MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Docket No. 09-BPA-00597

[redacted]

Complainant

v.

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

Respondent

REPLY BRIEF FOR RESPONDENT

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I. INTRODUCTION

Respondent The R.O.S.E. Fund, Inc. (R.O.S.E.) submits this Reply Brief to address several arguments made by Complainant [redacted] in his initial brief.

First, Complainant's initial brief to the Commission is wholly devoid of any reference to R.O.S.E.'s selectivity of eligibility for services, which establishes that it is a private organization and not open to the general public. Instead, he focuses on the argument that R.O.S.E. is a "place" of accommodation within the meaning of Section 92A. Regardless of whether R.O.S.E. is a "place" within the meaning of the statute, it offers its services exclusively to a small, vulnerable, subpopulation of women. Thus it is not open to the *general public*. The mere fact that R.O.S.E. solicits the assistance of domestic violence advocates in order to locate and serve that vulnerable subpopulation of women does not mean it solicits the patronage of the general public.

Second, Complainant asserts, without support or even a developed argument, that R.O.S.E. is somehow inciting or aiding hospitals and medical providers in unlawful discrimination. The argument is an unsupported distraction. The "services" at issue here are those that R.O.S.E. provides, which are the *referrals* of female victims of domestic violence to medical providers. Whether medical providers themselves limit their services to women – or whether they accept referrals from a number of sources - is neither part of the record nor something over which R.O.S.E. has any control.

Third, Complainant's insistence that the exemption contained in Section 92A for entities "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" is inapplicable to

R.O.S.E. is premised on dicta and ignores the plain language of the statute. His reading of the exemption to apply exclusively to the Boys' Club and Boy Scouts would render the exemption virtually meaningless.

Fourth, Complainant recognizes that his reading of Chapter 151B, § 4(14) might operate to negate the effectiveness of the express exemptions to the public accommodation statute. To harmonize this obviously incongruous result, Complainant urges the Commission to invent statutory language that would authorize it and courts to apply the exemptions contained exclusively in Section 92A to Chapter 151B, § 4(14) without any legislative authority to do so. The more reasonable approach would be to read Chapter 151B, §4 (14) in context with the entire statutory scheme and apply it to the provision of credit-related services only.

There is nothing in Massachusetts law that prevents R.O.S.E. and its donors from selectively offering the very limited charitable services to a particularly vulnerable sub-population of women. This does not mean that male victims of domestic violence are not also in need of assistance. They assuredly are and similar non-profit organizations may well exist that are either devoted to helping men or make no gender distinction. R.O.S.E. and its donors, however, have lawfully decided to focus on women. Forcing R.O.S.E. to change its mission and also serve men is not required by the law and would have the perverse result of severely limiting the ability of private charitable organizations to continue to assist the precise classes of vulnerable people the Massachusetts public accommodation law was intended to protect.

II. REPLY ARGUMENT

A. Regardless of whether R.O.S.E. is a "place" within the meaning of the public accommodation statute, it is not open to the "general public."

The *Currier* case that Complainant cites liberally in his initial brief is not analogous to the present situation and offers little guidance to the Commission. In *Currier*, the Court focused

on whether a non-profit organization, the National Board of Medical Examiners ("NBME"), that creates and administers the United States medical licensure test is a "place" of public accommodation in the absence of a physical presence in Massachusetts. *Currier v. Nat'l Bd. of Med. Exam.*, 462 Mass. 1, 965 N.E.2d 829 (2012). *Currier* is inapposite because R.O.S.E. is not advancing the argument that it is not subject to Section 92A because it has no physical location in Massachusetts where female domestic violence victims in need of facial reconstructive surgery come to receive referral services. Rather, R.O.S.E. is not subject to Section 92A because it is not open to and does not solicit the patronage of the *general public*. The *Currier* court is entirely silent on how to determine whether a "place" – regardless of whether it is a bricks and mortar establishment or conducts its business over the phone and internet - is open to the general public or whether it is private.[1]

The primary argument Complainant makes in support of his contention that R.O.S.E. is open to and solicits the patronage of the general public is based on two emails sent to domestic violence advocates informing them of R.O.S.E.'s services and requesting help in identifying eligible recipients. First, at the outset, it is notable that these email "advertisements" were not sent to the *general* public but were selectively sent to domestic violence advocates and allies. Second, even if these emails suggests that R.O.S.E. was soliciting the *assistance* of the general public to locate eligible recipients of its charity, the emails are not evidence that R.O.S.E. solicits the *patronage* of the general public. Rather, the only patronage R.O.S.E. has ever sought is that of female victims of domestic violence in need of facial reconstructive surgery who meet the stringent eligibility criteria.

