Commonwealth of Massachusetts
Supreme Court

No. SJC-12487

BUFFALO-WATER 1, LLC,

Plaintiff-Appellant,

– against –

FIDELITY REAL ESTATE COMPANY, LLC,

Defendant-Appellee.

ON APPEAL FROM THE ORDER IN THE SUFFOLK SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT AT NO. 17-1584

BRIEF OF *AMICI CURIAE* THE APPRAISAL INSTITUTE AND MASSACHUSETTS BOARD OF REAL ESTATE APPRAISERS

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In the context of an appraisal, whether judicial review should be limited to cases involving actual "fraud, corruption, dishonesty, or bad faith;" whether, or to what extent, judicial review should be available for claims involving nondisclosure or concealment of a conflict of interest or bias on the part of an appraiser.

INTEREST OF THE AMICI CURIAE

The Appraisal Institute is the nation's largest professional association of real estate appraisers. See Our History, THE APPRAISAL INSTITUTE, https://www.appraisalinstitute.org/about/our-history/ (last visited on September 10, 2018). The Appraisal Institute has more than 18,000 members in nearly 50 countries, the majority of whom are "practicing real estate appraisers and property analysts who provide valuation-related services to such clients as mortgage lenders, financial institutions, government agencies, attorneys and financial planners as well as homeowners and other individual consumers." See About Us, THE APPRAISAL INSTITUTE, https://www.appraisalinstitute.org/about/ (last visited September 10, 2018). Its mission is "to advance professionalism and ethics,

global standards, methodologies, and practices through the professional development of property economics worldwide." Id. The Appraisal Institute is also the world's largest publisher of real estate appraisal literature, and actively engages in advocacy to encourage the adoption of appraisal policies that best serve the public interest. Id. The Appraisal Institute has adopted a Code of Professional Ethics and Standards of Professional Practice to establish requirements for ethical and competent practice (the "Code"). These requirements also serve to promote and maintain a high level of public trust and confidence in Appraisal Institute Members, Candidates, Practicing Affiliates, and Affiliates. See Ethics and Standards, THE APPRAISAL INSTITUTE, https://www.appraisalinstitute.org/professional-practice/ethics-and-standards/ (last visited September 10, 2018). The Appraisal Institute (in its current form and through its predecessor) has enforced standards and ethics governing appraisal services since the 1930s.

The Massachusetts Board of Real Estate Appraisers ("MBREA") is a state appraisal association founded in 1934. MBREA was the first (and for decades, was the

only) state appraisal association in the country that was a sponsor of The Appraisal Foundation, the organization which sets the minimum standards (the Uniform Standards of Professional Appraisal Practice or "USPAP") and minimum qualifications for real estate appraisers for certain federally related transactions. The MBREA's mission is to "support, promote and encourage the highest level of professionalism and ethical appraisal standards, through education and communication, and to represent the interests of our members." See https://www.mbrea.org/ (last visited September 4, 2018).

ARGUMENT

This case raises the question of whether judicial review of appraisals should be available to parties alleging nondisclosure of institutional (not personal or individual) relationships as encouraged by appellant Buffalo-Water 1, LLC ("Buffalo-Water"), and whether such review should remain limited to cases alleging "fraud, corruption, dishonesty, or bad faith," as set forth in Eliot v. Coulter, 322 Mass. 86, 90-91 (1947) (the "Eliot rule"). The Eliot rule was reaffirmed by this Court first in Jordan Marsh Co. v. Beth Israel Hosp. Ass'n, 331 Mass. 177, 185-86

(1954) and subsequently in Nelson v. Maiorana, 395 Mass. 87, 89 (1985). Most recently, the Appeals Court applied the Eliot rule in a case decided five years ago. See State Room, Inc. v. MA-60 State Assocs., L.L.C., 84 Mass. App. Ct. 244, 248-49 (2013).

The Appraisal Institute and MBREA respectfully submit this brief because a change to the Eliot rule would have far-reaching undesirable consequences, affecting thousands of individuals and entities beyond the parties to this litigation (the "Parties"). Indeed, a departure from the 71 year-old rule set forth in Eliot is not only completely unnecessary, it would fundamentally change the appraisal profession (and other related industries) and long-established appraisal standards and ethics rules in profound and harmful ways.

