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May 5, 2016

Alan Jay Rom, Esq.
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P.O. Box 585
Chelmsford, MA 01824

Re: *Mass. Assoc. of Court Interpreters, Inc. et al. v. Lewis "Harry" Spence et al.*; Suffolk Superior Court Case No. 2016-00969

Dear Counsel:

Enclosed pursuant to Superior Court Rule 9A, please find a copy of *Defendants' Motion to Dismiss Plaintiffs Amended Complaint with Supporting Memorandum of Law*. If you wish to oppose this Motion, please forward the original and one copy of your opposition to my office within the time frame allowed by this rule.

Thank you for your attention to this matter.

Very truly yours,

Janna J. Hansen, **Ext. 2812**
Assistant Attorney General
Trial Division

Enclosures

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. SUCV2016-00969

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, INC., MOUSSA ABBOUD, SOLEDADE GOMES DEBARROS, ANAHIT FLANAGAN, NORMA V. ROSEN-MANN, and MICHAEL R. LENZ, individually, and on behalf of other persons similarly situated,

Plaintiffs,

v.

LEWIS "HARRY" SPENCE, in his capacity as Administrator of the Trial Court, and his successors in office, MARIA FOURNIER, in her capacity as the Director of the Support Services Department of the Trial Court Office of Court Management and the Office of Court Interpreter Services Coordinator for the Administrative Office of the Trial Court, and her successors in office, and BRUCE SAWAYER, in his capacity as Manager of Accounting of the Fiscal Affairs Department of the Trial Court, and his successors in office,

Defendants.

DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants Lewis "Harry" Spence, Maria Fournier, and Bruce Sawayer (collectively "Defendants") move to dismiss Plaintiffs' Amended Complaint. Plaintiffs, *per diem* court interpreters, allege that the Trial Court's compensation formula improperly denies them pay and benefits equal to those received by staff court interpreters and that they are improperly classified as independent contractors rather than state employees. Plaintiffs bring claims for alleged

violations of the Massachusetts Wage Act and the federal Fair Labor Standards Act as well as a variety of other claims. As set forth in the enclosed memorandum of law in support of this Motion to Dismiss, Defendants bring this motion to dismiss Plaintiffs' claims both for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

LEWIS "HARRY" SPENCE in his official capacity; MARIA FOURNIER in her official capacity; and BRUCE SAWAYER in his official capacity

By their Attorneys,

MAURA HEALEY,
ATTORNEY GENERAL

Jamna J. Hansen, BBO #662063
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One Ashburton Place
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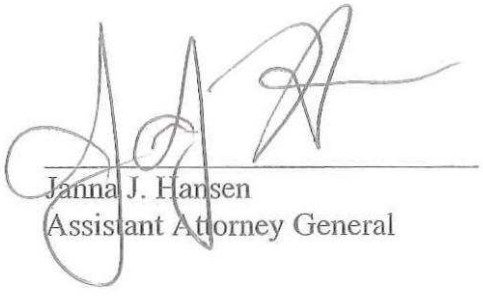
Date: May 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day, May 5, 2016, served the foregoing document, upon all parties, by mailing a copy, first class, postage prepaid to:

Alan Jay Rom, Esq.
Rom Law P.C.
P.O. Box 585
Chelmsford, MA 01824



Janna J. Hansen
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. SUCV2016-00969

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, INC., MOUSSA ABBOUD, SOLEDADE GOMES DEBARROS, ANAHIT FLANAGAN, NORMA V. ROSEN-MANN, and MICHAEL R. LENZ, individually, and on behalf of other persons similarly situated,

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Defendants,

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants Lewis "Harry" Spence, Maria Fournier, and Bruce Sawayer (collectively "Defendants") respectfully submit this memorandum of law in support of their Motion to Dismiss Plaintiffs' Amended Complaint ("AC"). Plaintiffs, *per diem* court interpreters, allege that the Trial Court's compensation formula improperly denies them pay and benefits equal to those received by staff court interpreters and that they are improperly classified as independent

contractors rather than state employees. Plaintiffs bring claims for alleged violations of the Massachusetts Wage Act and the federal Fair Labor Standards Act as well as a variety of other claims. Defendants bring this motion to dismiss Plaintiffs' claims both for lack of subject matter jurisdiction and for failure to state a claim.