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[1] Although the *Currier* court did not analyze whether the NBME is open to the general public, it noted that NBME does not establish eligibility requirements to take the licensure exam. *Currier*, 462 Mass. at 7, 965 N.E.2d at 834. NBME simply administers the exam and reports results to state licensing authorities. *Id.* Thus, it cannot be said to be selective in whom it serves and is open to the general public.

As explained more fully in R.O.S.E.'s initial brief, the analysis of whether R.O.S.E. is open to the general public or whether it is private can be guided by cases concerning private organizations with selectivity for membership. Complainant misses the point when he states that "what matters for purposes of the definition of public accommodation is that any member of the general public who meets the qualifications can access the public accommodation." Complainant's Brief at p. 14. That is not what matters. What matters is whether the ostensibly private organization has genuine selectivity in its eligibility requirements or whether the eligibility requirements are, in fact, illusory. *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716, 721, 524 N.E.2d 1364, 1367 (1988). ("While it is true that several factors tend to show that the Club is not open to, and does not accept, the patronage of the general public, the determinative factor in this case, requiring the conclusion of publicness, is the total absence of *genuine* selectivity in membership.").

In *Concord Rod & Gun Club*, the court determined that the club's membership requirements – such as age and residency - were illusory and did not effectively operate to exclude applicants *except for* women. *Id.* at 720, 1366 (noting that every single male applicant for membership during a two year period was accepted). In contrast, R.O.S.E.'s eligibility factors are designed to identify a select group of eligible and appropriate recipients of R.O.S.E.'s charity. R.O.S.E. has chosen to serve only women with unique facial injuries who have taken concrete steps to improve their safety and lives. It screens applicants and rejects anyone – including women - who does not meet the stringent requirements. It is truly selective in whom it elects to serve.[2]

[2] R.O.S.E. has not advanced any argument that it is not a public accommodation because it is a non-profit organization that does not charge for its services. Therefore, the legislative history Complainant recounts on page 12 of his initial brief is immaterial. The fact that the Legislature repealed the express exemption for *all* charitable organizations in 1971 (and replaced it with the single sex exemption discussed *infra*) does not render meaningless

B. R.O.S.E. does not aid or incite public accommodations to discriminate.

For the first time in this protracted dispute, Complainant makes the argument that R.O.S.E. is separately liable for aiding or inciting discrimination in a place of public accommodation. Complainant's argument should be summarily rejected. The parties stipulated to the relevant facts in lieu of a public hearing. Those facts concern whether R.O.S.E. discriminates in violation of the law in the provision of its *own* services. Those facts do not concern whether the hospitals and providers to whom R.O.S.E. refers eligible female victims of domestic violence discriminate in the provision of *their* services. There is absolutely no indication in the record – nor would there be any such indication if this case were brought to a public hearing – that the hospitals and providers limit their services to women or otherwise discriminate against men. In fact, there is nothing in the record that speaks to whether area hospitals obtain referrals for free or reduced cost facial reconstructive surgery from sources other than R.O.S.E. There is nothing in the record to establish whether Complainant contacted any hospitals or providers seeking free or reduced cost surgery or even inquired with other charitable organizations. The only record evidence is that R.O.S.E. offers its limited referral services to qualifying women. The question before the Commission is whether R.O.S.E.'s decision to limit its referral services is lawful. The question is not whether area hospitals and providers discriminate. If that were the question, those area hospitals would surely have been invited to participate in this proceeding in order to establish that they do not, in fact, discriminate.

Complainant asserts that similar to the manner in which NBME in the *Currier* case "controls the conditions under which the [medical licensure] exam is administered," R.O.S.E. somehow controls "conditions of access" to hospitals. Complainant's Brief at p. 12, quoting

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the requirement that an entity – whether charitable or not - must be open to the *general public* to fall within the ambit of Section 92A.

Currier, 462 Mass. at19, 965 N.E.2d at 843. It does no such thing. In *Currier,* NBME contracted with a third party to provide the physical structure where the exam was administered but it controlled every other aspect of the exam. *Currier,* 462 Mass. at 19-20, 965 N.E.2d at 843. Passing the NBME is required for medical licensure in Massachusetts. *Id.* at 4-5, 833. As such, NBME was akin to a gatekeeper with the power to decide who is able to practice medicine. R.O.S.E. is not a gatekeeper to access to hospitals or even to free or reduced cost medical care. R.O.S.E. merely provides one avenue for an initial referral to hospitals or providers. Whether, for example, a participating hospital provides sufficient access for individuals with disabilities or accommodations for a nursing mother, which was the issue in NBME, is not within R.O.S.E.'s control. Most importantly, whether the hospital restricts whom it serves is also not within R.O.S.E.'s control. Hospitals and providers have entire freedom and discretion to make their own decisions about whom they serve.

