COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT
C.A. NO. 03-01403

SHERVIN KHAKIAN,
Plaintiff

v.

FLEET NATIONAL BANK
Respondent

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANT'S MOTIONS FOR REMITTITUR OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON DAMAGES, AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

I. INTRODUCTION

As August 2002 approached, Shervin Khakian was riding the crest of a wave of recent successes at Fleet National Bank, the most recent being his selection together with Ruth Correia as Acting District Manager for the Newton District pending the arrival of the permanent District Manager, Donald Stevens. What Mr. Khakian could not possibly imagine is that Mr. Stevens would orchestrate over the course of only five months a classic "hatchet job" culminating in the abrupt end of Mr. Khakian's highly successful 18 year banking career at Fleet. It began innocently enough with Mr. Stevens and Mr. Khakian sharing a common bond of having a young son. However, when speaking of his own son (in front of other managers besides Mr. Khakian), Mr. Stevens described playing a war game where he would boast that, "We kill all the foreigners." This inappropriate story gave the first evidence of Mr. Stevens' discriminatory state of mind against foreigners which would soon be reflected in his conduct toward Mr. Khakian. Shortly after the "Kill all the foreigners" story, Mr. Stevens began to demean and abruptly dismiss Mr. Khakian in front of his colleagues at Branch Managers' meetings. Then, branch

assessments, which Fleet's witnesses conceded were merely designed to assist branch managers in preparing for and passing the annual risk management audits, were suddenly being used to attack the operational soundness of Khakian's branches. The negative information was being compiled despite the fact that Mr. Khakian never failed an audit, had taken two failing branches and led them to passing grades on the audits, and that many branches received the same branch assessment reviews as Khakian. Then, without warning Mr. Stevens asked for Mr. Khakian's resignation in substance because Fleet's culture had changed and Mr. Khakian did not fit in. When Mr. Khakian returned to tell Mr. Stevens that he would not resign, Mr. Stevens was armed with a Warning and Performance Improvement Plan which he literally threw across the desk to Mr. Khakian, with the warning that, in substance, it would do Mr. Khakian no good because Mr. Steven would assure that Mr. Khakian was fired. The Warning – a form document filled with generalized "management speak" not specific to Mr. Khakian's situation – was specious on its face. Demonstrating that the Warning was just a sham, Mr. Stevens failed to deliver on his commitment in the Warning to meet and "coach" Khakian weekly. Despite the Warning's demand that Mr. Khakian deliver "consistent results across all four quadrants" of the brand new Winning Gold program, even Mr. Stevens' boss, Danroy Henry, conceded there were no empirical tests by which such performance could be measured. In the end, Mr. Stevens subjected Mr. Khakian to a purely subjective standard in which he was the sole arbiter, and that was insidious. When the 30 days of the Warning period ended, no one at Fleet informed Khakian whether he had satisfied his requirements, and Stevens refused to answer Khakian's telephone calls. Meanwhile Stevens learns sometime in December about a $600 rebate, for which he knew Khakian had his authority, held it close to his vest, then used it to terminate Khakian on January 10, 2003. Fleet National Bank's corporate response to Khakian's claim in the Massachusetts

Commission Against Discrimination ("MCAD") was to embark on a policy of calumny against Khakian with a reckless disregard for statements made under oath and filed at the MCAD. After 6 days of trial and more than 5 hours of deliberation, the jury found that Fleet National Bank did discriminate unlawfully against Mr. Khakian and awarded him damages totaling One Million Dollars. As this Brief will demonstrate, the verdict was clearly warranted by the evidence.

II. ARGUMENT

A. Fleet's Motion For Judgment Notwithstanding The Verdict Should Be Summarily Denied As Mr. Khakian Adduced Ample Evidence Of Pretext And Disparate Treatment To Support The Jury's Finding Of Discrimination.

Fleet's burden in challenging the jury's finding of unlawful discrimination on a motion for judgment notwithstanding is onerous. Our appellate courts have held that taking the ultimate issue of liability for discrimination out of the jury's hands is disfavored because the ultimate issue of discrimination is almost always one of intent, a factual question for the jury. *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 820 (1997); *Blare v. Husky Injection Molding Sys. Boston, Inc*., 419 Mass. 437 (1995). With deference to the jury, on a motion for judgment notwithstanding the verdict, the evidence is viewed in light most favorable to the plaintiff and evidence favorable to the defendant is disregarded. *Labonte*, 424 Mass. at 821. "A jury verdict must be sustained if a plaintiff has presented *any evidence* from which the jury reasonably could have arrived at that verdict." *Id*. (emphasis supplied). The weight and credibility of the evidence are not to be considered. *Sahagan v. Commonwealth,* 25 Mass. App. Ct. 953 (1988).

When the law under Chapter 151B is applied in connection with a motion for judgment notwithstanding the verdict, Fleet's burden becomes even more onerous. On a motion for judgment notwithstanding the verdict, the jury verdict must be upheld if there is *any* evidence from any source that only *one* of the reasons given by Fleet was a pretext. *Lipchitz v. Raytheon*

Company, 434 Mass. 493, 501 (2002) (emphasis supplied) (holding that "if the fact finder is persuaded that *one or more* of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind."). Thus, Fleet's motion must be denied if there is a scintilla of evidence that only *one* of the many reasons given by Fleet was a pretext, from which the jury could (but was not required) to infer unlawful discrimination. *Id*. at 501.

