COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

 CIVIL ACTION NO. 2016-00969

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 )

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. )

 )

EXECUTIVE OFFICE OF THE TRIAL COURT, )

 )

Defendant. )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

 **PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO**

 **COMPEL LIST OF MACI MEMBERSHIP**

 Plaintiffs oppose Defendant’s Motion to Compel a list of the members of Massachusetts Association of Court Interpreters (“MACI”) for several reasons. First, knowing the names of individual members of MACI is not relevant to the contract claim in this case. Second, disclosing the names of its members violates Plaintiffs’ rights under the First and Fourteenth Amendments.

1. Disclosure of MACI Members Is Not Relevant to Contract Claim

Defendant confuses MACI and its individual members. The difference is that MACI is an organization as opposed to an individual, but those it seeks to represent include more than the membership at any one point of time. The Substituted Amended Complaint states:

“[T]his action is brought on behalf of all MACI members, and those eligible for membership in MACI now and in the future. Named plaintiffs bring this action on behalf of themselves and all others who are or will be similarly situated. The class consists of both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.”[[1]](#footnote-1)

 The first paragraph of Defendant’s motion separates MACI from the other named plaintiffs. However, MACI **is** a named Plaintiff, acting on behalf of the class as described above. MACI acts on behalf of the stated class as an organizational plaintiff, but a named plaintiff, nonetheless. That it may do so is supported by the United States Supreme Court in *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977), the First Circuit Court of Appeals in *NAACP v. Harris*, 607 F.2d 514 (1979) and approved by the Appeals Court in *Modified Motorcycle Ass’n of Mass., Inc. v. Commonwealth*, 60 Mass. App. Ct. 83, 85 (2003). Defendant cites three elements from *Modified Motorcycle*: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. This Court already rejected Defendant’s challenge to MACI’s standing in its organizational capacity in its February 10, 2020 order pending discovery. Defendant has taken the deposition of each individual plaintiff, including MACI and their testimony was under oath. Their sworn testimony showed that MACI has sufficient numbers to constitute standing for organizational representation.

 There is no compelling need regarding Defendant’s stated reason for its motion to compel the list of membership as to its relevancy to the relief sought in this action. Defendant states that knowing MACI’s members is relevant “to complete discovery pertaining to MACI’s associational standing – including whether MACI’s “**members would otherwise have standing to sue**.” Defendant’s Motion to Compel, at page 4 (emphasis supplied). However, no one can be a member of MACI unless s/he is a certified or screened court interpreter. They are the members of the class. Those are the only people who are claiming that provisions of the S&P have been violated. And Plaintiffs have told Defendants that MACI, as a Plaintiff, is not seeking damages for itself, as an organization, but is representing the stated class to secure injunctive relief and damages for the violation of the rights of the members of the class it represents in its organizational role. If MACI were not an individually-named Plaintiff, each of the other individual-named Plaintiffs could bring this action on behalf of the defined class and seek the same relief. Defendant nowhere argues that MACI does not meet the three requirements stated in *Modified Motorcycle*, *supra*, or Hunt or *NAACP*. Since MACI’s organizational standing is a mirror of the individualized members of the class, the claim of lack of typicality (Rule 23(a)(3)) or that the named plaintiffs can fairly and adequately represent the interests of the class (Rule 23(a)(4) do not require the disclosure of the names of the members of MACI, as its interests and role are one and the same as the interests and role of the other individually-named Plaintiffs and all members of the stated class.

1. Defendant’s Interests in Knowing the Names of the Members of MACI Violates MACI’s Rights Under the First and Fourteenth Amendments

Again, Defendant falsely claims that MACI is seeking monetary relief for MACI, as an organization, as opposed to seeking damages for the individual members of the class. See Exhibit 1, e-mails of January 12 and 26, 2021, where Defendant’s counsel recognizes that MACI is not seeking relief for MACI, *qua*, MACI and then states that, therefore MACI should not be a party, misstating or misunderstanding the law of organizational standing as described in *Hunt*, *NAACP*, and *Modified Motorcycle*, described in Part A. What Defendant claims is that, if MACI is not seeking damages, it cannot be a party plaintiff, and that is inconsistent with the law of organizational standing as described in the three cases cited above. And nowhere in its Prayer for Relief does MACI seek damages for the organization, *qua*, MACI.