Complainant's reliance on *Bowers v. NCAA*, 151 F. Supp. 2d 526 (D.N.J. 2001) is similarly misplaced. In that case, the federal court in New Jersey decided that even if the NCAA was truly a private club, its symbiotic relationship with public accommodations, such as colleges, rendered it subject to New Jersey's public accommodation law. *Id.* at 540. The NCAA has member institutions (colleges) that cede decision making to NCAA concerning who has access to and what occurs on athletic playing fields. *Id.* The NCAA and collegiate athletic programs are entirely dependent on each other. *Id.* In contrast, the relationship between R.O.S.E. and the hospitals and providers who donate their charitable services to victims referred by R.O.S.E. is not symbiotic. The hospitals and providers are no way dependent on R.O.S.E., have ceded no authority to it, and are not restricted in any way in the services they provide or how they provide them. R.O.S.E's limited referral services do not serve as a method for denying access to a place

of public accommodation. Rather, R.O.S.E. has simply chosen to focus its limited resources on a vulnerable subpopulation of women, leaving open all other avenues of access to public accommodations.[3]

C. R.O.S.E.'s reading of the exemption in Section 92A would give meaning to every word the Legislature chose to include in the exemption while remaining consistent with the policy goals of the public accommodation statute.

Complainant's assertion in his initial brief that the Massachusetts Supreme Judicial Court ("SJC") has twice explained that the exemption in Section 92A for entities "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" applies only to federally chartered organizations such as the Boys' Club and Boy Scouts of America omits the crucial aspect of these purported "explanations", which is that the SJC has never actually discussed or analyzed the exemption. In fact, the exemption was not even at issue in either of the cases in which the SJC observed, *in dicta*, that the exemption would exempt organizations *such as* the Boys' Club and Boy Scouts. *See Concord Rod & Gun Club*, 420 Mass at 720, 524 N.E.2d at 1367 (noting that the exemption, which applies to organizations *such as* the Boy Scouts and Girl Scouts, reflects Legislative intent that some membership clubs that do not qualify for this exemption may be subject to the Section 92A). *See U.S. Jaycees v. MCAD*, 391 Mass. 594, 602, n. 4, 463 N.E.2d 1151, 1156, n. 4 (1984) (rejecting the MCAD's analysis that the because the Jaycees do not qualify for the exemption, which *according to the MCAD* applies only to federally chartered

[3] R.O.S.E. does not advance any argument that it is exempt from the prohibition against gender based discrimination because it has a good justification to discriminate. *See Complainant's Brief* at pp. 14-16. Thus, the *Nathanson* and *Foster* cases relied on by Complainant in section B(1) of his brief are not applicable. To the extent *Nathanson* and *Foster* provide any guidance to the Commission, they further illustrate the distinction between private organizations with true selectivity and organizations open to the public whose sole – and unlawful – eligibility criteria are gender based. Thus, a law office and athletic facility cannot refuse to provide services for the sole reason that clients are male. R.O.S.E., however, bases eligibility determination on factors in addition to gender and does not offer its services to the *general public*.

organizations such as the Boys' Club and Boy Scouts, they must be a place of public accommodation, but also noting that the Jaycees do not have the requisite single sex focus of the exemption in any event). Those cases are neither controlling nor particularly helpful to the analysis because the SJC did little more than make offhand observations.

In the absence of binding authority from the SJC or any sort of interpretive analysis from courts, the Commission must engage in its own statutory interpretation of the exemption. As explained in R.O.S.E.'s initial brief, Complainant's insistence that the only organizations exempt from Section 92A are the Boys' Club and Boy Scouts ignores the plain language of the exemption, which is that it applies to organizations "authorized, created *or* chartered" by federal law. Regardless of whether the initial intent of the exemption was to protect the Boys' Club—and as the Commission most assuredly understands, it is always difficult to discern the intent of an entire body of legislators—the intent does not trump the plain language of the statute.

The federal tax code is one of the primary ways the U.S. government impacts the daily lives and choices of individuals and organizations. For example, the mortgage interest deduction is widely recognized as the primary manner in which the federal government promotes home ownership. Particularly in light of the virtually defunct federal charter system, the tax code is now one of the only ways for the federal government to put its stamp of approval on an organization and its mission. *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). By obtaining tax exempt status under Section 501(c) (3) of the U.S. tax code, the federal government has authorized R.O.S.E. to pursue its mission and, so long as it does so, to be exempt from paying taxes. I.R.C. §501(c) (3).

Complainant contends that R.O.S.E. is "authorized" only by state law because it is registered as a corporation in Massachusetts. Registering as a corporation under state law simply serves to define how the entity will be treated under the law and what its rights and liabilities may be. In fact, obtaining corporate status under state law is similar to obtaining 501(c) (3) status under federal law. Both processes provide a mechanism to determine the legal rights of the entity. R.O.S.E. is therefore "authorized" under both state and federal law. There is nothing in Section 92A that requires federal authorization to the exclusion of state authorization. Moreover, Massachusetts does not engage in any sort of analysis or inquiry into an organization's mission when it approves a corporation's registration. In contrast, in order to obtain 501(c) (3) status, an organization must demonstrate to the IRS's satisfaction that its purpose meets the requirements of the tax code.