I. THE PROPOSED CHANGE TO THE ELIOT RULE IS UNNECESSARY.

Appellant Buffalo-Water would have this Court reverse 71 years of settled common law by overturning Eliot to allow judicial review of appraisals even where there is no allegation of fraud, corruption, dishonesty, or bad faith. Indeed, Buffalo-Water's proposal would require an individual appraiser to

disclose engagements and relationships between parties to an appraisal and the individual appraiser's employer and the employer's parents or affiliates. As set forth in this section, any such requirement is unnecessary, and, as set forth in Section II below, would be onerous and detrimental.

Appellant Buffalo-Water's proposal is unnecessary because the relevant professional standards and ethics rules provide safeguards for unbiased, conflict-free appraisals. Specifically, the standards and ethics rules require individual appraisers to perform services in an unbiased manner. The prevailing standards and ethics rules have never required disclosure of potential conflicts on an institutional (*i.e.* not personal or individual) basis. Under the prevailing standards and ethics rules, an individual appraiser is obligated to disclose any personal interests in the property at issue or in the parties involved. If individual appraisers fail to abide by the Code or USPAP, they face serious consequences. Moreover, parties remain free to demand, in their contracts, disclosures above and beyond what the professional standards and ethics rules require. Accordingly, there is no reason to overturn Eliot.

A. The Relevant Standards and Ethics Rules Governing Appraisers Focus on the Individual Appraiser.

The relevant standards and ethics rules governing appraisers have always prohibited bias in appraisals, and have never required disclosures related to an individual appraiser's employer, let alone the employer's parent company and/or affiliates. Instead, the standards and ethics rules consistently focus on the potential conflicts of the individual appraiser, who is bound to act independently, objectively, and without bias. Simply put, a change to the Eliot rule is unnecessary (and, again, harmful) because individual appraisers are already required by robust standards and ethics rules to provide unbiased appraisals, and the standards and ethics rules are aggressively enforced with potentially severe ramifications for appraisers who violate them.

Notwithstanding the plain language of USPAP and the Code as set forth herein, Appellant Buffalo-Water conflates the services and independence of the individual appraiser, Robert Skinner, with those of his employer, Cushman & Wakefield of Massachusetts, Inc. ("Cushman") or even its parent company, Cushman & Wakefield U.S., Inc. ("C&W-US"). Indeed, Buffalo-

Water's chief complaint appears to be that the relationship between Fidelity and C&W-US was not disclosed prior to the appraisal. This conflation is unsurprising, because there is no allegation that Mr. Skinner was biased or had performed services for Fidelity (or relating to the subject property). Indeed, Mr. Skinner certified in the appraisal report that there was "no present or prospective interest in the property that is the subject of this report, and no personal interest with respect to the parties involved," and "no bias with respect to the property that is the subject of this report or to the parties involved with this assignment." Record Appendix ("RA") at RA-00141.

1. The Appraisal Institute's Code of Professional Ethics.

The Appraisal Institute wrote and developed the Code,[1] which provides a framework for ethical valuation by appraisers, and is premised exclusively on the individual appraiser's lack of bias.

Indeed, lack of bias is in the very definition of a "valuer," as is the concept that the appraiser will be an individual, not an organization: the Code

[1] Available at https://www.appraisalinstitute.org/assets/1/7/CPE.pdf (last visited September 10, 2018).

defines a "valuer" as "[o]ne who is expected to provide Services in an unbiased and competent manner." Id. at p. 6 (emphasis added).

The Code stresses an individual appraiser's obligation to provide services in an unbiased manner throughout. For example, Canon 3 of the Code requires that "In Providing Services, a Valuer Must Develop and Report Unbiased Analyses, Opinions, and Conclusions." Within Canon 3 are several ethical rules. The very first such rule, ER 3-1, provides that "[i]t is unethical to knowingly contribute to or participate in the development, preparation, use or reporting of an analysis, opinion, or conclusion that is biased." Id. at p. 12.