WHEREFORE, Plaintiffs request that this Court:

1. Declare that this action is maintainable as a class action.
2. Declare that the Standards and Procedures constitute a contract

Between Defendants and the class of plaintiffs described herein

And, following trial, that Defendants have violated Plaintiffs’

Rights under the S & P.

1. ***Award damages for wages, and all other forms of restitution right-***

***fully due members of the class, which are attributable to defendants’***

***wrongful conduct.*** (emphasis supplied)

1. Award multiple damages as authorized by law.
2. Award counsel fees, costs, pre-judgment and post-judgment interest

As the court may deem equitable in connection with this action.

1. Award any further relief, the Court may deem just, proper, or equitable.[[2]](#footnote-2)

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, the demand for the membership list of the NAACP was resisted.

“Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.”

*Id*. at 460. As will be seen, infra, MACI has similar fears and they are justified by facts. But first, Defendant throws a red-herring into the argument with its citing *Hastings v. N.E. Indep. Sch. Dist*., 615 F.2d 628, 632 (5th Cir. 1980), cited by Defendant on pp. 5-6 of its motion for the proposition that “(holding that a class action and money damages are reasons for justifying a disclosure of membership information under *NAACP v. Alabama*).” Yet, Defendant knew before making this argument in its Motion to Compel that MACI is not seeking monetary damages, See Exhibit 1, so there is no need, much less a compelling need, to know who are the members of MACI. NAACP urged:

that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues

more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court. In so concluding, we reject respondent's argument that the Association lacks standing

 to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation.

*Id*. at 458-459. The Court reasoned: “In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Id. at 461.

 The Court continued, “Where government action subjects persons to harassment and threats of bodily harm, economic reprisal, or “other manifestations of public hostility, the government must demonstrate a compelling interest … .” *Id* at 463. *See also*, *Bates v. Little Rock,* 361 U.S. 516, 524 (1960). There must be a substantial relationship between the information sought and the compelling state interest, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) and the state regulation must “be drawn to prevent the supposed evil,” *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). [[3]](#footnote-3)

The Court concluded:

We hold that the immunity from state scrutiny of membership lists which

the Association claims on behalf of its members is here so related to the right

of the members to pursue their lawful private interests privately and to

associate freely with others in so doing as to come within the protection of

the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free

enjoyment of the right to associate which disclosure of membership lists is likely to have.

*Id*. at 466.

 On page 4, MACI stated that it has fears that are comparable to those in NAACP. These fears can be demonstrated by reference to Plaintiffs’ Motion to Compel. In its Motion to Compel, Plaintiff summarized some of its contract claim under the 2009 Standards and Procedures (“S & P”)

Examples of Requested Discovery. Among the 2009 S&P provisions that Plaintiffs claim were violated by Defendant are:

1. Section 7.02: whether the class was compensated on a half-day/full day basis when members of the class worked, or were available for the half-day or full-day;
2. Section 7.02: whether members of the class were compensated for the full-day after working more than four hours or available for working more than four hours;
3. Sections 7.02/7.09: whether members of the class were compensated when the assignments were cancelled within 24 hours of the scheduled proceeding, including cancellation of the afternoon session;
4. Section 7.03: whether members of the class were compensated at a rate of 25**%** greater than the standard rate when they were scheduled to an assignment to interpret in more than one language, but did not in fact interpret in more than one language for any reason not of their own fault;
5. Section 9.01: whether members of the class who are certified court interpreters did not receive an assignment because it was first offered to screened *per-diem* court interpreters;
6. Sections 9.01/9.07: whether members of the class who were available for assignments were passed over in favor of the use of Language Line telephonic interpreters;
7. Whether members of the class were docked pay for being more than 15 minutes late to an assignment which is not authorized by any section of the S&P;
8. Whether members of the class were not able to take lunch because they were traveling to an afternoon assignment, kept after 1 pm by the court or for any other reason, and whether they were compensated for that time;
9. Section 7.02: whether members of the class were paid by the hour because Defendant scheduled them to start after 9 am even though they indicated their availability to start at 9 am and not authorized by the S&P except for overtime or travel time;
10. Section 7.02: whether when compensating members of the class for travel and lunch time, they were paid an hourly rate less than the rate would be per hour when working a full-day or half-day as per the requirements of the S&P.
11. Section 11.08: This section states, “A summary sheet of what OCIS has approved and processed for payment will be sent to each *per-diem* court interpreter,” but the class of *per-diem* court interpreters did not receive them after a certain date, or did not receive them timely when they were being sent; and
12. Section 12.01: *Per-diem* court interpreters, including Plaintiff Michael Lenz, have been taken off the list without the process delineated in this section being followed.