FACTUAL BACKGROUND[1]

The individual named plaintiffs in this matter are *per diem* court interpreters in the Commonwealth of Massachusetts.[2] AC ¶¶ 2-6. Named defendants are all Trial Court employees sued in their official capacities as representatives of the Trial Court. AC ¶¶ 21-23. The Office of Court Interpreter Services ("OCIS"), a department of the Trial Court, has hired *per diem* court interpreters since 2006. AC ¶ 35. These *per diem* interpreters are classified as independent contractors and submit to OCIS a monthly or bi-monthly schedule, indicating their availability for court assignments. AC ¶ 38. Plaintiffs allege unequal treatment between staff interpreters, who are employed by the Trial Court, and *per diem* interpreters, claiming Plaintiffs: (1) should be considered employees rather than independent contractors; (2) are inconsistently paid for their half or full day commitments; (3) do not receive adequate travel expenses; (4) do not receive pay in a timely manner; and (5) are occasionally replaced by Screened Interpreters, whom Plaintiffs allege are less qualified. AC ¶¶ 41-53. Plaintiffs also allege that OCIS

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[1] Defendants assume, as they must, that the allegations in the Amended Complaint are true for purposes of this Motion only.

[2] The named plaintiffs also purport to bring this action on behalf of all Massachusetts Association of Court Interpreters ("MACI") members, those eligible for MACI membership, and those who might become eligible in the future. AC ¶ 7. Plaintiffs' proposed class would consist of certified and screened court interpreters who are treated as *per diem* court interpreters. AC ¶ 8. Defendants' Motion focuses on the jurisdictional and pleading deficiencies of the Amended Complaint. Defendants respectfully reserve the right, if necessary, to challenge Plaintiffs' ability to bring this Amended Complaint as a class action at a later date.

improperly retaliated against them for bringing complaints concerning their pay. *See, e.g.*, AC ¶¶ 83-84.

PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint directly in the Supreme Judicial Court pursuant to G.L. c. 211, § 3, requesting relief under that Court's general superintendence powers. *See* Dkt. No. 2 at ¶ 24. Defendants moved to transfer the case to the Superior Court on January 29, 2016. That motion was granted on February 26, 2016, and the case was docketed in this Court on March 7, 2016. Plaintiffs filed their Amended Complaint on March 25, 2016. Plaintiffs' Amended Complaint names Lewis ("Harris") Spence, Maria Fournier, and Bruce Sawayer as defendants in their official capacities. AC ¶¶ 21-23. Plaintiff brings claims for alleged violations of the M.G.L. c. 149, § 148B (Count I) and the federal Fair Labor Standards Act ("FLSA") (Counts II and IV), as well as Contract claims (Counts III and IX), an Unjust Enrichment claim (Count V), a Quantum Meruit claim (Count VI), and Retaliation claims (Counts VII, VIII, and X). Defendants respectfully submit that each of these claims must be dismissed for lack subject matter jurisdiction or failure to state a claim as a matter of law.

ARGUMENT

In order to survive a motion to dismiss under Massachusetts Rule of Civil Procedure 12(b)(6), a plaintiff must allege "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). This requires "more than labels and conclusions;" Plaintiffs' "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* Complaints that do not meet this threshold requirement are subject to dismissal for failing to state a claim. *Id.*

The Court reviews a motion to dismiss for lack of subject-matter jurisdiction pursuant to Massachusetts Rule of Civil Procedure 12(b)(1) under the same standard as a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *See, e.g., Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322 (1998). The party asserting jurisdiction bears the burden of demonstrating the existence of subject matter jurisdiction. *Wooten v. Crayton*, 66 Mass. App. Ct. 187, 190 n.6 (2006) ("[P]laintiff bears the burden of proving jurisdictional facts to support each of the plaintiff's claims.")

I. PLAINTIFFS' M.G.L. c. 149, § 148B AND RETALIATION CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

Plaintiffs' claims that Defendants are in violation of M.G.L. c. 149, § 148B (Count I) and that Defendants retaliated against Plaintiffs for complaining about their wages (Counts VII, VIII and X) are all barred by the Commonwealth's sovereign immunity.[3] The doctrine of sovereign immunity generally shields the Commonwealth from suit. *See Smith v. Massachusetts Bay Transp. Auth.*, 462 Mass. 370, 373 (2012); *Todino v. Town of Welfleet*, 448 Mass. 234, 238 (2007). A private party cannot sue the Commonwealth or its components unless there has been a waiver of the Commonwealth's sovereign immunity. *See Lopes v. Commonwealth*, 442 Mass. 170, 175 (2004); *Cameron Printing, Inc. v. University of Massachusetts*, 83 Mass. App. Ct. 345, 347 (2013). Courts adhere to stringent rules of construction governing such purported waivers. *See DeRoche v. Mass. Com'n Against Discrimin.*, 447 Mass. 1, 12-13 (2006); *Woodbridge v. Worcester State Hosp.*, 384 Mass. 38, 42 (1981). The sovereign immunity waiver and consent to suit must be set forth in the statute's plain terms or appear by necessary implication from such