1. There Was Evidence That Every One Of Fleet's Reasons Was Pretextual.

With Fleet's Position Statement to the MCAD (Ex. TT) as a trail map, Mr. Khakian adduced evidence that *every* one of the reasons given by Fleet justifying his termination was a pretext. Evidence that any one of these reasons was false is, of course, sufficient to sustain the jury verdict. *See Lipchitz*, 434 Mass. at 501. Moreover, the fact that the only reason cited by Mr. Stevens to Mr. Khakian for his termination was the $600 rebate enabled the jury to find that Fleet concocted many of its reasons after Mr. Khakian's termination, which by definition is pretextual. *See Trustees of Forbes Library v. Labor Relations Comm'n,* 384 Mass. 559, 568 (1981) (holding that "employer should not be permitted to escape liability by invoking after the fact some defect in the employee's performance."); *Buckley Nursing Home, Inc. v. Massachusetts Comm. Against Discrimination*, 20 Mass. App. Ct. 172, 181 (1985) (upholding finding for plaintiff because reasons given "were in fact not the reasons for the selection, but were a post hoc rationalization for the racially motivated act.").

a. *Winning Gold*

Faced with the unassailable fact of Mr. Khakian's stellar sales performance and excellent performance reviews for many years prior to his termination, Fleet's overall strategy was to throw up a smoke screen in the form of the "Winning Gold" program. Fleet attempted to brush

aside Mr. Khakian's numerous awards and excellent performance reviews by arguing that, under the "new and bold" Winning Gold strategy launched in the summer of 2002, "gone were the days" when sales alone were important at the Bank. Operations, Fleet claimed, was now the paramount criteria on which a branch manager's performance was measured. As if this suggestion was not specious enough – and the evidence permitted the jury to find that Winning Gold did not change the long standing principles of successful banking at Fleet – the Bank further claimed that the four quadrants of the Winning Gold program (the so-called Dashboard) was now the standard by which to measure a branch manager's success. According to this theory, Mr. Khakian, despite his 18 years of banking experience and an armful of awards and accolades, just could not meet this more difficult standard.

The disingenuousness of this ploy was easily unmasked on several levels. First, Mr. Khakian's performance reviews for several years prior to his termination – all rating him the highest measure, an outstanding contributor – evaluated him on the areas which make up the four categories of the Dashboard. (Exhibits A, B). Second, the Winning Gold Dashboard itself established criteria in each of the four quadrants that Mr. Khakian had already met as of the time of his termination. The quadrants on employee experience and customer experience quadrants required merely that branch managers achieve 80% favorability by December 31, 2003, almost a full year after Mr. Khakian's termination. Mr. Khakian testified, which was corroborated by Carolyn Talebi, that he had 100% retention rate among his employees, and that he was already over 90% on the customer experience category. This testimony went unrebutted. The operations/risk quadrant established the goal of achieving a satisfactory or strong review rating on the annual risk management audit. The undisputed evidence was that Mr. Khakian took two operationally failing branches, and led them to a "satisfactory" rating at the flagship branch in

Watertown Square and ultimately a "strong," the highest rating, for the Watertown Stop & Shop branch. Further, despite Fleet's reliance on the sporadic branch assessments, his 2002 annual audit cited no problems with the one specific item listed on the operations/risk quadrant, the soundness of the "ICI" log. *See* Exhibit F ("the ICI log was well maintained."). Fleet did not dispute that Mr. Khakian excelled as he always had on the sales quadrant of the Dashboard. In sum, given the sheer breadth of evidence that Mr. Khakian was complying with, and had already achieved most, if not all, the Winning Gold objectives at the time of his termination, the jury was well warranted in finding that Winning Gold was merely a pretextual smoke screen offered by Fleet to cover up its unlawful discrimination of Mr. Khakian.

b. *Operational deficiencies—inclusion of the January 2001 Watertown Square branch assessment in the Position Statement.*

In conjunction with its Winning Gold smokescreen, Fleet hammered Mr. Khakian again and again with the sporadic branch assessments, beginning with its ill-conceived inclusion in its MCAD Position Statement of the January 2001 Watertown Square branch assessment. Of course, Mr. Khakian was not the branch manager at Watertown Square until after this assessment. Only now, after Jane Gervais and Judith Peacott along with trial counsel in her closing argument defended Fleet's inclusion of the assessment, has Fleet finally admitted that it was "erroneous" and "mistaken" in doing so. *See* Fleet's Motion at 19. This admission of pretext, in and of itself, warrants upholding the jury verdict. *See Lipchitz*, 434 Mass. at 501 (holding that evidence that only one reason was pretext is sufficient to carry plaintiff's burden at trial). By blaming Mr. Khakian for a bad assessment report, which occurred before he became branch manager, the Bank either suborned perjury or, at the very least, acted with a reckless disregard for the truth. Hence, faced with such a blatant lie, the jury could discredit all of the several branch assessments which Fleet relied upon so heavily.

Fleet used the same questionable technique by citing two reviews of Khakian's branches conducted merely one and two months into his management tenure. At the time of Michael Maloney's review in March 2001, Khakian was managing that branch for only one month, and was in the process of correcting all of the deficiencies noted in the report for which Mr. Fuchs was responsible. Likewise, at the time of the second review in April 2001, Khakian had been the branch manager for just two months, with a new branch operations manager hired only one month prior. Despite Fleet's after-the-fact criticism, Khakian needed only a few months to right the ship. In the July 2001 official risk management review audit, he led Watertown Stop and Shop branch to passing grades.

There was evidence that branch assessments citing numerous deficiencies were common, rather than the exception. Moreover, the assessments, the evidence showed, were merely used as a training tool to prepare a branch for its annual risk audit, and was not intended to be ammunition for a termination. Fleet, however, loaded the assessments into its shotgun defense of this case. With respect to the assessments, where Fleet's aim was to totally discredit Mr. Khakian after a lifetime of excellence in the banking industry, the Bank should not have been surprised at the jury's finding of liability and assessing $600,000 in punitive damages. What Fleet did was to take what might have been a simple unlawful for discrimination and turn it into an unabashed character assassination.

c. *The Warning And PIP*.

As mentioned in the Introduction, the Warning and PIP given by Mr. Stevens to Mr. Khakian was specious on its face. The evidence permitted the jury to conclude that Mr. Stevens prepared it solely for the purpose of setting up Mr. Khakian to be fired. The Warning, admittedly a form document, was substantially the same to that given by Mr. Stevens to James

Steele. However, Mr. Stevens' statements when delivering each Warning could not have been more disparate and indicative of his discriminatory state of mind. With Mr. Khakian, he said, in substance, that the Warning would do him no good as I will see to it that you get fired. With Mr. Steele, he said, in substance, Dan Henry said I had to give this to you, but don't worry about it. Mr. Stevens then promotes Mr. Steele to a larger branch. But with Mr. Khakian, Mr. Stevens waits until weeks after the 30 day probationary period, and fires Mr. Khakian for giving a customer a $600 rebate when it should have been a "provisional credit."