In January 2021, the Trial Court issued its “updated S & P. Exhibit 2 consists of selected pages of the comparable sections Plaintiffs complained were violated in the 2009 S & P, Exhibit 3. Comparing the two versions, it is clear that whatever rights Plaintiffs may have had in the 2009 version that they complained about and which is the subject of this litigation, they have disappeared in the 2021 version. Examples of such changes include the following:

Section 4.02 of the 2009 S & P required each interpreter to sign a form indicating their compliance with the S & P. Because there were provisions of this S & P under which they claimed contractual right that were violated is what is before this Court for proof, the first part being the determination of the class. See Exhibit B of Plaintiffs’ Motion to Compel Discovery (and Exhibit 3 here). This form is missing from the 2021 S &P. See the last two sentences of Section 4.02 on page 8 of the 2009 S & P. There is a separate document that Defendant requires them to sign, but it is not referred to in the new S & P, and thus, at least arguably, does not make the 2021 S & P a contract.

Moreover, a comparison of specific provisions of the 2009 S & P that spoke to compensation is missing from the comparable section of the 2021 S & P.

1. Section 7.02. Under the 2009 S &P, a *per-diem* court interpreter would work and be paid for based on a half-day or full-day. The last time rates were set was in 2006 or 2007; those rates were $300 for a full-day and $200 for a half-day for a certified court interpreter. In the new S & P, there is no indication as to what payment will be based on. Will *per-diem* court interpreters be able to choose to work half-days or will they be required to make themselves available for full-days only, thus jeopardizing other work they might pursue?
2. In Section 7.03 of the 2009 S & P, *per-diem* court interpreters who are assigned to interpret in more than one language are paid at a rate 25% greater than the standard rate. One of the complaints in this litigation is that when *per-diem* court interpreters were “assigned” to interpret in more than one language (usually one language in the morning and the other in the afternoon) and they adjusted their schedules accordingly and gave up other potential work, and for whatever reason the second language interpreting was cancelled (e.g. case continued or settled) they were not paid for the second language, even though it was “assigned.” This provision is eliminated from the 2021 S & P.
3. Section 7.04 of the 2009 S & P provided for paying *per-diem* court interpreters at an hourly rate for work after 8 hours in a day. This section is omitted in the 2021 S & P.
4. Section 7.05 of the 2009 S & P addressed the issue of compensating waiting time, one of the issues addressed in the Substituted Amended Complaint, but this provision is eliminated in the 2021 S & P
5. Section 7.06 of the 2009 S & P provides for compensation for travel time. This is an issue raised in the litigation of not being compensated according to its provisions. There is no mention of compensation for travel time in the 2021 S & P.
6. Section 7.09 of the 2009 S & P provides for payment for one-half day if the assignment is cancelled within 24 hours of the time it is to be performed. This is one of the elements of Plaintiffs’ Substituted Amended Complaint. Compare this language with the language in the 2021 S & P, Section 7.05, which leaves compensation for such cancellations in the discretion of management.
7. Section 9.01 of the 2009 S & P addressed the issue of priority of assignments. The 2021 S & P does not address priority of assignments.
8. There is no provision in the 2009 S & P for docking pay for late arrival. There are many reasons beyond the control of *per-diem* court interpreters for arriving late, such as severe weather conditions, traffic accidents, etc. Section 7.03 of the 2021 S & P provides for docking pay for late arrival.
9. Section 11.08 of the 2009 S & P provided for giving per-diem court interpreters a summary sheet of what was approved and processed for payment. This provision was removed from the 2021 S & P.