[3] Plaintiffs' suit against the individual Defendants in their official capacity is treated as a suit against the Commonwealth. *See O'Malley v. Sheriff of Worcester County*, 415 Mass. 132, 141 n.13 (1993); *Longval v. Comm. of Correction*, 2000 WL 1476089, *2 (Mass. App. Ct. July 13, 2000).

language. *See, e.g., Locator Servs. Group, Ltd. v. Treasurer & Receiver Gen.*, 443 Mass. 837, 858 (2005); *Ware v. Commonwealth*, 409 Mass. 89, 91 (1991).

A. Plaintiffs' M.G.L. c. 149, § 148B Claim is Barred by Sovereign Immunity

Plaintiffs allege a cause of action under the Massachusetts independent contractor statute, M.G.L. c. 149, § 148B. This statute addresses the classification of individuals as independent contractors as opposed to employees. But, this statute does not contain a waiver of the Commonwealth's sovereign immunity. Nowhere does the statutory provision declare expressly that it applies to the Commonwealth or its agencies. *See* M.G.L. c. 149, § 148B; *see also Jergensen v. Mass. Historical Com'n*, 2015 WL 3422114, *4 (Mass. Super. May 14, 2015) ("The language of Section 148B(d) suggests a legislative intent to apply those remedies only to nongovernmental entities"). Nor does the statute provide for a private right of action against the Commonwealth. *See* M.G.L. c. 149, § 150 (contemplating a private action under § 148B but not mentioning the Commonwealth or its agencies); *see also Jergensen*, 2015 WL 3422114, at *2 (noting that M.G.L. c. 149, § 148B does not "expressly provide[] a private right of action against the Commonwealth"). As such, Plaintiffs have not met their jurisdictional burden and their claims under M.G.L. c. 149, § 148B must be dismissed.

To the extent that Plaintiffs are making a claim under the Massachusetts Wage Act, M.G.L. c. 149, § 148, it should fail for the same reasons. The Massachusetts Wage Act provides certain protections for workers against employers in the Commonwealth. However, only Commonwealth employees who are "mechanic[s], workm[e]n and laborer[s]" and Commonwealth employees working at a "penal or charitable institution" have recourse against the Commonwealth under the Wage Act. *See* M.G.L. c. 149, § 148; *see also Jergensen*, 2015 WL 3422114 at *4 ("because Section 148 applies only to certain limited categories of state employees, the existence of a private cause of action and waiver of sovereign immunity to allow

claims under Section 148 is similarly limited only to those employees"); *Roche v. Commonwealth*, No. 13-cv-04555-B, at 2 (Mass. Super. Jan. 15, 2015) (attached as Exhibit 1) (noting that the Wage Act "was written so as to protect employees almost exclusively in private enterprise, and very few exceptions apply to state employees."). As explained below, Plaintiffs have not alleged (nor could they) that they are employed as workmen, laborers, or mechanics or are employed at a "penal or charitable institution" within the meaning of Section 148 and thus their claim must be dismissed. *See Wooten*, 66 Mass. App. Ct. at 190 n.6 ("Plaintiff bears the burden of proving jurisdictional facts to support each of the plaintiff's claims.").

1. Plaintiffs are Not Employed as Workmen, Laborers, or Mechanics

As *per diem* court interpreters, Plaintiffs do not fall within the categories of a "mechanic, workman, or laborer." Although the terms "mechanic, workman and laborer" are not defined in M.G.L. c. 149, courts have relied on "the common meaning attributed to these words in other legislation pertaining to the rights of workers in this Commonwealth." *Newton v. Comm'r of Dep't of Youth Servs.*, 62 Mass. App. Ct. 343, 348 (2004). As a result, courts have found that highly educated office workers, *Roche*, No. 13-cv-04555-B, at 2 (Ex. 1), a supervisory janitor whose work was not of "menial" character, *White's Case*, 226 Mass. 517, 521 (1917), a teacher in an industrial school, *Lesuer's Case*, 227 Mass. 44 (1917), and an on-call firefighter, *Randall's Case*, 279 Mass. 85 (1932), were not considered to be workmen, laborers, or mechanics. *Newton*, 62 Mass. App. Ct. at 348.