d. *The $600 Rebate.* The jury heard that Mr. Stevens summarily ended Mr. Khakian's 18 year career by springing on him his authorization of a $600 rebate to a customer to whom Fleet had not credited a deposit. Mr. Stevens admitted that he granted the branch managers in his district authority for rebates up to $1,000, consistent with the "Make It Right On The Spot" policy. Faced with this, Fleet attempted to convince the jury that, notwithstanding the $1,000 rebate limit granted by Donald Stevens and his own acknowledgment that the customer deserved a refund, Mr. Khakian's 18 year career should be terminated because he entered the refund into the system as a "provisional credit," as opposed to a rebate. Marilyn McCabe, one of Mr. Khakian's biggest detractors at trial, even testified at her deposition that she would never recommend terminating an 18-year banking employee because of one $600 rebate. Particularly egregious was that Fleet did not investigate the circumstances surrounding the rebate or otherwise afford Mr. Khakian the opportunity of explaining what happened before he was fired. Given all the evidence, the jury could find that the $600 rebate was a preposterous and pretextual reason for ending an otherwise incredibly successful 18 year career.

e. *Growth Plans.* Here again, contrary to the assertion in Fleet's Position Statement that Mr. Khakian failed to prepare growth plans for his staff, Mr. Khakian testified, and Ms. Armatas

confirmed, without contradiction, that he prepared all of his growth plans and forwarded them to Ms. Armatas. At trial, Fleet did not dispute that Mr. Khakian had completed the growth plans.

f. *The cup incident.* Another pretextual reason offered by Fleet was that two Fleet managers allegedly observed Mary Grace Aboudou in the bank lobby holding a mug which said "Pissed Off." The sole admissible evidence of this alleged incident came from Ms. Aboudou's deposition testimony read into evidence. Fleet failed to call the two other eyewitnesses, Juanita Petty and Thomas Mercuro. Contrary to Fleet's totem pole hearsay version of the event, Ms. Aboudou testified that she had the mug in her own private office. The mug actually stated "Piss Off…Improper Bostonian." She was putting the mug into her purse for lunch when suddenly Mr. Mercuro and Ms. Petty walked into her office. She testified that she did not have the mug in the bank lobby.

g. *Fleet's claim that Donald Stevens held all of his branch managers to the same standard.* In an effort to support Donald Stevens' actions against Mr. Khakian and to bolster its theory that Mr. Khakian was simply failing to comply with the Winning Gold strategy, the Bank claimed in its Position Statement that "Mr. Stevens, who oversees 17 branches in the Newton District, accordingly held all branch managers to the same standard." Notwithstanding that Jane Gervais signed the MCAD Position Statement under oath, she ultimately admitted that prior to signing it, she had heard that Donald Stevens had played favorites among his branch managers.

In sum, Mr. Khakian adduced evidence that all of the reasons given by Fleet supporting its decision to fire him were not true and a pretext. On this strong record, Fleet's motion for judgment notwithstanding the verdict must be denied.

2. There Was Strong Evidence Of Disparate Treatment Involving Similarly Situated Branch Managers Which Supports The Jury's Finding Of Unlawful Discrimination.

"The most probative means of establishing that the plaintiff's termination was a pretext for [illegal] discrimination is to demonstrate that similarly situated [non foreign born] employees were treated differently." *Matthews v. Ocean Spray Cranberries, Inc*., 426 Mass. 122, 129 (1997). To show disparate treatment, Mr. Khakian offered telling comparisons with James Steele, Martha Bullock and Donald Fuchs, all American born branch managers to whom Fleet held to an entirely different standard than Mr. Khakian.

James Steele. When James Steele arrived for work at Fleet in 2001, he was a 23 year old white American born male and recent high school graduate, with absolutely no banking experience. Shervin Khakian, at the time of his termination, had approximately 18 years of banking experience, most of it at the management level, a college degree, and had earned three consecutive "Top Performer" awards. Both men were branch managers under the direct supervision of Donald Stevens. Accordingly, as this Court ruled at sidebar, they were similarly situated as a matter of law. *See Matthews*, supra, at 129. Mr. Steele testified that the operations at his branch was so poor that upper management referred to him as an "operational mess." He testified that a team of operations staff spent many days and several nights at the branch to fix the deficiencies, and that his branch barely passed the risk audit. By contrast, Mr. Khakian took two operationally failing branches and led one to a passing grade and the other to the highest rating possible. Donald Stevens gave both Mr. Steele and Mr. Khakian written warnings. Both Mr. Khakian's and Mr. Steele's warnings stated it was being delivered because "your current level of …leadership around the [Winning Gold] dashboard is unacceptable." *See* Exhibit J and SS. When delivering Mr. Steele's warning, Mr. Stevens said, in substance, "Don't worry about it." When delivering Mr. Khakian's, he said in substance, "Sign it but it will not do you any good because I will make sure you are fired." Then Mr. Stevens used the warning as a device to

orchestrate Mr. Khakian's firing for giving a $600 rebate, although Mr. Steele testified that he gave several rebates over $500 with no objection from Mr. Stevens. Mr. Stevens promoted Mr. Steele to a larger branch, despite his lack of experience, operational deficiencies, being placed on a written warning.

Martha Bullock. Martha Bullock, a white American born female, was one of Mr. Khakian's predecessor branch managers of the Watertown Square branch. *See* Exhibit WW. In 1999, as branch manager, she led the Watertown Square branch to the lowest score possible on the annual risk audit, an "unsatisfactory." *Id*. The next year, 2000, she again received the lowest score, another "unsatisfactory." Ms. Bullock's deficient operational performance was the reason that Mr. Khakian was sent to the Watertown Square branch. Rather than terminating Ms. Bullock's employment for poor operational performance, as it claimed to do with Mr. Khakian, Ms. Bullock was transferred to the largest branch in the Newton District, the Brookline/Coolidge Corner branch. There, she again failed the audit with an "unsatisfactory" and a myriad of noted deficiencies. *See* Exhibit VV. Despite her multiple operational failures, Fleet never fired Ms. Bullock.

Donald Fuchs. Mr. Fuchs, a white, American born male, was Mr. Khakian's immediate predecessor at the Watertown Square branch. He was the branch manager responsible for the poor January 2001 branch assessment that Fleet included in its Position Statement. Mr. Fuchs was not fired for poor operational results.

