

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.

EXECUTIVE OFFICE OF THE TRIAL
COURT,

Defendant.

**MEMORANDUM IN SUPPORT OF THE TRIAL COURT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AND IN THE ALTERNATIVE,
MOTION TO STRIKE CLASS ALLEGATIONS**

This putative class action for breach of contract arises from complaints made by independent contractors who provide translation and interpreter services to the Massachusetts Trial Court on a per diem basis (“per diem court interpreters”). Plaintiffs are five current or former per diem court interpreters as well as the Massachusetts Association of Court Interpreters, Inc. (“MACI”), a professional organization that works to advance the interests of court interpreters in Massachusetts. Plaintiffs allege that the Standards & Procedures (“S&P”) of the Trial Court’s Office of Court Interpreter Services (“OCIS”) constitutes a contract, and that the Trial Court breached this purported contract in various ways regarding interpreter assignments and the calculation of compensable time. They bring a single cause of action for breach of contract against the Trial Court, on behalf of themselves and a putative class. Although the Trial

Court disputes the claim in its entirety, the Trial Court now moves for partial summary judgment on two specific issues, resolution of which would save trial time, simplify the trial and promote resolution of the case.¹

First, the class claims must be dismissed because the proposed class does not meet the requirements of Rule 23, and Plaintiffs have adduced no evidence through discovery to show otherwise. Plaintiffs filed their Substituted Amended Complaint (“Complaint”) in April 2018 and defined the putative class to include “both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.” Over the course of discovery, however, Plaintiffs have done nothing to develop a basis for class certification, and through their inaction have implicitly abandoned their class claims. Plaintiffs have not requested any class discovery since filing the Complaint; they have not served interrogatories; they have not served notices of deposition; they have not asked to conduct class discovery outside the discovery period (which ended in June 2019); and they have not moved for class certification pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure.

Plaintiffs therefore cannot show that they satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, or adequacy of representation. Plaintiffs also cannot meet their burden under Rule 23(b) to show that questions of law or fact common to the class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for adjudication. Proving Plaintiffs’ claim would require individualized findings regarding the formation and existence of agreements with each per diem

¹ The Trial Court moves for partial summary judgment pursuant to Superior Court Rule 9A(b)(5)(vi) because resolution of the issues presented in this motion will “save ... trial time, ... simplify the trial and ... promote resolution of the case.” Specifically, such resolution could determine whether the trial relates to the claims of five per diem court interpreters or to the claims of an unspecified larger number of per diem court interpreters.

court interpreter, and any breach of that contract for each per diem court interpreter. Moreover, because the proposed class is defined in terms of a legal conclusion (those per diem court interpreters whose rights have been “violated”) rather than an objective event, the proposed class does not satisfy Rule 23’s implicit requirement that the members are ascertainable. In the alternative to partial summary judgment as to the class claims, the Trial Court moves to strike the class allegations on the same grounds.

Second, plaintiff MACI has no standing to bring its claims and must be dismissed from the action. MACI is not a party to any agreement with the Trial Court and therefore has no standing on its own behalf to pursue a contract claim. Nor does MACI have associational standing to seek relief on behalf of its members. A required element of associational standing is that the association must be able to litigate the claim without involvement of individual members. Here, MACI cannot litigate its contract claim without involving MACI members in proving the existence and breach of an agreement with the Trial Court.

BACKGROUND

Factual Background

OCIS, a department of the Trial Court, administers the provision of all interpreter services to the Trial Court, and is responsible for the training, certification, assignment and supervision of spoken language court interpreters who provide services in court proceedings. Statement of Undisputed Material Facts (“SMF”) ¶ 1. Per diem court interpreters are freelance court interpreters assigned to court proceedings from the lists of court interpreters developed and maintained by OCIS. SMF ¶ 2. They submit to OCIS their schedules of availability for court assignments, and are assigned to proceedings on a day-to-day, as-needed basis. SMF ¶¶ 3, 4. The Trial Court has two classifications of per diem court interpreters. Screened Interpreters and

Certified Interpreters are defined in the S&P and come with various requirements in education, training and examinations, with Certified Interpreters having to meet a greater number of requirements. SMF ¶¶ 6, 7.² Currently, OCIS identifies 142 per diem court interpreters on its list of per interpreters: 80 are Certified in one or more languages; and 62 are Screened but not Certified. SMF ¶ 9. Of the 142 per diem court interpreters on the list, 40 are Certified or Screened to interpret in more than one language. SMF ¶ 10. In addition to engaging per diem court interpreters, the Trial Court employs staff interpreters who work as full-time employees for the Trial Court. SMF ¶ 5.