This Court should find the same here. Whether an individual comes within the classification of a "mechanic, laborer or workman" is dependent on the nature of the work performed by him or her. *Newton*, 62 Mass. App. Ct. at 348. Plaintiffs' Amended Complaint fails to allege sufficient facts demonstrating that they perform the kind of work associated with that of a mechanic, laborer, or workman. Instead, Plaintiffs' own allegations show that the

language interpretation work that they perform is more similar to the highly educated office workers that were found not to be mechanics, laborers, or workman in *Roche*. *See* Ex. 1 at 2; AC ¶¶ 35-36 (alleging that Plaintiffs must meet "qualifying requirements," must be "certified" or "screened," and must complete online training); AC Ex. A at 7 (stating that court interpreters are "highly skilled professionals"); M.G.L. c. 221C, § 7 (requiring that court interpreters be qualified, trained, and certified). Given the nature of Plaintiffs' work, they cannot demonstrate that they qualify as mechanics, laborers, or workmen, and, like the plaintiffs in *Roche*, their Count I should be dismissed.

2. The Trial Court is not a Penal or Charitable Institution

Similarly, the exception of the Commonwealth's sovereign immunity under the Wage Act for employees who are employed in a "penal or charitable institution" does not rescue Plaintiffs' claim. The Wage Act does not define "penal or charitable institution." In *Newton*, the Court relied on G.L. c. 125, § 1 which defines the term "penal institution" as a "correctional facility." 62 Mass. App. Ct. at 348-49. That statutory provision defines a "state correctional facility" to mean "any correctional facility owned, operated, administered or subject to the control of the department of correction." G.L. c. 125, § 1(n). The Trial Court is not a correctional facility under this definition. Indeed, in *Newton*, the Court found that the Department of Youth Services, which deals with juvenile delinquency, did not constitute a "penal institution" under the Wage Act. 62 Mass. App. Ct. at 349. The same should hold true for the Trial Court.

Similarly, Plaintiffs have failed to satisfy their burden that the Trial Court qualifies as a "charitable institution" under the Wage Act. There is nothing in the statute authorizing the Trial Court that suggests it was intended to be a charitable institution; instead it is part of the Commonwealth's judicial system. *See* M.G.L. c. 211B, § 1. Moreover, given the plain meaning

attached to the word "charitable institution," the Trial Court would not qualify as such under the Wage Act. *See, e.g.*, *Roche* at 2 (Ex. 1) (finding that the Department of Mental Health is not a charitable institution but instead an agency within the Commonwealth); *Newton*, 62 Mass. App. Ct. at 349 (finding that the Department of Youth Services is not a charitable institution under G.L. c. 149, § 148).

The conclusion that Plaintiffs' claims would be barred is also consistent with "the narrow construction that has been afforded G.L. c. 149, § 148," *Newton*, 62 Mass. App. Ct. at 349, and waivers of sovereign immunity in general. It is well settled that "[t]he rules of construction governing statutory waivers of sovereign immunity are stringent." *Ware*, 409 Mass. at 91. In light of such stringent construction and Plaintiffs' failure to plead sufficient facts demonstrating that they fall into an exception to the Commonwealth's sovereign immunity, this Court should find that Plaintiffs have failed to satisfy their burden that this Court has jurisdiction to adjudicate their claim under M.G.L. c. 149, § 148B.

B. Plaintiffs' Retaliation Claims are Also Barred by Sovereign Immunity

Plaintiffs' retaliation claims (Counts VII and VIII and X) are barred for the same reason as their employee/independent contractor claim, namely that the requisite waiver of sovereign immunity and consent to suit is also absent from M.G.L. c. 149, § 148A (the anti-retaliation provision of the Wage Act). Like the independent contractor statute, the anti-retaliation statute also does not expressly state that it applies to the Commonwealth or its agencies. *See* M.G.L. c. 149, § 148A; *see also* M.G.L. c. 149, § 150 (contemplating a private action under § 148A but not mentioning the Commonwealth or its agencies). And since Plaintiffs are not mechanics, laborers, or workmen, and since the Trial Court is not a penal or charitable institution, *see* Section I.A(1)-(2), *supra*, the limited waiver of the Commonwealth's sovereign immunity with respect to the Wage Act in general fails to apply. *See, e.g.*, *Roche* at 2 (Ex. 1) (dismissing

retaliation claim under the Wage Act because the Commonwealth has not waived its sovereign immunity). As such, Plaintiffs have not met their jurisdictional burden and their claims for retaliation should also be dismissed.

