exemption for organizations, such as R.O.S.E., that are "authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex . . .." M.G.L. c. 272, §92A (10).

If the Commission adopts Complainant's position that R.O.S.E. cannot lawfully limit its services to this particularly vulnerable subpopulation of women, the viability and continued existence of many other charitable organizations that focus on the health, social, educational, vocational, and character development of a single sex will be threatened. This cannot have been the intended result of the M.G.L. c. 272, §92A, particularly in light of the express carve out for

such organizations. Accordingly, R.O.S.E. respectfully requests that the Commission REVERSE the Investigating Commissioner's finding of Probable Cause and dismiss Complainant's complaint in its entirety.

IV. ARGUMENT

A. The R.O.S.E. Fund is Not a Place of Public Accommodation within the Meaning of M.G.L. c. 272, §92A.

A place of public accommodation is defined as "any place . . . which is open to or solicits the patronage of the general public . . .." M.G.L. c. 272, §92A (emphasis added). The statute lists examples of places of public accommodations such as motels, taverns, restaurants, gas stations, barber shops, public highways, theaters, hospitals, etc. *See id.* Admittedly, the list of public accommodations set forth in M.G.L. c. 272, §92A is not exhaustive and courts have held that the provision should be construed liberally and inclusively. *Local Fin. Co. of Rockland v. Mass. Comm'n Against Discrimination*, 355 Mass. 10, 15 (1968). However, established tenants of statutory instruction also require that "none of the words of a statute are to be regarded as superfluous, but each is to be given its ordinary meaning . . .." *Kobrin v. Gastfriend*, 443 Mass. 327, 332 (2005) (internal citation omitted). Thus, notwithstanding the instruction that that statue be construed liberally, for a place to be a public accommodation, it must be open to the "general public."

The word "general," which modifies "public," is defined by Black's Law Dictionary as "relating to the whole kind, class, or order . . . universal, not particularized . . . comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only." BLACK'S LAW DICTIONARY 812 (rev. 4th ed. 1968). The examples of public accommodations provided in the statute share this feature: they are typically open to the patronage of the whole public rather than designed to serve only a portion of the community.

Similarly, entities that are not expressly enumerated in the statute but which Massachusetts courts have found to be public accommodations provide services comparable to those provided by the enumerated public accommodations and provide those services to the *general public*. For example, the Supreme Judicial Court of Massachusetts held that a finance company in the business of making loans was a place of public accommodation. *Local Fin. Co. of Rockland*, 355 Mass. at 15. In bringing the finance company within the definition of a public accommodation, the court gave weight to the fact that one of the enumerated statutory examples was a "retail store or establishment," which "enter[ed] into credit arrangements similar in substance to small loans made by [the finance company] and comparable institutions." *Id.* at n.3. *See also Nathanson v. Mass. Comm'n Against Discrimination*, 2003 WL 22480688, *3-4 (Mass. Super. Ct. Sept. 16, 2003) (holding law office place of public accommodation when law offices were easily comparable to services provided by listed establishments within the statute). Other MCAD cases have expanded on the list of establishments enumerated in §92A in similar ways. *See, e.g., King v. Hanover Ins. Co.*, 2 M.D.L.R. 1429 (1981) (insurance company determined place of public accommodation for similar reasons as *Local Finance Co. of Rockland*); *Lumley v. Flyn*, 5 M.D.L.R. 1031 (1983) (taxicab service found to be place of public accommodation). These entities all provide services appropriate for the entire community and are open to the general public.

1. R.O.S.E. offers services to a very small subsection of a vulnerable population of women and is not open to the general public.

R.O.S.E. is not a place of public accommodation within the meaning of §92A because R.O.S.E. is not "open to" and does not "accept or solicit the patronage of the general public." Unlike the enumerated list of establishments that are public accommodations, R.O.S.E. limits its services to a very small subset of a vulnerable female population and bases eligibility for

services on select criteria. It offers its services only to women who are (1) victims of domestic violence, (2) in need of facial reconstructive surgery, (3) who have been out of the abusive relationship, and (4) who have been living in a safe environment for at least one year. Stipulation, Exhibit 2. R.O.S.E. and its focused charitable and private services are in no way comparable to the services provided by the statutorily enumerated establishments or those establishments that courts have found to be public accommodations, such as a law office and finance company, or taxi cab service.