The evidence of Mr. Khakian's comparators was entirely admissible and proper under *Matthews v. Ocean Spray*. All of the comparators were branch managers, as Mr. Khakian. All were American born. All were seemingly qualified as they were either promoted (in Mr. Steele and Ms. Bullock's case) or not terminated. All had operational deficiencies, equal or even more

serious than Mr. Khakian's alleged deficiencies. *See Matthews*, 426 Mass. at 130 ("the offenses of two employees need not be identical, the offenses must be of comparable seriousness."). Mr. Steele, in particular, provides the classic, side-by-side "tale of two employees" demonstrating that Mr. Stevens held an American born branch manager to an entirely different set of standards than Mr. Khakian, a foreign born manager. *See Smith Coll. v. Massachusetts Comm'n Against Discrim.*, 376 Mass. 221, 227-28 (1978) (imposition of stricter performance standards on plaintiff as compared to other similarly situated employees supports an inference of discrimination). If Mr. Steele is not a proper comparator as Fleet argues, then the entire device of disparate treatment would be unavailable to any plaintiff. Mr. Khakian and Mr. Steele could not be more similarly situated and comparable, and Fleet's argument to the contrary is simply wrong. Accordingly, the plethora of evidence of disparate treatment supports the jury's finding of discrimination.

3. Mr. Khakian Offered Evidence Of Mr. Steven's Bias Against Foreigners.

In addition to strong evidence of pretext and disparate treatment, Mr. Khakian offered evidence showing that Mr. Stevens had an acute distain for foreigners. From this evidence the jury could infer that, as with other foreign born persons, Mr. Stevens' decision to terminate his employment was motivated by unlawful discriminatory intent. *See Lipchitz v. Raytheon Company*, 434 Mass. 493, 501 (2001).

In one of his first meetings with branch managers, attended by Mr. Khakian and Ms. Talebi, both from Iran, Mr. Stevens chose to tell a story that he plays war games with his son and boasts that he would "Kill all the foreigners." Both Mr. Khakian and Ms. Talebi found the comment offensive to them as foreigners. The jury had to ponder, of all the stories Mr. Stevens could have chosen to tell the managers he would soon be supervising, he told that story. While

Fleet dismisses Mr. Stevens' offensive statement as a "stray remark," as this Court ruled, the comment was clearly admissible and probative of Mr. Stevens' discriminatory state of mind which is at the heart any c. 151B case. *See Wynn & Wynn v. MCAD*, 431 Mass. 665, 666-67 (2002); *Johansen v. NCR Comten,* Inc., 30 Mass. App. Ct. 294, 300- 01 (1991). The jury could ascribe whatever weight it chose to the comment, and they obviously gave it significant weight given the amount of their verdict.

Evidence was also provided of Mr. Stevens' xenophobic distain for another foreign born manager, George Chahine. Mr. Steele testified that Mr. Stevens ordered him to fire Mr. Chahine because he was an "asshole." Mr. Steele personally observed Mr. Chahine's performance and recommended to Mr. Stevens that he not be fired as he was a good employee. Nevertheless, as Mr. Steele retold, Mr. Stevens essentially forced Mr. Chahine to resign, and then overrode Mr. Steele's designation of his rehiring status in the computer system from re-hirable not re-hirable.

Mr. Stevens also targeted Ms. Talebi unfairly, the jury could conclude on the evidence. She had written a letter for an employee verifying his salary which had just been increased by 50 cents an hour, and approved by a former district manager. After the letter was written, Mr. Stevens did not want to honor the employee's raise and was upset that Ms. Talebi had written the letter. He told her that "legal" recommended that she should resign, but there was no evidence that Mr. Stevens had in fact consulted "legal." Believing Mr. Stevens was telling the truth, Ms. Talebi resigned, but the circumstances were certainly questionable enough to raise the jury's eyebrows that Mr. Stevens was again unfairly targeting a foreign born employee.

In sum, Mr. Khakian presented ample and strong evidence of: (1) pretext, (2) disparate treatment, and (3) that Mr. Stevens harbored a hatred and animus towards foreign born persons. Evidence on any of these points is sufficient to sustain the jury verdict on a motion for judgment

notwithstanding the verdict. *See Lipchitz v. Raytheon Company*, 434 Mass. 493, 501 (2002). Combined they mandate denial of Fleet's motion.

B. The Jury's Award Of Back Pay Should Be Sustained.

1. The jury was not necessarily confined by Plaintiff's expert's calculations where there was other evidence supporting its back pay award.

It is axiomatic that a jury is not required to follow blindly the opinions of experts. *Loschi v. Massachusetts Port Auth.*, 361 Mass. 714, 716 (1972) (upholding jury's assessment of eminent domain damages well in excess of claimant's expert opinion). A jury may assess damages below, equal to, or above the highest opinion offered by any expert in the case, so long as there is evidence to support the verdict. *Id*. This is especially so where, as here, the plaintiff's expert was conservative in her assessment of damages. *Id*. (noting that claimant's appraiser reached disproportionately low opinion of value based on the data presented).

Here, although the jury seemingly awarded back pay in an amount higher than Ms. Parente calculated, that was not necessarily the case. Regardless, there was evidence to support the award.

Ms. Parente' calculations were most definitely conservative, and the jury had the evidentiary basis to compute back pay in a different manner and amount. She did not, as she could have, take into account Mr. Khakian's history of past bonuses and annual salary increases in assessing back pay between the time of his termination, January 2003 and trial, March 2006. Mr. Khakian testified that for the years prior to this termination at BayBank BankBoston and Fleet he received annual pay increases in the range of approximately $10,000 per year. He also testified that at Fleet he received substantial bi-annual sale performance bonuses ranging as high as $45,000. Ms. Parente took the conservative route, and based her lost wage calculations on Mr. Khakian's 2002 taxable wages, and set the salary *constant* at $95,214 for the three plus years

between January 2003 and trial. *See* Parente Exhibit 2. The jury, however, did not have to be so restrictive, and on the evidence, could have factored Mr. Khakian's likely annual pay increases of 10% per year for the years 2004 through 2006. This would justify an additional back pay damages of $45,448 over and above Ms. Parente's lost wage calculation in her Exhibit 2.[1]

Likewise, the jury could have factored the likelihood that Mr. Khakian would have earned modest annual bonuses for 2004 through 2006 while at Fleet, based on his past receipt of bonuses of up to $45,000, his receipt of three consecutive Top Performer awards and his undisputed stellar sale performance. The jury was thus warranted in considering a modest bonus of $10,000 per year over the years 2003 through and including 2006 which would result in addition back pay of $30,000.