II. PLAINTIFFS' FAIR LABOR STANDARDS ACT CLAIMS ARE SIMILARLY BARRED

Plaintiffs' claims for alleged violations of the Fair Labor Standards Act (Counts II and IV) should similarly be dismissed under Rule 12(b)(1) because this Court also lacks jurisdiction over these claims. Plaintiffs' Counts II and IV both purport to bring claims against Defendants for alleged violations of federal law, namely the Fair Labor Standards Act ("FLSA"). *See* AC ¶ 70 (alleging that Defendants are in violation of the FLSA for failure to classify Plaintiffs as "employees"); AC ¶ 77 (alleging that Section 7.06 of the S&P violates the FLSA). However, the Supreme Court has held that Congress does not have the power to "subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999). In *Alden*, the Supreme Court upheld the dismissal of an FLSA claim that was brought in state court against the State of Maine, on the basis of sovereign immunity. *Id.* The Court stated "we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* at 754.

The Commonwealth can waive its sovereign immunity. *See Maysoent-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003). However, such a waiver of sovereign immunity must be "unequivocally expressed." *Fed Aviation Admin v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Any waiver must be "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (alteration in original) (internal quotations omitted). No such waiver

has occurred here. As such, the Commonwealth's immunity applies and Plaintiffs' FLSA claims must be dismissed.[4]

III. PLAINTIFFS' CONTRACT CLAIMS SHOULD BE DISMISSED

Plaintiffs bring two contract-related claims (Count III and Count IX), but neither states a claim that is compensable as a matter of law.

A. Plaintiff's Count III Fails to State a Claim

Plaintiffs' Count III alleges that the OCIS Standards and Procedures ("S&P") constitutes a contract. The S&P, attached to Plaintiffs' Complaint, states that it "provide[s] court interpreters, judges, attorneys, and other court personnel with important information about accessing, using, and providing quality court interpreter services in the Massachusetts Trial Court." AC Ex. A at 1, § 1.01. Plaintiffs claim that the S&P "govern[s] *per diem* court interpreters" and that the S&P is a contract between Plaintiffs and Defendants. AC ¶ 74. Even if this is assumed (although not conceded) to be true for purposes of this Motion, Plaintiffs do not adequately explain why the S&P being interpreted as a contract means that Plaintiffs have stated a cause of action.

To the extent Plaintiffs are alleging that the S&P is an unconscionable contract that should not be enforced against them (*see, e.g.*, Prayer for Relief (c); AC ¶ 57), they have not adequately alleged sufficient facts to demonstrate this. A contract has historically been considered unconscionable and unenforceable only "if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Miller v. Cotter*, 448 Mass. 671, 679 (2007) (quoting *Hume v. United States*, 132

[4] Although Plaintiffs' Amended Complaint indicates that they are also seeking injunctive relief, the FLSA is clear that it only "authorizes the Secretary of Labor to seek injunctive relief, limiting employees to suits for unpaid wages and liquidated damages." *Mills v. Maine*, 118 F.3d 37, 55, 49 (1st Cir.1997) (noting that "every post-*Seminole Tribe* federal district court decision of which we are aware has dismissed private FLSA actions for lack of subject matter jurisdiction").

U.S. 406, 411 (1889)). "Under Massachusetts law, to prove that the terms of a contract are unconscionable, a plaintiff must show *both* substantive unconscionability (that the terms are oppressive to one party) *and* procedural unconscionability (that the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise)." *Machado v. System4 LLC*, 471 Mass. 204, 218 (2015) (emphasis added) (internal quotation omitted).

Plaintiffs have made no such allegations here. First, Plaintiffs do not demonstrate any procedural unconscionability with respect to the S&P. Plaintiffs are highly skilled professionals who do not allege that they faced undue pressure to sign the S&P. *See, e.g.*, *Miller*, 448 Mass. at 545 (contract not procedurally unconscionable where signee was "intelligent and educated man" and was not subject to any undue pressure to sign the contract); AC Ex. A at 7 (stating that court interpreters are "highly skilled professionals"); M.G.L. c. 221C, § 7 (requiring that court interpreters be qualified, trained, and certified). Nor do Plaintiffs adequately allege that they were somehow coerced or defrauded into signing the S&P; indeed Plaintiffs themselves allege that they often choose to work with the Trial Court over alternate employers. *See e.g.*, AC ¶ 39; *Debnam v. FedEx Home Delivery*, 2011 WL 1188437, *2 (D. Mass. Mar. 31, 2011) (dismissing plaintiff's claim that his alleged misclassification as an independent contractor instead of an employee was void as against public policy and an "unconscionable contract" because plaintiff could have rejected the agreement and found employment elsewhere and because plaintiff did not adequately allege that he was coerced or defrauded into signing the agreement); *see also Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 389 (1st Cir. 2001) (enforcing contract not unreasonable despite defendant's alleged "overwhelming bargaining power and influence" since there was no evidence plaintiff was coerced into entering into agreement). Therefore, Plaintiffs

have not adequately alleged procedural unconscionability and any potential claim stating that the S&P is unenforceable should be dismissed.