Another ethical rule contained in Canon 3 of the Code is ER 3-6, which provides:

> It is unethical to provide a Service if a valuer has any direct or indirect, current, or prospective personal interest in the subject or outcome of the Service or with respect to the parties involved in the Service, unless:
>
> (a) prior to agreeing to provide the Service, the valuer carefully considers the facts and reasonably concludes that he or she would remain unbiased and reasonable persons, under the same circumstances, would reach the same conclusion;

> (b) such personal interest is disclosed to the client prior to the valuer agreeing to provide the Service; and
>
> (c) such personal interest is disclosed in each Report resulting from such Service.

Id. at pp. 12-13.

The Appraisal Institute's Code intentionally focuses on the individual appraiser, not his or her employer or affiliated companies. The Code was drafted this way for good reason: at bottom, an appraisal is an opinion of the value of a particular property, and only an individual - not a firm - can have an opinion.[2] In other words, the outcome of an appraisal could only be affected if the individual appraiser is biased. The existence of a relationship between a party to the transaction and the individual appraiser's employer (or, as is alleged here, the employer's parent company or other affiliate) matters not one whit if the individual appraiser is not biased.[3]

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[2] The focus on individual appraisers also makes sense because of the difficulty in identifying an appraisal firm's (or its parent's) conflicts, as opposed to an individual appraiser's potential conflicts. Section II of this brief explores this issue in more detail.

[3] Buffalo-Water has not explained why this court should deem inadequate an individual appraiser's certification, like Mr. Skinner's certification here, that discloses his or her past related engagements and confirms that he or she has no bias. Nor are the

Appellant Buffalo-Water's brief hints that, under the Code, Mr. Skinner should have provided a more fulsome disclosure that cited institutional agreements between C&W-US and Fidelity (agreements to which Mr. Skinner is not alleged to have been a party, and with which he is not alleged to have been involved). As the author of the Code, the Appraisal Institute can and does attest that, while the Code requires the disclosure of personal interests of the individual appraiser, it does not require disclosure of relationships between the appraiser's employer (or its affiliates) and a party to the appraisal. Indeed, Buffalo-Water's opening brief even acknowledges that, per ER 3-6, it is unethical for a "valuer" (again, an individual) to provide services if he or she has a personal interest in the subject or outcome of the service or with respect to the parties, unless certain disclosures are made. The Code does not require a disclosure on an institutional level, and any such reading of the Code is simply wrong.

The Code is not mere words on a page. It has teeth. Its requirements (and prohibitions) are

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amici, the Appraisal Institute and MBREA, aware of any such explanation.

vigorously enforced. Potential violations of the Code are reported to the Appraisal Institute, where they are screened and then, if warranted, investigated thoroughly.[4] If the investigator(s) conclude the Code has been violated, one of five possible disciplinary actions will be imposed (admonishment, reprimand, censure, suspension, or even expulsion from the Appraisal Institute membership).

2. USPAP.

The Uniform Standards of Professional Appraisal Practice ("USPAP")[5] is a set of appraisal standards that, like the Code, focuses on conflicts of interest

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[4] A summary of the Appraisal Institute's Regulation No. 6 is available at http://www.appraisalinstitute.org/assets/1/7/Summary Reg61.pdf (last visited September 17, 2018).

[5] These standards were developed by several leading professional appraisal organizations that formed a committee in 1986 specifically to develop USPAP. See About The Appraisal Foundation, The Appraisal Foundation, http://www.appraisalfoundation.org/imis/TAF/About Us/TAF/About Us (last visited September 9, 2018). The following year, the committee established The Appraisal Foundation ("TAF"), a non-profit organization to develop USPAP. Id. In 1989, with the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. 101-73, 103 Stat. 183 (1989), TAF was authorized by Congress to establish the minimum USPAP appraisal standards for appraisals to be used for all transactions involving federally regulated lending institutions. Id.

at the individual appraiser level only. USPAP clearly and unequivocally prohibits bias in appraisal assignments. But, as set forth below, USPAP repeatedly - and exclusively - focuses its provisions addressing bias and conflicts of interest on the individual appraiser, and not on his or her firm.

a. USPAP plainly prohibits bias in appraisal assignments.