In fact, none of the case law preceding this decision has gone as far as Complainant would have the MCAD go in this case to sweep a private, selective, non-profit charitable organization within the reach of Section 92A. For example, loan companies, insurance companies, and law offices offer services that nearly every individual within the general population may have a need for at some point in his or her life regardless of race, gender, religion, etc. In contrast, R.O.S.E.'s services will not even be needed by most women, let alone the general public. This is not to say that men cannot be victims of domestic violence. They certainly can and undoubtedly are in need of services analogous to those provided by R.O.S.E. Thankfully, however, it cannot be seriously disputed that the *general public* will not be accessing the services that R.O.S.E. and similar charitable organizations provide. Absent patronage by the *general public*, R.O.S.E. may lawfully choose to restrict its charitable focus to women.

2. R.O.S.E. is akin to a truly private club with genuine selectivity of membership.

An analogous line of cases in which Massachusetts courts have analyzed whether private clubs are public accommodations provides a useful framework for evaluating whether R.O.S.E. is a place of public accommodation within §92A. To determine whether an ostensibly private club is actually a public accommodation, courts evaluate whether there is a genuinely selective

process for applicants to the club. *E.g.*, *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716, 720 (1988); *Solyts v. Wellesley Country Club*, No. 0000050, 2002 WL 31998398, at *6 (Mass. Super. Ct. Oct. 28, 2002); *Human Rights Comm'n v. Benevolent and Protective Order of Elks of the U.S.*, 839 A.2d 576, 583-84 (Vt. 2003).

Applying this principle, the Supreme Judicial Court of Massachusetts held that a fishing and hunting club that limited membership to men only was not actually private club but a place of public accommodation under the statute due to the absence of genuine selectivity in membership. *Concord Rod & Gun Club*, 402 Mass. at 720-21. The Court found that the membership criteria were more illusory than genuinely selective because few male applicants were ever denied membership. Thus, the court concluded that, other than the criteria that an applicant be male, the remaining criteria did not actually need to be satisfied in order to obtain membership. *Id.* at 719-21. In contrast, the court in *Solyts* determined that the country club was not a public accommodation because its selection process demonstrated genuine exclusivity. *Solyts v. Wellesley Country Club*, No. 0000050, 2002 WL 31998398, at *6 (Mass. Super. Ct. Oct. 28, 2002). Thus, it was a private club not subject to Section 92A.

R.O.S.E.'s application process for awarding scholarship funds for free or low cost facial reconstructive surgery is analogous to the membership process for private clubs. Both private clubs and R.O.S.E. apply selective criteria to consider eligibility for acceptance. Not only is R.O.S.E.'s application process inherently selective due to the limited purpose of the fund, its specific eligibility criteria is stringent and exclusive. First, R.O.S.E.'s application mandates that chosen applicants are female victims of domestic violence, and that that violence resulted in the need for facial reconstructive surgery. Second, the applicant must prove that she has been out of an abusive relationship for at least one year, that she is currently living in a safe environment,

and that she can provide two witnesses who can attest to and confirm both situations and who will write sworn statements to that effect. Third, the applicant must supply police reports, medical records, and all other relevant information pertaining to the facial injury. Finally, the applicant must show 2-3 different kinds of proof that the applicant cannot afford surgery through her own means. Stipulation, Exhibit 2. Once accepted, both R.O.S.E. and private clubs then allow chosen applicants the use of services they would not otherwise have access to but for their acceptance.[1] Further, the reason that both distinctly private clubs and R.O.S.E. are interested in detailed and explicit criteria in applicants is to promote the respective organization's limited mission and purpose. Thus, under the analogous "genuine selectivity" standard, R.O.S.E. would most certainly not be characterized as a place of public accommodation because there is genuine selectivity in R.O.S.E.'s selection process.