Nor do Plaintiffs adequately allege substantive unconscionability. While Plaintiffs' allegations taken as true for purposes of this motion demonstrate that they, as *per diem* interpreters, are considered independent contractors while full-time staff interpreters are considered employees, this does not adequately allege that the terms that Plaintiffs voluntarily agreed to governing their status as *per diem* interpreters are somehow "oppressive." By Plaintiffs' own allegations, they pick which days they are available to work (AC ¶ 38), are free to work for non-Trial Court employers in addition to their Trial Court work (AC ¶ 39), and are paid $40 per hour (AC ¶ 41 n.10). Plaintiffs offer no explanation why the fact that full-time staff interpreters have certain different contractual terms means that the ones Plaintiffs agreed to are oppressive. Thus, Plaintiffs have not adequately alleged substantive unconscionability and for this additional reason, any contract claim based on the allegation that the S&P should not be enforced should be dismissed.

If instead Count III is intended to be read as a breach of contract claim, many of Plaintiffs' alleged breaches are belied by the S&P itself. First, Plaintiffs allege that they are being denied many supposed "statutorily required benefits for state employees" (AC ¶ 75) but point to no provision in the S&P (or any other contract) dictating that Plaintiffs, as *per diem* interpreters, are contractually bound to get the same benefits as state employees. Indeed, the S&P instead specifies that *per diem* interpreters have their own compensation structure and their own duties. *See* Ex. A, Section 7.00 to 7.09 and 10.00-10.04. Thus, any breach of contract claim based on an alleged failure to receive the same benefits as full-time employees must be dismissed.

Second, Plaintiffs allege that OCIS is underpaying their wages (*see* AC ¶ 75) but Plaintiffs do not adequately allege which provision of the S&P is being violated. Section 7.00 of the S&P (AC Ex. A) covers compensation for *per diem* court interpreters and provides that the rate of compensation is set by the Committee for the Administration of Interpreters for the Trial Court. *See* AC Ex. A at 7.01. Plaintiffs do not allege that this rate is being violated but instead allege that, for example, a *per diem* court interpreter who serves on a case from 11am to 1pm is paid for two hours of work rather than a half-day minimum salary (four hours) supposedly required by the S&P. *See* AC at p. 2. S&P Section 7.02, however, provides that "Compensable Time shall be calculated beginning at the time the court interpreter arrives at the assigned court and reports to the Court Liaison . . . If the court interpreter is present at the courthouse for the four-hour period, the court interpreter will receive payment for a half day as long as the court interpreter is available for the full four hour period." Plaintiffs appear to want to be paid for the full half-day as long as they indicated they were available that day (*see* AC at pg. 2) even if they only interpreted for two hours. Yet the S&P clearly states they must be present at the courthouse and available to interpret for that entire time. *See* S&P Section 7.02. Thus, Plaintiffs have not adequately alleged that Defendants are in breach of the S&P with respect to payment of wages.

Finally, Plaintiffs claim that OCIS has been tardy with respect to payments and reimbursements (AC ¶ 75) yet point to no provision in the S&P that would be violated even if these allegations are true. Instead Plaintiffs claim this alleged delay violates G.L. c. 149, § 148 (AC ¶ 51). As shown above, however, this statute does not apply to the Commonwealth. *See* Section I, *supra*. Thus, Plaintiffs have also not alleged a breach of contract with respect to alleged late payments and reimbursements.

B. Plaintiff's Count IX Also Fails to State a Claim

Plaintiffs' Count IX is labeled as a breach of contract claim but, again, even if the S&P constitutes a contract between the parties to this lawsuit, Plaintiffs have not sufficiently alleged that Defendants are in breach of the S&P. *See* AC ¶ 97.

