COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR NO. 17039

Yong Li,

Plaintiff - Appellant,

v.

Raytheon Company, and others
Defendants - Appellees.

IN SUPPORT OF APPELLANT'S APPLICATION

FOR FURTHER APPELLATE REVIEW

JOHN S. MARSHALL'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; JOHN S. MARSHALL'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S FAR APPLICATION

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Amici in support of plaintiff-appellant

COMMONWEALTH OF MASSACHUSETTS
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JOHN S. MARSHALL'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Mass. R.A.P. Rule 17, *amici curia* John Marshall, the Principal in Empowerment thru Self Help / CONSULTANTS hereby respectfully request to leave to file the accompanying brief of amicus of curiae brief. This brief is submitted in support of the Application for Further Appellate Review.

Plaintiff-Appellant Yong Li has consented the filing of this brief.

As set forth in the accompanying brief, the *amici* is affected by the due process and the equal protection under the Fourteenth Amendment and the state constitutional due process rights, and has a deep interest in their proper interpretation and application.

The *amici* is greatly concerned that the Massachusetts Appeal Court's error on the case statute, which resulted in a ruling of appellate *sua sponte* dismissal under Mass. R. Civ. P. Rule 12 (b) (6), which in turn deprived

appellant Yong Li of due process rights. There was no hearing, no opportunity to amend complaint, and no adversarial process. Moreover, Yong Li was deprived of right to appeal in the Appeal Court's level. Any further process in the Supreme Court would not be a matter of right.

The trick was that the Appeal Court did not identify the dismissal as *sua sponte*, because they "assumed" the issue of Rule 12(b)(6) had been raised in the low court, so that they applied case law Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990) to dismiss the appellant's discrimination claims against Raytheon. In fact, the issue of Rule 12(b)(6) had never been raised. Without such "assumption," the Appeal Court should remand the case back to the low court for further process, or should set up a precedent with respect to the *sua sponte* dismissal under Rule 12(b)(6) before dismissing this case.

Accordingly, the amici respectfully requests to leave to file the accompanying *amicus curiae* brief in support of the Application for Further Appellate Review ("FAR").

Respectfully submitted,

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Amici in support of plaintiff-appellant

Date: August 19, 2008

COMMONWEALTH OF MASSACHUSETTS
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AMICUS CURIAE BRIEF OF JOHN S. MARSHALL IN SUPPORT OF APPELLANT

STATEMENT OF INTERESET OF AMICI CURIA

The amici, John S. Marshall is a Boston resident, US citizen. He was elected to and served on the board of the Boston Branch NAACP in the 1970s, while he was a Ph.D candidate at Brandeis University, and had experienced injustice and was involved struggle for equality, civil rights and human rights. The amici is affected by the Bill of Rights, including the due process and the equal protection under the Fourteenth Amendment and the Massachusetts constitutional due process rights, and has a deep interest in their proper interpretation and application.

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STATEMENT OF PRIOR PROCEEDING

The amici agree with the major points set forth in the Statement of Prior Proceedings of Plaintiff-Appellant Yong Li ("Li") and the Defendants-Appellees Raytheon et al. ("Raytheon"). The amici, however, make some supplemental points.

The Appellant was a senior software engineer and had worked in Raytheon's Marlborough facility for seven (7) years. In 2004, she was subjected to alleged racial discrimination, harassment, illegal interrogation in Raytheon, and started suffering posttraumatic stress disorder, and became long-term disabled. She filed discrimination and retaliation lawsuit under M.G.L. 151B to the Middlesex Superior Court.

The appellant could not find attorney due to her severe mental condition which caused communication problem. She, as a pro se, went through the MCAD (Massachusetts Commission against Discrimination), the Middlesex Superior Court, and the Appeal Court. The process for the appellant went through was not efficient compare to a normal healthy complainant. The Superior Court dismissed Li's discrimination claims against Raytheon for a prior pending action in federal court.