The named individual plaintiffs—Moussa Abboud, Soledad Debarros, Anahit Flanagan, Michael Lenz, and Norma Rosen-Mann (“Individual Plaintiffs”)—are five Certified Interpreters who have provided services as per diem court interpreters for the Trial Court. SMF ¶ 11.

In 2009, the Trial Court adopted and approved a document, the Standards and Procedures of OCIS, which outlines the policies and protocols pertaining to court interpreter services in state court proceedings. SMF ¶ 12. The purpose of the S&P is (1) to “provide 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,” and (2) to “supply interpreters with principles and protocols to follow when interpreting for the Office of Court Interpreter Services.” SMF ¶ 13. For instance, the S&P outlines the process for requesting court interpreter services and for assigning interpreters to judicial proceedings. SMF ¶ 14. The S&P also outlines the professional code of conduct with which per diem court interpreters are expected to comply. SMF ¶ 15. Per diem court interpreters are expected to

² A Qualified Interpreter is a Certified Interpreter who has also passed the examination and is qualified to interpret in the United States District Court for the District of Massachusetts. SMF ¶ 8.

arrive on time to their assignments, maintain impartiality in their interpreting, and apply their best skills and judgment to preserve the meaning of what is said in court. SMF ¶ 16.

The S&P also provides an overview of certain compensation procedures for court interpreters. With respect to how compensable time shall be calculated, the S&P states:

Compensable Time shall be calculated beginning at the time the court interpreter arrives at the assigned court and reports to the Court Liaison. A “half day” shall be calculated as time spent up to and including four hours of actual interpreting or the time when the court interpreter is available and waiting to perform actual interpreting. “Full day” means a period of time that is more than four hours. Lunch time shall not be considered in this calculation. 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 or is otherwise excused from providing services during that period by OCIS.

SMF ¶ 17. The S&P also states that “[c]ourt interpreters who are assigned by OCIS to provide court interpreter services in more than one language on the same day shall be compensated at a rate 25% greater than the standard rate set by the Committee and the CJAM [Chief Justice of Administration and Management].” SMF ¶ 18.³

MACI is an organization that works to advance the interests of court interpreters in Massachusetts. SMF ¶ 23. MACI is not identified in the S&P. SMF ¶ 24. MACI does not have a contract or agreement with the Trial Court. SMF ¶ 25.

Procedural History

Plaintiffs filed their original complaint on or about March 7, 2016, and a first amended complaint on or about March 25, 2016. The first amended complaint asserted putative class

³ The S&P does not specify rates of compensation. Rather, the standard rates of compensation are set by the Committee for the Administration of Interpreters for the Trial Court and the Chief Justice of Administration and Management. SMF ¶ 19. Plaintiffs do not allege that the Trial Court failed to pay Plaintiffs the standard rates of compensation.

action claims on behalf of per diem court interpreters, including not only breach of contract, but also a claim that the Trial Court violated state law by classifying per diem court interpreters as independent contractors rather than as employees. The amended complaint was asserted against three Trial Court employees and officers. On November 3, 2016, this Court granted the original defendants' motion to dismiss with respect to all claims but the breach of contract claim. Docket No. 10 (Nov. 3, 2016 Order).

In May 2017, Plaintiffs served their first set of document requests, which sought materials relating to per diem court interpreters with the Trial Court. SMF ¶ 26. On May 30, 2018, Plaintiffs filed a motion for leave to file a Substituted Amended Complaint (or "Complaint"), which sought to redefine the putative class. Docket No. 15. The Trial Court opposed the motion on the grounds that redefining the class would be futile due to Plaintiffs' inability to satisfy the class requirements of Rule 23. On August 21, 2018, the Court granted Plaintiffs' motion and found that the Trial Court's opposition was premature because "discovery is not yet concluded." Docket No. 17 (Aug. 21, 2018 Orders) at 1. The Court also granted Plaintiffs' motion to add the Trial Court as a defendant and granted the Trial Court's motion to conform the pleadings to the ruling on the motion to dismiss by removing the individual Trial Court employees and officers from the caption. *Id.* at 1-2.

In October 2018, after the Court's order allowing Plaintiffs to amend the class claims in the Substituted Amended Complaint, Plaintiffs served their second set of document requests. These requests were largely identical to their first set of document requests, but limited the requests to material relating only to the five Individual Plaintiffs. SMF ¶¶ 28, 30. On November 28, 2018, Plaintiffs filed their Substituted Amended Complaint against only the Trial Court to reflect the Court's August 21, 2018 orders. Docket No. 18 (Substituted Am. Compl. (filed Aug.

21, 2018)) (“Compl.”). The Substituted Amended Complaint is now the operative complaint in this action.