Even if the genuine selectivity standard were inapplicable, the standard is still a powerful illustration that the statute does not reach certain private scenarios where the services or privileges are offered to only a select few. R.O.S.E.'s charitable focus is very narrow and is distinguishable from other community organizations that, although not for profit, have nonetheless been found to be public accommodations because they provide services to the entire community. For example, the Supreme Court of California held that the Boys' Club of Santa Cruz could not exclude girls from membership under California's anti-discrimination statute because, although the Club was a private nonprofit recreational facility, it opened its doors to the entire youthful population of Santa Cruz with the only condition being that its users be male. *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 81-91 (1985) (emphasis added). In

[1] The fact that R.O.S.E. sometimes seeks eligible women by advertising its services or disseminating emails to a broader section of the public does not render it open to the general public. *See* Exhibit 5. The inquiry is whether there is true selectivity for eligibility for *services*, not whether R.O.S.E. ever interacts with the general public to locate and serve the vulnerable subset of eligible women.

effect, the California court found the Boys' club was not genuinely selective in its membership. In so holding, the court explicitly stated that this result would not "threaten all private organizations which traditionally serve the special cultural or charitable needs of ***particular minority*** groups with common interests" because such organizations that "limit their services and programs to particular minority groups...are not public accommodations." *Id.* at 84 (emphasis added). Thus, the court expressly recognized that certain private charitable organizations which exist only to serve specific vulnerable populations do not fall within the reach of public accommodation statutes.

R.O.S.E. is exactly the type of nonprofit charitable organization that specializes in serving the needs of a specific vulnerable population. It is not comparable to the public accommodations listed in Section 92A, nor is it analogous to organizations such as the Boys' Club of Santa Cruz or the Concord Rod and Gun Club, which open their doors to the community at large with the sole selective criteria that users and members be male. Therefore, Section 92A does not operate to forbid R.O.S.E. from pursuing its extremely narrow and specific charitable purpose. Accordingly, the Commission should issue a finding of Lack of Jurisdiction because R.O.S.E. is not a "place of public accommodation" within M.G.L. c. 272, §92A.

B. The R.O.S.E. Fund, Inc. is Exempt under M.G.L. c. 272, §92A (10) Because it is "Authorized . . . by Federal Law for the Express Purpose of Promoting the Health, Social, Educational, Vocational, and Character Development of a Single Sex . . .."

Even if R.O.S.E. were open to the general public, it would be exempt from compliance with Section 92A because it is "authorized, created, or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex...." M.G.L. c. 272, §92A(10) (the "Exemption"). Throughout these lengthy proceedings at the MCAD, Complainant has taken the untenable positions that this Exemption

exists for the sole purpose of protecting the Arlington Boys Club (or/and the Boy and Girl Scouts of America) from compliance with Section 92A, and that unless a charitable organization regurgitates the precise language of the Exemption in its federal *charter*, the Exemption does not apply. Complainant's position must be rejected because it requires the MCAD to render superfluous certain words contained within the Exemption and cannot have been the Legislature's intent.

1. R.O.S.E. is authorized by Section 501(c)(3) of the federal tax code to pursue its express purpose to assist women.

R.O.S.E. was formed to be operated exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. To be tax exempt under §501(c)(3), an entity must be organized and operated exclusively for exempt purposes. *See* I.R.C. §501(c)(3) (2013). Exempt purposes include, among others, charitable, religious, educational, scientific, and literary objectives. Although the IRS does not take a position on whether it explicitly supports an entity's purpose, it must examine that purpose to determine eligibility for 501(c)(3) status. Once an entity or corporation meets the qualifications in §501(c)(3) it is authorized as a tax-exempt charitable organization under federal law to pursue that exempt purpose. *See id.*

In the probable cause finding, Commissioner Thomas-George stated that R.O.S.E. cannot avoid application of Section 92A by reference to its status as tax exempt under the IRS Code because otherwise, all not-for-profit organizations would be exempt from compliance with Section 92A. Respectfully, Commissioner Thomas-George has misconstrued the argument. The only tax exempt organizations that would be exempt from Section 92A would be those that exist for the "express purpose of promoting the health, social, educational, vocational, and character development of a single sex...." In other words, the charitable purpose for which the entity

received its tax exempt status must fit within the Exemption and all other tax exempt organizations that exist for other purposes (i.e environmental preservation, animal rights, etc.) would not be able to hide behind their status as 501(c)(3) organizations to discriminate.