On appeal, the Massachusetts Appeal Court found that the Superior Court erred in relying on Rule 12(b)(9). However, the Appeal Court did not remand the case back, instead, they "affirmed" the dismissal under Rule 12(b)(6) for failure to state a claim. The Appeal Court resembled "any valid ground on which the motion should have been allowed," Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990) . Apparently, the Appeal Court assumed that the issue of Rule 12(b)(6) had had been raised in the low court. There was no notice, no hearing, no opportunity to amend the complaint, and no opportunity to get response from the parties.

Li filed Petition for Rehearing timely, she specifically pointed out that the issue of Rule 12(b)(6) had never been raised, briefed, or argued. However, the Petition for Rehearing was denied.

Later, Li's FAR Application was denied in the SJC.

WHY FURTHER APPELLATE REVIEW SHOULD BE GRANTED

Yong Li v. Raytheon Company merits further appellate review because the case involves four substantial reasons impact on fairness and justice. The first reason is that the Appeal Court made mis-assumption in violation of the SJC Rule 3:09 Code of Judicial Conduct, and Canon 3B(2) "judge shall be faithful to the law and maintain professional competence in it." The Appeal Court erred by relying on Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990). Apparently, the Appeal Court assumed that the issue of Rule 12(b)(6) had been raised in the low court. This error is undisputed. The appellant Yong Li had pointed this error in her Petition for Rehearing and her Application for Further Appellate Review. The Court's failure to correct this error is against fairness and justice, and will result in a miscarriage of justice.

Further, the Massachusetts appellant court had no occasion to pass judgment on sua sponte dismissal under Rule 12(b)(6). Without establishing a case law, the court deprived Li of her due process by entering sua sponte dismissal under Rule 12(b)(6) in violation of Equal Protection under the Fourteenth Amendment rights.

Third, Appeal Court's ruling, if subjected to a sua sponte dismissal for failure to state a claim without providing the plaintiff an opportunity to amend the complaint, was conflicted with the authoritative decisions of the Supreme Courts in Ohio, Wyoming, and Arizona, and the authoritative decisions of United States Courts of Appeals for First, Second, Sixth, Seventh, Ninth, and Eleventh circuits on the same issue. "…, such dismissals are erroneous unless the parties have been afforded

notice and an opportunity to amend the complaint or otherwise respond.'" Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002) ; Lewis v. New York, 547 F.2d 4, 6 (2d Cir. 1976) ; *Tingler v. Marshall* , 716 F.2d 1109, 1111-12 (6th Cir. 1983) , and Ricketts v. Midwest Nat'l Bank , 874 F.2d 1177, 1184 (7th Cir. 1989)) ; Franklin v. Oregon State Welfare Division, 662 F.2d 1337, 1340-41 (9th Cir. 1981) (citations omitted); see also Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989) and Wong v. Bell, 642 F.2d 359, 361-62 (9th Cir. 1981) (citations omitted). Farese v. Scherer 342 F.3d 1223 (11th Cir. 08/19/2003) (citations omitted); Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997)" (citations omitted);

The Supreme Courts of Ohio, Wyoming, and Arizona had adopted the opinions of federal courts: "… a sua sponte dismissal without notice to the parties is fundamentally unfair to litigants." *Mayrides v. Franklin Cty.Prosecutor's Office* (1991), 71 Ohio App.3d 381, 384; Jenkins v. Miller, 2008 WY 45, 180 P.3d 925 (Wyo. 04/14/2008) , Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986) (citations omitted); See Hill v. Zimmerer, 839 P.2d 977, 981 (Wyo. 1992) (citations omitted); Acker v. Chevira, 934 P.2d 816, 188 Ariz. 252, 239 Ariz. Adv. Rep. 22 (Ariz.App.Div.1 03/20/1997) (citations omitted).

Final, concerning the plaintiff-appellant is a mental disabled pro se with English not as her first language, she could not adequately write her complaint at that time, the depriving of her opportunity to amend the complaint is extraordinarily imprudent in violation of American Disability Act, 42 U.S.C. § 12201–12213..

For the foregoing reasons, the Application for Further Appellate Review should be granted.

Respectfully submitted,

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Amici in support of plaintiff-appellant

Date: August 19, 2008

Certificate Service

Service was made upon counsel for each other party by first mail class in the counsel office, addressed as follow:

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Ms. Yong Li
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On _____, /s/_____(*Amici* John Marshall)