Additional evidence of the jury's back pay award is found in Mr. Khakian's unemployment benefits which Ms. Parente chose to deduct from her lost wage calculations. However, as this Court correctly ruled at trial, an award of back pay should not be offset by collateral sources such an unemployment benefits. *See Buckley Nursing Home v. MCAD*, 20 Mass. App. Ct. 172, 183 (1985). Thus, the jury was warranted in disregarding the $11,697 in unemployment benefits received by Mr. Khakian in 2003.

The jury also could have considered Ms. Parente's calculations of lost paid time off, lost pension benefits and lost stock options as a component of back pay. As a threshold matter, Fleet has waived its newfound challenge to Ms. Parente's methodology by failing to object to her testimony at trial. *See Bonofiglio v. Commercial Union Ins. Co.,* 411 Mass. 31, 34 (1991)("no grounds for motion for judgment notwithstanding the verdict may be raised which were not

[1] Lost wages recalculated with 10% annual increases would result in the following:

2004	2005	2006:
$104,735 salary	$115,208 salary	$31,682 prorated salary
($100,458) Sovereign	($84,508) Sovereign	($21,126) Sovereign prorated
= $4,242.	= $30,662;	= $10,544

asserted in the directed verdict motion."). Fleet did not challenge Ms. Parente's qualifications or her testimony in any way. Instead, Fleet vigorously cross examined her, exposing to the jury whatever perceived weaknesses it thought were apparent. Fleet has therefore waived its attack on Ms. Parente's methodology and factual bases for her opinions, all of which should have been raised either *in limine* or at trial. All of Fleet's arguments challenging Ms. Parente's expert testimony go to the weight of her testimony which is solely within the jury's province.

Despite its objection to Ms. Parente's methodology, Fleet concedes that at least a portion of Ms. Parente's calculations of lost paid time off and lost pension benefits from the date of termination through trial are properly included in the jury's back pay award. *See* Fleet's Motion at 4-6. As Ms. Parente's Exhibit 7 shows and she testified, Mr. Khakian suffered lost paid time off benefits of $10,069 from the date of termination through trial. As to lost pension benefits, based on Ms. Parente's calculations (Exhibit 8), Mr. Khakian could have earned $32,399 in pension fund earnings between the date of termination and trial if he was not fired by Fleet.

Fleet does not say anything about the lost stock option component of Mr. Khakian's damages. These are properly considered back pay as they are valued as of the time of trial. As Ms. Parente testified and her Exhibit 14 indicates, Mr. Khakian was awarded 500 shares of Fleet stock on October 17, 2000 with a vesting date of October 17, 2002 and strike price of $34.75. The Fleet shares were converted to Bank of America shares as of the April 1, 2004 merger between Fleet and Bank of America. Ms. Parente valued Mr. Khakian's stock options as of the time of trial (March 9, 2006) which demonstrates that it was not front pay, but rather, a component of back pay. Ms. Parente calculated that Mr. Khakian lost $7,919 in stock options.

The additional evidence of back pay outlined above is $137,572. When added to Ms. Parente's base calculation of lost wages of $45,650, which Fleet does not challenge, the sum

total is **$183,222**. Thus, the jury's assessment of back pay in the amount of $150,000 is well within the permissible range supported by the evidence, and thus, should not be disturbed.

C. The Jury's Award Of $250,000 In Emotional Distress Damages Should Be Upheld As The Award Is Reasonable, Is Grounded In The Evidence, And Is In Line With Awards In Similar Cases.

As the Supreme Court said in the seminal case of *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), the impact of discrimination upon an individual "generates a feeling of inferiority as to the victim's status in the community which may affect their hearts and minds in a way unlikely to be undone." Ironically, Fleet proclaimed in its Position Statement that it "would have preferred nothing more than to see Mr. Khakian succeed under the new and bold initiative given his longevity, banking experience, and *respect within the community*." (Exhibit TT). When Fleet unlawfully terminated Mr. Khakian's 18 year career because of his national origin, then engaged in a vicious character assassination during this litigation, it is not surprising that Mr. Khakian suffered the mental devastation and feeling of inferiority which the Supreme Court described so artfully in *Brown*. Recognizing the severe emotional impact of invidious discrimination as the Supreme Court did in *Brown v. Board of Education*, the Supreme Judicial Court has recognized that a "finding of discrimination alone permits the inference of emotional distress as a normal adjunct of the employer's actions." *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 824 (1997); *Bournewood Hosp. Inc. v. MCAD*, 371 Mass. 303, 317 (1976); *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass. App. Ct. 172, 182 (1985).

While Fleet criticizes Mr. Khakian for not calling a doctor to the stand or putting in medical records, expert testimony is not necessary to sustain an award of emotional distress damages. *See Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). Moreover, evidence in the form of some physical manifestation of the emotional distress is not even required, although

there is ample evidence of Mr. Khakian's physical manifestation of emotional distress to sustain the jury's award, as outlined below. *See id.*

When faced with a motion for remittitur on emotional distress damages, trial judges are instructed generally to defer to the jury, unless the award "shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption" or unless it "is so excessive as to represent a miscarriage of justice in light of the evidence presented." *Labonte*, 424 Mass. at 824; *see also Borne v. Haverhill Golf & Country Club, Inc.,* 58 Mass. App. Ct. 306, 320 (2003), *rev. denied*, 440 Mass. 1101. "A jury, composed, as they are, of persons from varying walks of life and reflecting a variety of experience, make a particularly suitable institution for assessing the emotional damage incident to being placed in a second-class citizen status, made to feel inferior, socially ostracized, and demeaned in public." *Haverhill Golf & Country Club, Inc.,* 58 Mass. App. Ct. at 320 (2003)(upholding emotional distress award of $424,000 in c. 151B gender discrimination public accommodation action).