Plaintiffs allege that the Defendants decided not to renew permanent identification badges for *per diem* interpreters when those badges expire and have instead required that these *per diem* interpreters obtain temporary identification badges from security officers at each court. *See* AC ¶¶ 87, 89. Plaintiffs further allege that many courthouses do not have security officers that issue identification badges. *See* AC ¶ 90. Plaintiffs then conclude that these alleged actions by Defendants constitute a breach by Defendants of Section 4.05(j) of the S&P, which states "[c]ourt interpreters shall wear their official identification badges in such a manner as to make their presence clear to all persons in court in need of their services." *See* AC ¶ 97; AC Ex. A at 13.

At most, this provision of the S&P would create a condition precedent for Plaintiffs' performance. That is, if the S&P constituted a contract between the parties, the cited provision would merely describe an event that must happen (that the Defendants provide identification badges) before a contractual duty arises (that the Plaintiffs wear such identification badges). *See Twin Fires Inv., LLC v. Morgan Stanley*, 445 Mass. 411, 420-21 (2005) ("A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract. If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced"). If Defendants brought an action against Plaintiffs alleging that Plaintiffs violated the S&P by failing to wear their identification badges, Plaintiffs could aver that Defendants failed to satisfy a condition precedent of that clause, namely providing Plaintiffs with an identification badge. Plaintiffs do not allege that Defendants have

brought such an action, nor could they. Defendants' alleged failure to satisfy this condition precedent is not an independent breach of contract and Plaintiffs' Count IX should be dismissed.

IV. PLAINTIFFS' UNJUST ENRICHMENT AND QUANTUM MERUIT CLAIMS ALSO FAIL TO STATE A CLAIM

Plaintiffs' claims for unjust enrichment (Count V) and quantum meruit (Count VI) similarly fail. First, Plaintiffs offer no specific allegations as to why they are entitled to relief under either legal theory, instead merely conclusorily assert that each applies.[5] *See, e.g.*, AC ¶¶ 79, 81. Second, even if Plaintiffs did offer further explanation, their claims would still fail. Plaintiffs themselves allege that the S&P is a contract that governs *per diem* court interpreters' "performance requirements, pay rates, and other terms and conditions of employment." AC ¶ 73. However, "[r]ecovery in quantum meruit presupposes that no valid contract covers the subject matter of a dispute. Where such a contract exists, the law need not create a quantum meruit right to receive compensation for services rendered." *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 250 (1993). Since Plaintiffs allege that such a contract exists—even though Defendants do not concede that a contract exists—their claims for unjust enrichment and quantum meruit must be dismissed. *See, e.g., Saia v. Bay State Gas Co.*, 2012 WL 1145913, *4 (Mass. App. Ct., Apr. 6, 2012) (dismissing unjust enrichment claim because plaintiff affirmatively pled the existence of a contract); *Michael Shea Co., Inc. v. Chellis*, 2011 WL 6339817, *3 (Mass. App. Ct. Dec. 20, 2011) (dismissing quantum meruit claim where plaintiff admits entering into contract that covered the subject matter of the dispute); *SAR Group Ltd. v. E.A. Dion, Inc.*, 2011 WL 2201063,

[5] Indeed, quantum meruit is a theory of recovery based on unjust enrichment, not a separate cause of action. *See J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 793-94 (1986). Massachusetts courts thus treat claims for unjust enrichment and for quantum meruit as the same. *Saia v. Bay State Gas Co.*, 2012 WL 1145913, *4 (Mass. App. Ct., Apr. 6, 2012); *see also SAR Group Ltd. v. E.A. Dion, Inc.*, 2011 WL 2201063, *6 (Mass. App. Ct. June 8, 2011) ("Under Massachusetts law, a claim for unjust enrichment and quantum meruit are treated similarly and have the same elements.").

*6 (Mass. App. Ct. June 8, 2011) (since contract existed covering issue of compensation, plaintiffs did not have a viable unjust enrichment claim); *Rostanzo v. Rostanzo*, 2010 WL 5094276, *2 (Mass. App. Ct. Dec. 14, 2010) ("Given that there is a binding contract addressing the very subject that the plaintiff here presses, the quantum meruit claim is necessarily and fatally flawed."); *Beaupre v. Town of Douglas*, 2006 WL 1360814, *2 (Mass. Super. Apr. 4, 2006) (dismissing quantum meruit claim and noting that "Massachusetts courts have consistently held that recovery in quantum meruit requires at least that no actual contract exist regarding the subject matter being disputed").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' Amended Complaint be dismissed in its entirety.