Whether these changes constitute retaliation against *per-diem* court interpreters for filing this case is not before the Court in this Opposition to Defendant’s Motion to Compel, because its Motion only focusses on whether Plaintiff MACI should have to disclose its membership list of names in discovery, and the disclosure of its members is not even relevant to the issue of whether a class exists, as all past, current, and *future per-diem* court interpreters constitutes the class of members for whom relief is sought in this case. However, these changes constitute a shot across the bow as to the reality of the fears of MACI and its members as warned in *NAACP v. Alabama, supra.* And, because the class consists of all current or future per-diem court interpreters, the membership list is not even relevant to the determination of the class, as described above in Part A.

1. Conclusion

*NAACP v. Alabama, supra,* requires strict scrutiny to be applied to government intrusion of Plaintiffs’ First and Fourteenth Amendment rights where fears in exercising those rights are real. Plaintiffs have demonstrated that their fears are real and therefore this Court should protect their First and Fourteenth Amendment rights by denying Defendant’s Motion to Compel MACI’s membership list.

WHEREFORE, Plaintiffs respectfully pray that the Court deny Defendant’s Motion for a list of MACI members.

 Respectfully submitted,

Massachusetts Association of Court Interpreters, Inc. (MACI), Norma V. Mann, individually, and in her capacity as President of MACI, Moussa Abboud, Soledad Gomes DeBarros, Anahit Flanagan, and Michael R. Lenz, PLAINTIFFS

 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Dated: 15 February 2021 [www.romlawoffice.com](http://www.romlawoffice.com)

 **CERTIFICATE OF SERVICE**

 I, Alan Jay Rom, hereby certify that a copy of the above Plaintiffs’ Opposition to Defendant’s Motion to Compel MACI’s Membership Lists was served on defendant by sending a copy both electronically and by first-class mail, postage pre-paid, to Katherine B. Dirks, Esq., Assistant Attorney General, Government Bureau/Trial Division, One Ashburton Place, Room 1813, Boston, Massachusetts 02108, this 16th day of February, 2021.

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 Alan Jay Rom

1. Paragraph 1 of Plaintiffs’ Substituted Amended Complaint describes the organization: “MACI is a non-profit corporation organized under Chapter 180 of the General Laws of Massachusetts in in November 2014. As set out in its Articles of Incorporation, MACI includes, as one of its purposes, advocating for competent and fair language access and equal justice opportunity to LEP people, of particular importance here, for sustained improvement of the courts’ interpreting services throughout Massachusetts. It advocates for just pay and just working conditions for judicial interpreters, including, advocating for appropriate budgets, regular rate reviews, merit and seniority recognition, fair grievance procedures and other conditions of employment.” [↑](#footnote-ref-1)
2. Plaintiffs’ attorney mis-labeled these prayers, omitting c). What is c) here was labeled d) in the Substituted Amended Complaint, and the mislabeling continued because the label c) was omitted. Above is the way the Prayer for Relief should read. [↑](#footnote-ref-2)
3. Lower courts have applied the *NAACP v. Alabama* standard of strict scrutiny. In *Familias Unidas v. Briscoe*, 619 F.2d 391, 394 (5th Cir. 1980), the Fifth Circuit struck down a Texas statute that empowered a county judge to compel public disclosure of the names of individual students and parents who were members of organizations that sought reforms in a public school district. The underlying state interest was not compelling and legitimate and the disclosure requirement not “drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary.” *Id* at 399. *See also*, *Brock v. Local 375, Plumbers International Union of America,* 860 F.2d 346, 350 (9th Cir. 1988), which recognized that once a plaintiff shows that disclosure will result in “harassment, membership withdrawal, or discouragement of new members,” or otherwise chill associational rights, heightened scrutiny applies: the government must demonstrate that the information sought “is rationally relate to a compelling governmental interest,” and that the disclosure requirement is the least restrictive means of obtaining that information. *Id*. at 350; *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) (“[i]nfringements on [the freedom to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”). This burden is on the government, not the association, *United States v. Comley*, 890 F.2d 539, 543-44 (1st Cir. 1989); *Humphreys, Hutcheson, & Moseley b. Donovan*, 755 F. 2d 1211, 1222 (6th Cir. 1985), and *Clark v. Library of Cong*., 750 F.2d 89, 94 (D.C. Cir. 1984) [↑](#footnote-ref-3)