A trial court's review of the award of emotional distress damages on a motion for remittitur is quite narrow because "no precise measurement can be made between a monetary amount and the degree of one's physical or mental suffering." *Id.* at 824-26. A court should not disturb a jury award of emotional distress damages simply because it believes the award is extremely generous or that damages are considerably less. *Koster v. TransWorld Airlines, Inc*. 181 F.3d 24, 34 (1st Cir. 1999). A judge should not set aside a verdict merely because she would have assessed the damages in a different amount. *Bartley v. Phillips,* 317 Mass. 35, 40 (1944).

> 1. The evidence of Mr. Khakian's emotional distress was compelling; he suffered depression, frequent headaches, months of sleepless nights, loss of self-esteem and self-confidence, and anxiety; he sought medical attention and was prescribed medication to control his anxiety and help him sleep.

To put the award of emotional distress into perspective, one has to remember that what Mr. Khakian lost was the American Dream for which he worked so hard to achieve. Mr. Khakian testified that he overcame an inability to speak English and a heavy accent to achieve professional success in America. In the 30 years since leaving Iran, Mr. Khakian worked his way up from being a gas station manager to the branch manager of one of the top revenue producing "flagship" branches in the Fleet system. At Fleet, he earned a nearly six-figure income, numerous sales awards and recognition among his peers as a "Top Performer."

The evidence permitted the jury to draw the inference that Mr. Khakian worked extremely hard to achieve the American Dream, until Donald Stevens and Fleet turned that dream into a living nightmare by firing him for discriminatory reasons. As he testified, Mr. Khakian's emotional distress began the day Donald Stevens made the "kill all the foreigners" comment. His distress continued as Mr. Stevens habitually demeaned and singled him out at meetings in front of his peers. It continued when after only four months as district manager, Mr. Stevens asked for his resignation, on the grounds that the Bank had "changed." That night, Mr. Khakian testified, he was terrified as the prospect of losing his job. Mr. Khakian testified he was shocked and in disbelief when Mr. Stevens literally threw the Warning and Performance Improvement Plan across his desk and said words to the effect that it would do him no good, as I will see to it that you get fired. When Mr. Khakian read the specious Warning/PIP, his distress worsened. When Mr. Stevens waited until weeks after the Warning had expired and sprung the $600 rebate on him as grounds for termination, Mr. Khakian was devastated, as would be expected when an 18 year career comes to a crashing halt due to unlawful discrimination.

In the weeks and months which followed his termination, Mr. Khakian testified that he was despondent, and suffered depression, frequent headaches, months of sleepless nights, loss of

self-esteem and self-confidence, and anxiety. Mr. Khakian emotionally and rhetorically asked the jury, "How do I explain this to my kids…that this [discrimination] can happen in America?" He stressed over how he would be able to provide for his family, especially as the lone income earner in the Khakian household. He recounted that as a result of his inability to sleep and general anxiety, Mr. Khakian saw his primary care doctor who prescribed anti-anxiety/sleeping medication. Mr. Khakian also testified that his loss of self-esteem and self-confidence affected his performance on job interviews. Mr. Khakian said that although he is reemployed at Sovereign Bank, his fear of discrimination hinders his advancement inasmuch as he is paranoid that unlawful discrimination will again happen to him. He stated that his current manager is a good person, and that he is afraid of applying for a promotion for fear than another "Don Stevens" would become his boss and do the same thing to him. Despite Fleet's contention that Mr. Khakian is now fine, while on the witness stand Mr. Khakian recounted how he still feels the devastating emotional effects of losing a career he worked so hard to achieve simply because he was a foreigner.

The jury, having observed Fleet's pretextual character assassination of Mr. Khakian during this litigation, including perjuring itself in the Position Statement, could also take into account the distress these tactics caused Mr. Khakian. It was egregious enough that Fleet ended his successful career because he was Iranian, but to support it with lie after lie…the emotional state of any reasonable person in Mr. Khakian's shoes would be just ruined.

Based on the compelling evidence of Mr. Khakian's emotional distress as outlined above, the jury's award of $250,000 does not come close to being "shocking" enough to compel the conclusion that the jury was influenced by "partiality, prejudice, mistake or corruption." *Labonte*, 424 Mass. at 824. All of the jurors were eminently capable of assessing and

quantifying the emotional pain and anguish this man suffered. The jury's role in assessing damages for Mr. Khakian should be given the utmost respect. *Labonte*, 424 Mass. at 824; *Haverhill Golf & Country Club, Inc.,* 58 Mass. App. Ct. at 320 (2003).

3. The award is in line with comparable awards.

Further supporting the award are awards given and upheld in other cases, even after remittitur. A survey of comparable awards are as follows, all of which are included in the Plaintiff's Appendix Of Decisions filed herewith:

Award	Case
$1,800,000	*Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367 (2005) (defamation of a physician resulted in her being depressed, anxious; she lost of sleep, gained weight, and would frequently break down at family gatherings)
$500,000	*Clifton v. Massachusetts Bay Transportation Auth*., 445 Mass. 611 (2005) (500,000 in emotional distress damages upheld where plaintiff was subject to egregious racially hostile work environment; no evidence cited of medical treatment to plaintiff).
$500,000	*Dahill v. Boston Police Department*, C.A. No. 98-11441 (D. Mass. 1998) (jury verdict on c. 151B claim based on refusal to hire because of handicap; case settled without appeal).
$350,000	*Powers v. H.B. Smith Co*., 42 Mass. App. Ct. 657, 665 (1997), *review denied*, 425 Mass. 1105 (age discrimination where plaintiff attended more AA counseling sessions but did not seek formal psychological treatment)
$335,000	*Walsh v. Carney Hospital*, Norfolk Superior Court C.A. 94-2583, 1998 WL 1470698 (June 10, 1998) (Cowin, J.) (no appeal) (upholding $335,000 emotional distress award in c. 151B sexual orientation case, where Plaintiff was devastated, lost weight, suffered migraines, and sought professional care)
$300,000	*Danco, Inc. v. Wal-Mart Stores, Inc.,* 178 F.3d 8, 12, 14, 16-17 (1st Cir. 1999) (after remittitur, emotional distress damages of $300,000 in a case alleging hostile work environment on basis of Mexican national origin involving three incidents).
$275,000	*O'Rourke v. Providence,* 235 F.3d 713 (1st Cir. 2001) (sexual harassment of female firefighter who was "nervous wreck", had sleeping difficulties, headaches and weight gain and was diagnosed with post traumatic stress disorder)

$250,000 *Abramian v. President and Fellows of Harvard College,* 9 Mass. L. Rptr. No. 25, 556, 562 (April 19, 1999) ($250,000 in emotional distress damages properly awarded in G.L. c. 151B national origin and retaliation claim, where the jury was entitled to conclude that the emotional impact of loss of job was "enormous"; no cited evidence of medical testimony), *aff'd in part and reversed in part*, 432 Mass. 107 (2000)

$250,000 *Koster v. Trans World Airlines, Inc.,* 181 F.3d 24 (1st Cir. 1999) (upon remittitur emotional distress award of $250,000 for lack of sleep, trouble sleeping; plaintiff did not seek medical treatment and there was no expert testimony).