There is nothing in the plain language of the Exemption that requires the federal government to support or approve of the purpose of an agency by, for example, expressing whether the entity's purpose is in line with federal policy or providing continuous oversight of the entity. Rather, the requirement is simply that federal law has created, authorized, or chartered the organization. In fact, similar to the process of obtaining tax exemption under §501(c)(3), the federal chartering process – which Complainant concedes could establish applicability of the Exemption - does not require that Congress support the activities of chartered organizations. *See* Ronald C. Moe, *Congressional Research Service Report for Congress: Congressionally Chartered Nonprofit Organizations: What They Are and How Congress Treats Them*, at CRS-5, Apr. 8 (2004) ("In addition, there may be an implication that Congress approves of the organizations and is somehow overseeing its activities, which is not the case."). To fall within the Exemption, the IRS need only provide R.O.S.E. federal authorization to pursue its purpose, which is exactly what it did when it granted R.O.S.E. tax exempt status under §501(c)(3). Arguably, the tax code is the most competent way for the federal government to authorize the provision of charitable services by tax-exempt organizations.

2. R.O.S.E.'s express purpose is consistent with promoting the health, social, educational, vocational, and character development of women.

R.O.S.E.'s express purpose is to "assist women who are confronted with survival needs that result from sexual assault, molestation, eating disorders or abuse" and to "break the cycle of domestic violence." To that end, it partners with medical affiliates, including leading hospitals, and participating medical providers, and refers eligible female survivors of domestic abuse to

those providers for reduced or free medical and dental reconstructive procedures. This express purpose fits exactly within the Exemption's scope of promoting the health, social, educational, vocational, and character development of women. R.O.S.E. and its partnering medical providers are erasing physical scars on the faces of female victims of domestic violence to improve their physical health, self-esteem, and promote their character development, as well as to give them more confidence in exploring new and healthy relationships, better career opportunities, and to encourage them to educate themselves and others about the serious repercussions of domestic violence. It is difficult to understand how this purpose could be inconsistent with "promoting the heath, social, educational, vocational, and character development" of women.

In prior filings, Complainant has also taken the position that R.O.S.E. does not exist for the purpose of promoting the health, social, educational, vocational, and character development of women because on its website R.O.S.E. says it "assists" women rather than "promotes" their development and because the website states R.O.S.E. wants to end the cycle of domestic violence without mentioning that its focus is on women. Complainant's position elevates form over substance and ignores the obvious fact that the only reason the parties are before the MCAD is because R.O.S.E. focuses its services on women. Segregating a single sentence from R.O.S.E.'s website cannot possibly capture R.O.S.E.'s purpose, and implying that R.O.S.E. is not "promoting" women and their development while "assisting" them is nonsense.

Moreover, R.O.S.E. need not regurgitate the language of the Exemption in its articles of organization. Complainant has previously argued that the fact that the mission statement of the Boys Club of Arlington identically mirrors the language of the Exemption suggests that the Legislature intended it only apply to that club. Regardless of what he thinks the various and diverse members of the Legislature may have intended, to interpret the statute in this manner

would be to elevate form over substance and lead to unreasonable results. The inquiry is NOT whether the organization has adopted the mission statement of the Boys Club of Arlington. The inquiry is whether the "express purpose" of the organization is consistent with promoting the health, social, educational, vocational, and character development of a single sex. For all the reasons discussed *supra*, it is impossible to see how R.O.S.E.'s mission to "assist women who are confronted with survival needs that result from sexual assault, molestation, eating disorders or abuse" and to "break the cycle of domestic violence," does not clear this hurdle.[2]