Fact discovery closed on June 10, 2019, and Plaintiffs have conducted no class discovery. *See* Am. Tracking Order (May 2, 2018). Plaintiffs have not served interrogatories. Plaintiffs have not served notices of deposition. Since amending their complaint to redefine their proposed class, Plaintiffs have not served any requests for documents relating to the proposed class or to class certification. Plaintiffs have not asked the Court to permit them to conduct class discovery outside of the discovery period allowed by the Court’s May 2, 2018 amended tracking order. Plaintiffs have not served or filed a motion for class certification.

The Allegations and Claims in the Operative Complaint

The operative Complaint asserts only one cause of action: breach of contract against the Trial Court. Compl. ¶¶ 58-61. The Individual Plaintiffs claim that the S&P is a contract between the Trial Court and per diem court interpreters. *Id.* ¶¶ 59, 60. Plaintiffs claim that the Trial Court has breached the terms of the S&P in the following ways: (1) by occasionally not paying per diem court interpreters when court assignments were canceled within 24 hours of the scheduled proceeding (*id.* ¶ 37); (2) under certain circumstances, by paying per diem court interpreters on an hourly basis, rather on a half-day basis, such as when work is scheduled to begin at 10:00 instead of 9:00 (*id.* ¶ 38); (3) by failing to pay per diem court interpreters at a rate of 25% greater than the standard rate, when they are given assignments to interpret in more than one language but do not in fact interpret in more than one language (*id.* ¶ 39); (4) by not paying full-day compensation when per diem court interpreters work during the lunch break (*id.* ¶ 46); (5) by occasionally failing to pay invoices in a timely manner (*id.* ¶ 48); (6) by occasionally assigning Screened Interpreters to court assignments before offering those assignments to a

Certified Interpreter (*id.* ¶ 50); and (7) by encouraging courts to use Language Line telephonic interpreting when per diem court interpreters are available (*id.* ¶ 56). The Complaint also claims that “OCIS is violating rights of the plaintiff class in many ways, including, without limitations, by virtue of underpaying of wages, for tardiness of payments and reimbursements for work done, assignments, and many other required benefits for state employees under the ... S&P.” *Id.* ¶ 61.

Aside from the allegations in the Substituted Amended Complaint, in discovery the Individual Plaintiffs have also stated that the Trial Court breached the terms of the S&P by docking pay for per diem court interpreters who arrived late to their assigned court proceedings, and by removing Plaintiff Michael Lenz from the Trial Court’s list of per diem court interpreters. SMF ¶¶ 31, 32.

The Complaint defines its putative class as “both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.” Compl. ¶ 7.⁴ The Complaint also recites satisfaction of the Rule 23 requirements for class certification, but without specifying how those requirements are met. *Id.* ¶¶ 8-19.

ARGUMENT

I. THE PROPOSED CLASS CANNOT SATISFY THE CERTIFICATION REQUIREMENTS OF RULE 23.

The Complaint’s class claims must be dismissed because no genuine issue of fact exists to dispute the conclusion that the proposed class cannot satisfy the four requirements of Rule 23(a) and the two additional elements of Rule 23(b). Plaintiffs seeking the certification of a class must “provide information sufficient to enable the motion judge to form a reasonable judgment that the class meets the relevant requirements.” *Bellerman v. Fitchburg Gas and Electric Light*

⁴ The Substituted Amended Complaint consists of two paragraphs identified as paragraph 7. The language quoted above is taken from the second paragraph 7.

Co., 470 Mass. 43, 52 (2014) (internal quotation marks omitted). Plaintiffs may not satisfy this burden “on the basis of speculation or generalization regarding satisfaction of the requirements of rule 23.” *Weld v. Glaxo Wellcome Inc.*, 434 Mass. 81, 85 (2001). Here Plaintiffs propose the following class: “The class consists of both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.” Compl. ¶ 7. Such a class has defects not only on its face but also through Plaintiffs’ failure to pursue class claims. *See supra* at 7. This Court has broad discretion to certify or decertify a class at this stage of the litigation, *see Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008), and should exercise that discretion to dismiss the class claims for failure to satisfy (or even attempt to satisfy) Rule 23.

A. The Proposed Class Does Not Meet the Requirements of Rule 23(a).

Rule 23(a) requires Plaintiffs to show that their proposed class meets the following four requirements:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Mass. R. Civ. P. 23(a). Plaintiffs have adduced no evidence that their proposed class meets these requirements.