$250,000 *Hill v. Suntory Water Group, Inc*., Omnibus Memorandum of Decision and Order, C.A. No. 00-03983, Giles, J., January 30, 2003 (c. 151B handicap discrimination case where plaintiff was "devastated," depressed, desperate for money, insecure, and award was "in line with other similar awards in this area")

$250,000 *Chanson*, 18 Mass. Discrim. L. Rep. 210 (Massachusetts Comm'n Against Discrimination);

$250,000 *Capel*, 18 Mass. Discrim. L. Rep. 233 (Massachusetts Comm'n Against Discrimination /gender);

$250,000 *Baldelli*, 17 Mass. Discrim. L. Rep. 1541 (Massachusetts Comm'n Against Discrimination /sexual harassment), *aff'd*, 1998 WL 1270644 (Mass. Super. Ct. June 30, 1998).

$250,000 *Westinghouse Electric Supply Corp. v. Massachusetts Commission Against Discrimination,* No. CIV. A. 97-4267E, 1999 WL 140492 (Mass. Super. Ct. Mar. 5, 1999) (plaintiff suffered depression, insomnia, constant diarrhea, and stomach pain).

While Fleet cites to the *Labonte* decision, which ordered the remittitur of an award ($550,00) over two (2) times the amount of damages awarded to Mr. Khakian, and two Superior Court decisions awarding nominal emotional distress damages, Mr. Khakian has cited 15 decisions where the emotional distress awards were $250,000 and higher. In some of these cases, noted above, the awards were subject to remittitur, but even those were not reduced below $250,000. *See Danco; Koster.* In some cases, unlike Mr. Khakian who saw a doctor and was prescribed medication to alleviate his anxiety, there was no evidence that the plaintiff sought medical assistance for his or her distress, yet courts sustained their awards in amounts equal or

higher amounts than Mr. Khakian. *See Koster; Abramian*. Further, the evidence of emotional distress in all of these cases are comparable to Mr. Khakian's: depression, anxiety, difficulties sleeping, loss of self esteem, and headaches. In light of these comparable awards, the jury's assessment of Mr. Khakian's emotional distress should be upheld.

C. The Punitive Damage Award Should Be Upheld.

1. Fleet Has Waived Its Argument That The Evidence Did Not Warrant Punitive Damages By Not Only Failing To Object To The Punitive Damage Instruction, But Affirmatively Requesting It.

Surprisingly, Fleet did not object to Mr. Khakian's request for a punitive damage instruction. Rather, it, like Mr. Khakian, requested such an instruction in virtually the same form. *See* Defendant's Amended Proposed Jury Instructions No. 21. Upon asking for the punitive damage instruction, Fleet endorsed that the evidence warranted a finding of sufficient "outrageousness" to allow for punitive damages. Under settled waiver principles, Fleet cannot now challenge the punitive damage award on the ground that the evidence did not warrant a finding of "outrageousness." *See Scott v. Boston Hous. Auth*., 56 Mass. App. Ct. 287, 297 (2002). *Compare*, *Lipchitz v. Raytheon Company*, 434 Mass. 493, 501 (2002), where an objection to an offending jury instruction was properly preserved. With all evidentiary arguments being waived, Fleet is left only with arguments based on the due process concerns as set out in *BMW of N. Am. v. Gore,* 517 U.S. 559, 575-77 (1996), adopted by the Supreme Judicial Court in *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 826 (1997). The argument centered around those factors, discussed below, are quite distinct from Fleet's arguments challenging the evidence supporting the award. Nevertheless, in discussing the *BMW* factors below, Mr. Khakian will show that Fleet's conduct was sufficiently reprehensible to warrant punitive damages.

2. The Jury's Award Of Punitive Damages Was Warranted Given Fleet's Outrageous and Reprehensible Conduct.

"As in the case of compensation for emotional distress, the imposition of punitive damages is not an exercise in quantitative analysis." *Borne v. Haverhill Golf & Country Club, Inc.,* 58 Mass. App. Ct. 306, 321 (2003), *rev. denied*, 440 Mass. 1101. Punitive damages under G.L. c. 151B are appropriate "where a defendant's conduct warrants condemnation and deterrence." *Dartt v. Browning-Ferris Industries, Inc.* 427 Mass. 1, 17 (1998).

As just mentioned, the Supreme Judicial Court has sanctioned the use of the factors set forth in the United States Supreme Court's *BMW* opinion to analyze the reasonableness of a punitive damage on a motion for remittitur. *Labonte*, 424 Mass. at 826. The factors are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damage award to compensatory damages awarded, and (3) consideration of the civil or criminal penalties that could be imposed for comparable misconduct. *BMW of N. Am. v. Gore,* 517 U.S. 559, 575-77 (1996). According to the Supreme Court, the most important indicator of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *BMW*, 517 U.S. at 575. The rationale is that "[s]ome wrongs are more blameworthy than others." *Id*.

2. Fleet's Conduct Was Reprehensible, Warranting Condemnation And Deterrence.

Mr. Khakian contends that every instance of intentional unlawful discrimination in violation of c. 151B is reprehensible as a matter of law. *See Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 623-24 (2005) ("deliberate violations of G.L. c. 151B, by those charged with the public duty to enforce the law equally, present a heightened degree of reprehensibility"). Was Fleet's actions reprehensible here? Most certainly. Not only did Fleet wipe out Mr. Khakian's 18-year banking career by deliberate unlawful discrimination in violation state law, but it attempted to cover it up with a campaign of character assassination

based on outright lies and pretextual reasons, forcing Mr. Khakian to incur over $200,000 in legal fees and expense to vindicate his honor and reputation.