3. The Exemption is not limited to federally chartered organizations such as the Boys Club and the Boy and Girl Scouts.

As noted above, "none of the words of a statute are to be regarded as superfluous, but each is to be given its ordinary meaning. . .." *Kobrin v. Gastfriend*, 443 Mass. 327, 332 (2005) (internal quotation omitted). The actual words chosen by the Legislature are critical to the task of statutory interpretation. *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 495 (2013). Complainant's reading of the Exemption—to apply only to certain federally chartered organizations such as the Boys Club and the Boy and Girl Scouts—would render superfluous the words "created" and "authorized" and must be rejected. If the Legislature had intended to limit the Exemption to federally chartered organizations, it certainly could have done so. Further, such a reading of the statute would render the Exemption nearly obsolete since the federal government rarely charters organizations anymore. *See* Ronald C. Moe, *Congressional Research Service Report for Congress: Congressionally Chartered Nonprofit Organizations: What They Are and How Congress Treats Them*, Apr. 8 (2004) ("The congressional practice of chartering

[2] In *U.S. Jaycees v. MCAD*, 391 Mass. 594 (1984), the SJC found the Jaycees, a single sex club did not fit within the exemption because, although they excluded women from membership, they otherwise included women in all other Jaycee sponsored activities. Thus, they cannot have been created for the "express purpose" of promoting men's development. Unlike the Jaycees, R.O.S.E. is unquestionably expressly dedicated to promoting women's development.

selected private, nonprofit organizations that engage in patriotic, charitable, historical, and educational activities is essentially a 20th century phenomenon.").

The only case law to give any insight into interpreting the Exemption are two MCAD decisions from the early 1980s, both of which simply note examples of organizations that are exempt under the statute. *See Oldham v. Concord Rod & Gun Club*, MCAD No. 80-BPA-0054 (MCAD, Dec. 18, 1984) (using "i.e." to describe the Boys Scouts and Girl Scouts as two examples of organizations exempt under the statute) (emphasis added); *Fletcher v. U.S. Jaycees*, 3 M.D.L.R. 1058 (MCAD, Jan. 27, 1981) (using the language "***such as*** the Boy Scouts of America . . . or the Boys Club of America . . ." to provide examples of organizations exempt under the statute) (emphasis added). In neither case did the Commission rule that the Exemption is limited to those two organizations. In fact, neither case actually concerned the Exemption, but concerned whether the membership organizations were public accommodations; thus, the Commission's statements concerning the Exemption are mere dicta.[3]

The Commission cannot disregard the words "created" and "authorized" in the Exemption without breaking a fundamental rule of statutory construction; the Exemption cannot therefore be limited to "chartered" organizations such as the Boys Club of America and the Boy Scouts. Further, "express purpose" cannot mean the mere regurgitation of the language within the Exemption; to hold otherwise would lead to unreasonable results. Accordingly, even if R.O.S.E. is deemed to be a "place of public accommodation," R.O.S.E. is exempt from the prohibitions in §92A because it is an entity "authorized . . . by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex . . .."

[3] Further, to the extent those cases could be said to be authoritative in any manner, they cannot continue to be the law because, as noted *supra*, such a reading renders the words "created" and "authorized" superfluous.

C. M.G.L. c. 151B, §4 (14) Does Not Apply to R.O.S.E. Because Subsection 14 Concerns Only Credit-Related Services.

Subsection 14 provides that it shall be an unlawful practice "[f]or any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, marital status, age, or sexual orientation . . .." M.G.L. c. 151B, §4 (14) (2013). In order to property interpret Subsection 14 the statute must be read in context and given effect consistent with its plain meaning. *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001).