USPAP's Ethics Rule provides, in the Conduct subsection, that an appraiser "must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests," and goes on to state first and foremost that an appraiser "must not perform an assignment with bias." See THE APPRAISAL FOUNDATION, 2016-2017[6] Uniform Standards of Professional Appraisal Practice, available at http://www.appraisertom.com/2016-17-eUSPAP+(Final)-bookmarks-retail.pdf, at p. 8 (emphasis added).

Similarly, USPAP's Standards Rule 2-3 requires that every written real property appraisal report

[6] USPAP is amended every two years. The 2016-2017 version was in effect at the time of the appraisal at issue in this case. The current 2018-2019 version does not differ in any material respect from the earlier version.

contain a signed certification, wherein the individual appraiser certifies, to the best of his or her knowledge, that, inter alia:

- The "reported analyses, opinions, and conclusions" are his or her "personal, impartial, and unbiased professional analyses, opinions, and conclusions;"
- He or she has "no . . . present or prospective interest in the property that is the subject of [the] report and no . . . personal interest with respect to the parties involved" (or, if there is such an interest, such interest is disclosed);
- He or she has "performed no . . . services, as an appraiser or in any other capacity, regarding the property that is the subject of [the] report within the three-year period immediately preceding acceptance of this assignment" (or, if such services have been performed, such services are disclosed); and
- He or she has "no bias with respect to the property that is the subject of [the] report or to the parties involved with this assignment." (emphasis added).

Id. at 27 (emphasis added). Thus, the sine qua non of appraisals under USPAP is that they be unbiased.

b. USPAP's requirements are applicable to individual appraisers.

Like the Code, USPAP's requirements, including but not limited to its prohibition on any assignments tainted by bias, only apply to the individual appraiser, not the appraiser's employer or its affiliates. For instance, USPAP's Standards Rule 2-3

requires a signed certification whereby the individual appraiser makes certain disclosures and representations based on, among other things, his or her lack of bias, past engagements, and lack of personal interest in the property or parties involved. Nothing in USPAP requires disclosures of the appraiser's employer's (or its parent's or affiliates') relationships or engagements.

In sum, USPAP, a set of standards for appraisers which has been in place for 32 years, focuses on the individual appraiser's unbiased performance, just as the Code does. This focus makes sense because it is an individual appraiser's bias or lack thereof that has an effect on the outcome of an appraisal. It is far-fetched to believe that the fact that the individual appraiser's firm may have a business relationship with one of the parties, wholly unrelated to the property at issue and not even known by the individual appraiser, could affect an appraisal. So it is with good reason that USPAP does not require the disclosure of business relationships at the firm level.

c. USPAP is Vigorously Enforced.

Like the Code, violations of USPAP are taken seriously. In Massachusetts, the Massachusetts Board of Registration of Real Estate Appraisers (the "Board") is the Commonwealth's enforcement entity for violation of USPAP. 264 CMR § 11.00 specifically requires that "[a]ll real estate appraisers shall observe the standards of practice contained in the USPAP." Id. at § 11.01(1) (emphasis added). Should the Board be made aware of an allegation that an appraiser violated USPAP, the Board would launch an investigation and follow an established process to determine if the complaint has merit and if the appraiser should be subject to disciplinary action (up to and including revocation of the appraiser's license).

B. Parties to commercial real estate transactions are free to require additional disclosures by contract.

The requirements placed on appraisers by USPAP and the Code are a floor, not a ceiling. Contracting parties are, as always, free to include additional requirements for contemplated appraisals in their agreements if they feel the need to protect themselves further. As discussed below, additional disclosures,

if burdensome, may lead to some firms declining appraisal engagements. If the contracting parties want to risk narrowing the pool, they can choose to do that. But this Court should not impose that risk on all parties to real estate transactions in Massachusetts, whether the parties wish it or not.