It is difficult to imagine the parade of horribles that Complainant believes will happen if the exemption is interpreted to be applicable to charitable organizations that are tax exempt and that exist for the express purpose of promoting the development of a single sex. This is not a slippery slope that would allow all tax exempt organizations to discriminate. Rather, the exemption is limited to those organizations that exist to promote the development of a single sex. Organizations that exist for other charitable purposes, such as for public safety or environmental purposes, but which wish to limit participation to a single sex would not fall within the exemption. Moreover, the organization's purpose could not be illusory and would need to be examined to determine if the organization truly existed to promote men or women's health, social, educational, vocational, and character development. *See Jaycees*, 391 Mass. at 602, n. 4, 463 N.E.2d at 1156, n. 4 (observing that "the single gender emphasis of the Boys' Club's and Boy Scouts' activities clearly far exceeds that of the Jaycees, who permit women to attend

membership meetings and to participate fully in all Jaycees-sponsored activities."). Surely, the Commission and courts can undergo their own analysis of an organization's unique purpose to determine whether it is consistent with the exemption or whether it is simply an excuse to discriminate.

Fear of a slippery slope does not prevent application of the exemption to R.O.S.E. in this case. As explained in R.O.S.E.'s initial brief, R.O.S.E. exists for the purpose 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." That express purpose promotes women's physical health, self-esteem, prospect for economic and emotional security including steady employment, and full integration into society as self-assured and healthy individuals. It is disingenuous to argue, as Complainant has, that simply because R.O.S.E. has expressed its purpose in its own terms rather than parrot the language of the Boys' Club, it does not exist for the express purpose of promoting the development of women. It most assuredly does.

D. Complainant's interpretation of Chapter 151B, § 4(14) would impermissibly require the Commission to amend subsection 14 to reconcile it with the parameters and exemptions of the public accommodation statute.

Complainant's reading of Chapter 151B, § 4(14) to include all services without limitation would render utterly meaningless the entirety of the public accommodation statute. Gone would be the inquiry into whether the entity providing services is open to the general public. Gone would be the express exemptions that the Legislature found necessary to include. Instead, any individual or entity offering any services whatsoever would be required to offer them to everyone without exclusion. Thus, an otherwise private club that does not fall within the public accommodation statute would nevertheless fall within Chapter 151B, § 4(14). So too would the

Boy Scouts and similar organizations that Complainant concedes are exempt from the public accommodation statute.

Recognizing the absurdity of this result, Complainant proposes that the Commission invent statutory language authorizing it to graft the exemptions and parameters of the public accommodation statute onto Chapter 151B, § 4(14). Neither courts nor the Commission has any authority to re-write the statute and exempt from compliance with Chapter 151B, §4(14) those organizations exempt under Section 92A. Rather, adjudicatory bodies must give a reasonable interpretation of statutes using cannons of statutory construction. Those cannons require an interpretation that the word "services" is modified by the word "credit" in Chapter 151B, §4(14) and that the entire statutory scheme was designed to address discrimination in the provision of credit or credit-related services.

Complainant's creative argument that the legislative history of Chapter 151B, §4(14) somehow implies that the section relates to all services rather than just credit-related services is unpersuasive. First, regardless of whether subparts (1) – (6) were present in the initial enactment of the statute, Section 4(14), by its clear terms, has an obvious focus on an individual's credit. In addition to the prohibition against discrimination in the provision of credit and services, the statute adds *in the same sentence* that is it unlawful "to adversely affect an individual's *credit* standing because of such individual's sex or marital statutes." (emphasis supplied) The clear focus of the entirety of Section 4(14) is on protecting an individual's access to credit. Second, the addition of subparts (1) – (6) reflects the Legislature's belief as of the date of the amendments that Section 4(14) applies to credit and credit-related services. Otherwise, why would the Legislature have amended the statute to make lawful six different credit related practices?

There is good reason for the Commission to depart from its 1999 decision in *Stropnicky v. Nathanson*, 1999 WL33453079 (MCAD, July 26, 1999). First, that decision was expressly rejected by the Massachusetts Superior Court. *Nathanson v. MCAD*, 2003 WL 22480688, at *3 (Mass. Sup. Ct., Sept. 16, 2003). Second, as noted in R.O.S.E.'s initial brief and explained *supra*, such an interpretation would result in the vitiation of the entire public accommodation statutory scheme. That could not have been the intent of the Legislature.

III. CONCLUSION

For the foregoing reasons and for the reasons stated in its initial brief, 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,

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