In *Nathanson*, the most recent case to decide the issue of Subsection 14's scope, the Superior Court in Massachusetts held that Subsection 14 "focuses ***solely*** on credit services . . .." *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *3 (Mass. Super. Ct. Sept. 16, 2003) (emphasis added). In coming to this conclusion, the court specifically and unequivocally held that Subsection 14 could not be the basis of the MCAD's finding of discrimination where the services at issue were not credit related because interpreting the statute to isolate the term "services" from the context of credit would impermissibly require reading portions of the statute out of context. *Id.* Thus, Subsection 14 is inapplicable to R.O.S.E. because it does not provide any credit-related services within the meaning of §151B.

To further illustrate that the interpretation of Subsection 14's scope in *Nathanson* was correct, the statutory principle of *ejusdem generis*, provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Mammoet USA, Inc. v. Energy Nuclear Generation Co.*, 64 Mass. App. Ct. 37, 41 (2005) (internal quotations omitted). The principle "indicates a more limited contextual meaning for a word that in isolation might appear general or broad." *Id.* For example, the Appeals Court of Massachusetts

held that when looking at the context of the statute in question, the words "building" and "structure" preceding the word "improvement" narrowed the meaning of "improvement" to make it more specific, referring only to construction-related improvements. *Mammoet*, 64 Mass. App. Ct. at 41-42. Similarly, in Subsection 14, not only does the word "credit" precede the word "services" thereby narrowing the meaning of "services," but also, the entire subsection is in the context of credit-related activities. Furthermore, it is of no consequence that Subsection 14 refers to "credit or services," not "credit and services." The statute at issue in *Mammoet* said "building, structure or improvement," and the Appeals Court of Massachusetts still found that the meaning of "improvement" was modified pursuant to *ejusdem generis*. *See id.* (emphasis added).

Moreover, as a rule of statutory construction, an enactment cannot be presumed to have been meaningless; "[i]t must be assumed to have intended to produce some effective result." *Allen v. Commonwealth-Atl. Nat'l Bank of Boston*, 248 Mass. 302, 307 (1924). To read Subsection 14 as encompassing more than credit-related services would be to render the exemptions within §92A irrelevant. If Subsection 14 meant that no person (or organization) that renders "services" could deny those "services" on the basis of sex, then an organization that is exempt from compliance with Section 92A because it has been "created, authorized or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex" would nonetheless be liable under Section 151B. The Commission cannot assume that the Legislature intended to render ineffective the explicit exemptions contained in §92A by reading Section 151B(14) in this way. It is a fundamental tenet of statutory interpretation that the Commission should not adopt a construction of a statute if the consequences of such a construction are absurd. *Bates v. Dir. of the Office of Campaign & Political Fin.*, 436 Mass. 144, 165 (2002).

The cases previously cited by Complainant to argue otherwise, i.e. a federal case from 1984, an MCAD decision, and a Superior Court case from 1986, are all distinguishable or have been overruled. First, not only is a federal court's interpretation of a Massachusetts statute from 1984 non-binding, more importantly, the federal court's analysis did not even address the argument that "services" in Subsection 14 relates solely to the provision of credit. *See Franklin v. Order of United Commercial Travelers of America*, 590 F. Supp. 255 (Mass. 1984). Second, the MCAD decision from over ten years ago, *Stropnicky v. Nathanson*, 1999 WL 33453078, at *1 (MCAD, July 26, 1999), was expressly rejected by the Superior Court. *See Nathanson,* 2003 WL 22480688, at *3. Third, the Superior Court case from 1986, relying on *Franklin*, not only put forth an incomplete analysis of the issue and therefore should not carry weight, but it was also decided nearly thirty years ago. *See Green v. Blue Cross of Mass.*, 8 M.D.L.R. 1257 (Mass. Super. Ct. Aug. 21, 1986). *Nathanson,* the most recent Superior Court decision that directly and unambiguously answers this issue, is the only authority the Commission needs to determine that Subsection 14 is inapplicable to R.O.S.E.

D. To hold that R.O.S.E. Cannot Limit its Charitable Aims to Promoting the Health and Well-being of Female Victims of Domestic Violence Would Unconstitutionally Infringe Upon R.O.S.E. and its Donors' Freedom of Speech and Freedom of Association.