Indeed, Buffalo-Water and Fidelity opted to include in their contract additional requirements beyond those contained in USPAP or the Code – including that the appraiser be a designated MAI member of the Appraisal Institute or an ASREC member,[7] and that he or she have significant experience appraising real estate in the Boston area. See RA-00110 ("Each appraiser shall be a member of the M.A.I. or A.S.R.E.C. (or successor professional organizations) and each shall have at least ten (10) years' experience appraising property in the Greater Boston area"). Yet the complaint is devoid of any allegation that, prior to receiving the appraisal report, Buffalo-Water desired disclosures concerning potential conflicts of interest beyond what USPAP or

[7] The MAI designation can only be used by certain highly qualified appraisers as determined by the Appraisal Institute. The organization "Counselors of Real Estate" (CRE) was known as "American Society of Real Estate Counselors" (ASREC) when formed in 1953.

the Code require at the individual level, let alone that it contracted for such disclosures.

In the engagement letter to the Parties, which was signed by Buffalo-Water, Mr. Skinner represented that the appraisal report would be developed in accordance with both USPAP and the Code (as is nearly universally the case in large commercial real estate transactions). RA-00122. In fact, both Mr. Skinner's appraisal report and the engagement letter, which was signed by Buffalo-Water, clearly state: "USPAP requires disclosure of prior services performed by the individual appraiser within the three years prior to this assignment. The undersigned appraiser has not provided prior services within the designated time frame." RA-00123 (emphasis added). Accordingly, Buffalo-Water could not - or should not - have been surprised that Mr. Skinner's disclosures were limited to his own past engagements.

Based on Buffalo-Water's own allegations and the exhibits attached to the complaint, it is evident that the Parties have complied with USPAP, the Code, and the terms of their own contract, which they presumably negotiated and entered into voluntarily. Had Buffalo-Water been concerned that the contractually required

disclosure was limited to Mr. Skinner individually and not his employer, Cushman, or Cushman's parent company, C&W-US, and desired disclosures beyond those mandated by the Code or USPAP, Buffalo-Water could have contracted for additional disclosures as part of the engagement letter (despite the fact that the Parties' option agreement did not require any disclosures above and beyond those mandated by USPAP).

This Court should not create a rule that would require parties to perform unnecessary and difficult (as set forth below in Section II) disclosures, when parties can voluntarily agree to such requirements if and when it suits their particular needs.

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In sum, it is unnecessary for this Court to overrule Eliot. Relevant standards and ethics rules hold appraisers to high ethical standards and address any legitimate concern about bias in appraisals. They provide strong disincentives, including career-ending sanctions, for appraisers, who take pride in their reputation as independent, impartial, and unbiased experts, charged with ensuring the integrity of the appraisal process. This Court should not substitute its judgment in this instance for that of TAF and the

Appraisal Institute, which have decades of expertise in the appraisal profession (including, in TAF's case, authorization from Congress to enact minimum appraisal standards for federally regulated lenders), and have steadfastly focused on the individual appraiser, not the appraisal firm. Further, as set forth below in Section II, such an unnecessary change would in fact be onerous and detrimental to the appraisal profession.

II. THE IMPACT OF A CHANGE TO THE ELIOT RULE ON THE APPRAISAL PROFESSION WOULD BE PROFOUND AND DETRIMENTAL.

In addition to being unnecessary, a change to the state of the law would be profoundly harmful to the appraisal profession, and to parties who use appraisal services.

A. A Change In the Eliot Rule Would Require a Sea Change In the Appraisal Profession, and Might Unnecessarily Stifle Competition.

The change to the Eliot rule proposed by Appellant in this case would essentially require the individual appraiser chosen by the parties to disclose any and all engagements undertaken within a certain timeframe related to the subject property or the parties, not only at an individual level, but also at an institutional level (and beyond). In other words,

the appraiser chosen by parties would be obligated to research and disclose engagements (or other relationships) related to his or her employer and any related entity, even those unrelated to appraisal services, if those engagements or relationships pertain in any way to the subject property or the parties. And while USPAP only requires a three-year lookback, it is unclear whether a change to Eliot would allow a party to an appraisal to seek judicial review based on non-disclosure of even older engagements. The contemplated broad, institutional conflict-check regime would be an immense undertaking, as appraisal services are commonly a small portion of a larger entity's business. Companies with appraisal divisions, as well as large appraisal firms, typically do not have a ready-made database of all of their client and vendor relationships that would be required by such a change.[8]

[8] Many appraisers who work for appraisal firms and large real estate companies with appraisal divisions are members of the Appraisal Institute and/or the MBREA. The amici are familiar with the operations of their members, and know just how rare it is that these members have anything resembling the expansive conflict checking systems that would be required if the Eliot rule were abrogated.