Fleet employed a reprehensible "throw as much mud against the wall and see what sticks" strategy. It started with Fleet's Position Statement filed with the MCAD which included the January 2001 branch assessment of the Watertown Square branch. After three years of litigation, a week long trial, and a $1 Million jury verdict, Fleet finally admits this was a "mistake." But in fact it is a reckless disregard for the truth made under oath. Then Fleet said Mr. Khakian did not do the growth plans. He did. The pretextual mudslinging went on to Winning Gold, operational deficiencies, the Ms. Aboudou cup incident, and Fleet's claim that Mr. Stevens treated branch managers equally, all which were thoroughly exposed as fabrications at trial. At the end of the day, Fleet summarily terminated Mr. Khakian's 18 year career because he gave a customer a $600 refund which Mr. Stevens, admitting was appropriate, claimed should have been a provisional credit rather than a rebate. Yet, no one at Fleet gave Mr. Khakian the benefit of the doubt. Ms. Gervais, along with Ms. McCabe, did not bother to ask Mr. Khakian his side of the story on the $600 rebate.

Fleet's actions and legal strategy warranted condemnation and deterrence, and the jury sent Fleet the message that no employer should do this to an employee. Yet Fleet characterizes what it did to Mr. Khakian as "mild." Fleet still does not get it. Fortunately, the jury did.

When Fleet argues that only Mr. Stevens's conduct requires deterrence, it is laughable. As a matter of law, Fleet is vicariously liable for the actions of all of its employees in this case, including Mr. Stevens. *College-Town, Div. of Interco, Inc. v. MCAD,* 400 Mass. 156 (1987). That Mr. Stevens no longer works at Fleet (and this Court knows why) is irrelevant. Fleet has a legal obligation to ensure that its upper managers are not engaging in discriminatory and other

illegal activities. In addition to Mr. Stevens, every person at Fleet involved in formulating the reasons for Mr. Khakian's termination is complicit in the strategic decision Fleet made to "go after" Mr. Khakian. Fleet should not be able to use Mr. Stevens as a scapegoat to avoid punitive damages.

In following the punitive damage instruction, the jury found Fleet's conduct "outrageous" and with "reckless indifference" to Mr. Khakian's rights. Accordingly, Fleet's conduct was, by definition, reprehensible and warranted the imposition of punitive damages.

3. The Ratio Of Compensatory Damages To Punitive Damages Here Is 1:1.5, Well Below The Maximum Ratio of 1:10.

The second *BMW* factor considers the ratio between compensatory damages and punitive damages. While the Supreme Court had steadfastly refused to formulate a bright-line ratio which a punitive damage award cannot exceed, it has recently commented that few awards exceeding a single digit ratio (*i.e.*, up to 1:10), will satisfy due process. *State Farm Auto. Ins. Co., v. Campbell*, 538 U.S.408, 425 (2003). "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios of 500 to 1, or, in this case, 145 to 1." *Id*. As the Appeals Court held in upholding a 3.96 compensatory to punitive ratio in a c. 151B case, the limitation emphasized in the *BMW* case is that the punitive damage award not "shock the reviewing court." *Borne.,* 58 Mass. App. Ct. at 322.

Here, the jury awarded $400,000 in compensatory damages and $600,000 in punitive damages. Therefore, the ratio in this case is ***1.5***. This is on the lowest range of single multiplier ratios which the Supreme Court has ruled satisfies due process, and is hardly "shocking" given Fleet's despicable conduct. Fleet even agrees that this ratio should be maintained. *See* Fleet's Motion at 15. This ratio, on its face, comports with due process while achieving the

Commonwealth's goals of condemnation and deterrence for intentional discrimination in violation of Chapter 151B. While G.L. c. 151B does not cap punitive damages for national origin (and race and gender) discrimination, indicative of the reasonableness of the jury's award is that it is less than the statutory capped 1:3 ratio for age discrimination. *See* G.L. c. 151B, §9; *Clifton v. Massachusetts Bay Transp. Auth*., 445 Mass. 611, 623 (2005).

Also indicative of the reasonableness of the award in this case are recent awards upheld in other cases. *See, e.g*., *New Boston Select Group v. DeMichele*, 15 Mass. L. Rptr. No. 20, 473 (January 13, 2003) (van Gestel, J.) (**$1.5 Million** c. 151B retaliation for termination, stoppage of benefits, and initiation of retaliatory lawsuit for misrepresentation and breach of fiduciary duty); *Borne v. Haverhill Golf & Country Club, Inc.,* 58 Mass. App. Ct. 306, 320 (2003), *rev. denied*, 440 Mass. 1101 (upholding punitive damage award of **$1.43 Million** in c. 151B gender discrimination with ratio of 3.96); *Labonte v. Hutchins & Wheeler*, (after appeal, Superior Court remitted punitives damages to **$900,000** which Plaintiff accepted); *Daigle v. Rudomin*, 41 Mass. App. 1110 (1996) (upholding **$750,000** punitive damage award in c. 151B sexual harassment claim); *Walsh v. Carney Hospital*, Norfolk Superior Court C.A. 94-2583, 1998 WL 1470698 (June 10, 1998) (sustaining **$650,000** in punitive damages).

The amount set by the jury was also of sufficient magnitude to provide the "sting" necessary to get the attention of one of the then largest banks in Northeast. An award of $650,000 is just the right amount to get Fleet's (now Bank of America's) attention, and have it realize a financial "loss" for its unlawful conduct. *See Labonte*, 424 Mass. at 827.[2]

[2] The last *BMW* factor is the civil or criminal penalties that could be imposed for comparable misconduct. These penalties would be entirely lacking in this case. The MCAD has authority to assess civil penalties of $10,000 up to $50,000, but only if the respondent has been adjudged have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint. G.L. c. 151B, § 5. Here, a civil penalty of $10,000 would most likely be available in the absence of 2 or more prior instances of discrimination by Fleet. This paltry sum would utterly fail to provide any level of condemnation or deterrence against a large bank such as Fleet.

III. CONCLUSION

For the foregoing reasons, Fleet's Motion For Judgment Notwithstanding the Verdict should be denied. Fleet's Motion For Remittitur Or In The Alternative, A New Trial On Damages should likewise be denied.