Even if the Commission were to find that R.O.S.E. is a place of public accommodation within §92A and/or that Subsection 14 of M.G.L. c. 151B, §4 applies to "services" generally, R.O.S.E. is protected from being subject to either provision by its First Amendment rights to freedom of speech and its corresponding right of freedom of association. The freedom of association has been recognized in two senses: 1) it encompasses the right to enter into and maintain certain intimate relationships, and 2) it encompasses the right to associate for the purpose of engaging in those activities protected by the First Amendment. *Donaldson v.*

Farrakhan, 436 Mass. 94, 100 (2002) (internal quotation omitted). "[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). In this case, the latter interpretation is implicated because donating money to directly benefit a particular person or group has already been held to be constitutionally protected expressive activity under the First Amendment. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Further, "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

For example, the United States Supreme Court found that the application of the New Jersey public accommodations law requiring the Boy Scouts to readmit a homosexual scout leader unconstitutionally burdened the Boy Scouts' right of expressive association under the First Amendment. *Id.* The Court reasoned that the Boy Scouts, a private, nonprofit organization, was engaged in expressive association when its general mission was "to instill values in young people," and that forcing the Boy Scouts to include a homosexual as a scout leader would significantly affect the Boy Scouts' ability to advocate both its private and public viewpoints because the Boy Scouts taught young people that homosexual conduct was not "morally straight" and they did "not want to promote homosexual conduct as a legitimate form of behavior." *Id.* at 648-51.

Similarly, R.O.S.E. is a private, nonprofit organization engaged in expressive association with its mission to coordinate the provision of services from a small base of donor benefactors to

promote the development of female survivors of domestic violence. R.O.S.E. decided at its inception that female victims of domestic violence are a special group facing unique challenges and has tailored its programs and sought donations expressly for that purpose. R.O.S.E. has openly expressed its reasons for assisting women on its website, including "[i]n Massachusetts alone more than 55 women were killed in 2007 as a result of domestic violence" and "[a]lmost 1/3 of all emergency room visits for women between the ages of 18-44 are a direct and immediate result of domestic violence."[4] Being forced to change its mission to include men will significantly affect R.O.S.E.'s ability to advocate its public and private viewpoints that women are uniquely affected by domestic violence abuse. Further, the inclusion of men will detract from R.O.S.E.'s mission to provide support for female survivors of domestic violence, disrupt the tailor made referral programs that R.O.S.E. already has in place, and most importantly, will cause R.O.S.E. to lose valuable donations from people who want to specifically target their donations to women survivors, thereby threatening its very existence as a charitable organization. *See Nathanson v. MCAD*, 2003 WL22480688, at n. 9 (Mass. Super, Setp. 16, 2003) (distinguishing a private law office from organizations such as NAACP and NOW, which, though arguably public accommodations, may be engaging in expression on behalf of their members protected by the First Amendment).

Accordingly, the Commission should find that R.O.S.E. is protected from being subject to the provisions in M.G.L. c. 272, §§92A, 98 and M.G.L. c. 151B, §4 (14) by its First Amendment rights to freedom of speech and freedom of association.

[4] *See* R.O.S.E. website, http://www.rosefund.org/index.php?option=com_content&view=article&id=8&Itemid=19.

V. CONCLUSION

Holding R.O.S.E. subject to Section 92A would have the perverse result of rendering unlawful services rendered by an organization that exists for the express purpose of assisting a particularly vulnerable sub-population of women. This vulnerable population is within the category of disadvantaged minority groups anti-discrimination statutes such as Section 92A were originally intended to protect. It cannot have been the Legislatures intention to sweep this private, donation dependent, highly selective organization that exists to promote the development of vulnerable women within the reach of Section 92A. For the foregoing reasons, Respondent respectfully requests that the Commission REVERSE the Investigating Commissioner's finding of Probable Cause and dismiss Complainant's complaint in its entirety.

Respectfully Submitted,

Dated: August 26, 2013

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