The lack of a database of firm-wide business relationships, as would be required to check for potential conflicts at the firm-wide level (and beyond),[9] is not a failing of appraisal firms or their parents. Nor is it an abrogation of their ethical obligations. Rather, the absence of such a database is directly related to the fact that the relevant rules, regulations, standards, and guidelines (including but not limited to the Code and USPAP), which have been developed and amended by individuals and organizations with significant expertise in the appraisal profession over the course of decades, have always focused on the individual appraiser. There has simply never been a need for appraisal firms to develop and maintain far-reaching databases aimed at identifying and compiling all firm-wide business dealings. Instead, the rules only require disclosure at the individual level, both because that is what is

[9] Here, the disclosure proposed by Appellant Buffalo-Water would have required not only a disclosure of business relationships that Mr. Skinner's company, Cushman, had with the Parties, but a full disclosure by that company's affiliate, C&W-US, of its business relationships with the Parties as well. Nor would it be limited to the business relationships of Cushman's appraisal business. Instead, it would encompass Cushman's much larger brokerage business, its consulting business, its capital markets business, its facilities management business, and so on.

reasonably feasible, and because that is all that has been needed to maintain the integrity of the appraisal process.

The fact that appraisal firms do not have established databases of firm-wide business relationships is also a function of the fact that appraisal services are often a small portion of an entity's overall business. Requiring a large, multi-national entity with various business lines (like C&W-US, for example) to create from scratch and maintain broad databases of all their business relationships simply because one division has appraisers who perform services in Massachusetts is unnecessary and overly burdensome.[10] And, we suspect that, in many cases, it may well result in such large firms opting out of the appraisal business in Massachusetts entirely — meaning that there would be fewer experienced appraisers in

[10] For a firm such as Cushman, associated with C&W-US - a company with 400 offices in approximately 70 countries employing close to 50,000 individuals, see http://www.cushmanwakefield.com/en/about-us (last visited September 10, 2018) - this would be a gargantuan task requiring disclosure of potentially hundreds or thousands of engagements and relationships, with no actual relationship to the appraisal engagement at issue or even to the appraisal function.

Massachusetts with the know-how to value a unique property like the one at issue in this case. Such a shrinkage of the appraisal market would benefit no one.

Finally, the proposed change would risk generating even more unnecessary litigation and confusion, as those firms that are willing to attempt to comply with firm-wide disclosure obligations may make innocent mistakes and errors that could be seized upon by aggrieved parties looking for a second bite at the apple. Put differently, to expand the Eliot rule as Appellant urges would run the serious risk of inviting unwarranted judicial review of any appraisal where one party learns or suspects that an individual appraiser's firm has an affiliate, subsidiary, parent, or division that has done completely unrelated work for another party to the transaction, but that was missed in the conflict-check and disclosure process.

CONCLUSION

For 71 years, this Court has properly limited judicial review of appraisals to cases in which a party alleges fraud, corruption, dishonesty, or bad faith. This rule comports with relevant industry standards and ethics rules, which have been honed for

decades, and which focus on the obligations of the individual appraiser. A change to this rule would not only be unnecessary, but would cause serious, harmful change to the appraisal profession.

For all the foregoing reasons, the judgment of the Superior Court should be upheld, and this Court should declare that judicial review for appraisals is limited to allegations of "fraud, corruption, dishonesty, or bad faith," as set out in Eliot v. Coulter, 322 Mass. 86, 90-91 (1947).

Respectfully submitted,

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September 20, 2018

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Mass. R. App. P. 16(k) that the brief of Amici Curiae Massachusetts Board of Real Estate Appraisers and The Appraisal Institute submitted herewith complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. (16)(a)(6) (pertinent findings or memoranda of decision); Mass. R. App. P. (16)(e) (references to the record); Mass. R. App. P. 16(f) (reproductions of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of brief); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers).

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