Respectfully submitted,

LEWIS "HARRY" SPENCE in his official capacity; MARIA FOURNIER in her official capacity; and BRUCE SAWAYER in his official capacity

By their Attorneys,

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Date: May 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day, May 5, 2016, served the foregoing document, upon all parties, by mailing a copy, first class, postage prepaid to:

Alan Jay Rom, Esq.
Rom Law P.C.
P.O. Box 585
Chelmsford, MA 01824

Janna J. Hansen
Assistant Attorney General

Exhibit 1

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

THE SUPERIOR COURT

SUFFOLK

~~MIDDLESEX~~, ss.

DOCKET NO.13-CV-4555-B

NOTICE SENT 01.16.15 MASS.A.G. H.R.M. S.+T. W.B.G. R.S.S.

JENNIFER ROCHE et al

v.

COMMONWEALTH OF MASSACHUSETTS et al

(LAT)

AMENDED MEMORANDUM OF DECISION AND ORDER[1]

Introduction

The plaintiffs Jennifer Roche and Jean Calvert were employed by the Massachusetts Department of Mental Health as the Clinical Director of Community Services and a Clinical Social Worker, respectively. Both possess master's degrees in social work: Roche from Boston University, and Calvert from Simmons' College.[2]

Before me is the Commonwealth's partial motion to dismiss counts I (wage act violation), II (retaliation), V (breach of a contract) and VII (unjust enrichment).

After reviewing the moving and opposition papers and a hearing, this motion must be **ALLOWED** for the following reasons.

COUNT I – Wage Act Violations.

The plaintiff is absolutely correct when he argues that the purpose behind the Wage Act is to "prevent the evil of the 'unreasonable detention of wages [by employers]. '" *Newton v. Commissioner of Department of Youth Services*, 62 Mass App. Ct. 343, 345 (2004).

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[1] The Amended Memorandum corrects this court's misspelling of the plaintiff Roche's surname and other minor *errata*, for which the Court apologizes.

[2] The Commonwealth's memorandum at page two states that Roche possesses a Master of Social Work degree from Simmons College, but this must be a typographical error because in the same paragraph, Roche is referred to as having a master of social work "from Boston University."

However, the Wage Act was written so as to protect employees almost exclusively in private enterprise, and very few exceptions apply to state employees. Those limitations extend only to "mechanic[s], workm[e]n or laborer[s] or workers" or those who work at a "penal" or "charitable" institution. Truly, neither Ms. Roche nor Ms. Calvert, both highly educated individuals who work in office settings, are neither mechanics, workmen nor laborers. Similarly, although perhaps they may have felt at times that they worked in a "penal" setting at the Department, they really did not work in a correctional facility, nor is the Department a charitable institution; instead, it is an agency within state government.

COUNT II – Retaliation

To prevail on this count, Ms. Roche and Calvert must be able to demonstrate that the Commonwealth has waived its sovereign immunity; it has not. This count, therefore, cannot proceed as a matter of law, despite the plaintiff's desires.

COUNT III- Breach of Contract

Ms. Roche and Calvert are members of a union which holds a collective bargaining contract with the Commonwealth. Each has filed grievances with their union, which, as the plaintiff points out, have been languishing for a year. (*See* Plaintiff's Opposition Memorandum at page 11.) The relief that the plaintiffs seek rests with their union (their exclusive bargaining agent), not directly with the Commonwealth. That is why individuals have banded together for a century in this nation, to strengthen their negotiating hand with large employers, rather than be treated dismissively as single, relatively powerless, individuals.

That the grievance has been pending with the commonwealth for "nearly a year" with the state, as the plaintiffs allege – if accurate - is unconscionable. The Commonwealth is requested to step up and address these grievances promptly. Ms. Roche and Calvert properly desire, and are entitled to, timely adjudication of their claims.

The remedy for Ms. Calvert and Ms. Roche for such a delay is against their own union. If they feel that the union has failed in its duty of fair representation to them, they should file a separate action (not to be consolidated with this one to avoid confusion) so as to focus the union on the merits of their grievance and claims.

COUNT IV- Unjust Enrichment

This count is intertwined with the count for breach of contract, and the plaintiffs are directed to exhaust their administrative remedy. The collective bargaining process has been long established, at least in part, as a grievance resolution system; that is the forum established by law where the plaintiffs are entitled to the justice they appear to deserve. And it is that process to which the plaintiffs are directed for their relief.

ORDER

For these reasons, the plaintiff's motion for partial dismissal of the plaintiffs' complaint must be **ALLOWED** and counts I, II, V and VI are hereby **DISMISSED.**

BY THE COURT,

DENNIS J. CURRAN
Associate Justice

January 15, 2015