1. The Proposed Class Does Not Meet the Numerosity Requirement (Rule 23(a)(1)).

Plaintiffs make the conclusory assertion that “[c]lass members ... are sufficiently numerous” in satisfaction of Rule 23(a)(1), Compl. ¶ 8, but there is no evidence to support this assertion. Of the approximately 142 per diem court interpreters in total, 80 are Certified in one or more languages, and 62 are Screened only. SMF ¶ 9. There is no indication as to how many of the per diem court interpreters experienced the purported violations of the S&P that are

alleged in the Complaint. Indeed, most of the Individual Plaintiffs testified that they have not experienced many of these purported violations. SMF ¶¶ 33-36.

For instance, with respect to the claim that the Trial Court assigned Screened Interpreters to court assignments before offering those assignments to a Certified Interpreter (Compl. ¶ 50), three of the Individual Plaintiffs testified that this has not occurred to them. SMF ¶ 33. With respect to the claim that the Trial Court encouraged courts to use Language Line telephonic interpreting when per diem court interpreters were available (Compl. ¶ 56), four of the five Individual Plaintiffs state that they have not been denied assignments on that basis. SMF ¶ 34. With respect to the claim that the Trial Court occasionally did not pay per diem court interpreters when court assignments were canceled within 24 hours of the scheduled proceeding (Compl. ¶ 37), three of the Individual Plaintiffs state that this has not happened to them. SMF ¶ 35.

With respect to the claim that the Trial Court failed to pay per diem court interpreters at a rate of 25% greater than the standard rate, when they are given assignments to interpret in more than one language but do not in fact interpret in more than one language (Compl. ¶ 39), this allegation does not apply to three of the five Individual Plaintiffs, who are not Certified or Screened to interpret in more than language. SMF ¶ 36. Indeed, of all the per diem court interpreters, only 40 are Certified or Screened to interpret in more than one language. SMF ¶ 10. And there is no indication as to how many of these 40 per diem court interpreters have experienced being given assignments to interpret in more than one language but without in fact interpreting in more than one language—let alone how many of these did not receive the 25% addition to their standard rate in such circumstances.

There is no support for the Complaint's assertion that the putative class satisfies the numerosity requirement of Rule 23(a)(1). *See Salvas*, 452 Mass. at 363 (“At the pretrial class

action stage, the plaintiffs must provid[e] information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23”) (internal citations and quotation marks omitted); W.B. Rubenstein, 1 Newberg on Class Actions § 3.13 at 215 (5th ed. 2011) (court is to make “commonsense assumptions regarding the number of putative class members”). Without information sufficient to enable the Court to form a reasonable judgment as to the approximate or minimum number of putative class members, Plaintiffs cannot satisfy the numerosity requirement.

2. The Proposed Class Does Not Meet the Commonality Requirement (Rule 23(a)(2)).

The proposed class does not meet the “commonality” requirement of Rule 23(a)(2), which is discussed in Part I.B, *infra*, because that requirement is subsumed by Rule 23(b). *See* Mass. R. Civ. P. 23(b) (predominance of common questions and superiority of class method).

3. The Individual Plaintiffs’ Claims Are Not “Typical” of the Claims of the Proposed Class (Rule 23(a)(3)), and the Individual Plaintiffs Cannot Fairly and Adequately Represent the Interests of the Proposed Class (Rule 23(a)(4)).

The proposed class also does not meet the Rule 23(a)(3) requirement that the claims of the named plaintiffs are “typical” of the claims of the rest of the class, nor does the proposed class meet the Rule 23(a)(4) requirement that the named plaintiffs fairly and adequately represent the interests of the class. The Complaint alleges without specificity that the “named plaintiffs’ claims are typical of the plaintiff class” and the “[n]amed plaintiffs fairly and adequately represent all class members and do not have antagonistic interests.” Compl. ¶¶ 8, 9. These types of “generalization[s]” are insufficient to meet Plaintiffs’ burden. *Weld*, 434 Mass. at 85.

It cannot be disputed that the Individual Plaintiffs’ claims are not typical of the claims of the rest of the class and cannot fairly and adequately represent the interests of the class. The five

Individual Plaintiffs are all Certified Interpreters. *See* SMF ¶ 11. And they claim that the Trial Court has violated the S&P by giving assignments to Screened Interpreters when a Certified Interpreter is available. Compl. ¶ 50. Yet the proposed class purports to include “both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.” *Id.* ¶ 7. The Individual Plaintiffs therefore have a conflict of interest with the Screened Interpreters in the putative class that they purport to represent, and their claims are not typical of the Screened Interpreters’ claims. Nor can the Individual Plaintiffs’ claims be said to “fairly and adequately” represent the interests of the Screened Interpreters, which are opposed to their own. For these reasons alone, class certification is inappropriate in this case.

B. The Proposed Class Cannot Meet the Requirements of Rule 23(b).

The proposed class has also failed to meet the requirements of Rule 23(b). Rule 23(b) requires “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Mass. R. Civ. P. 23(b). Plaintiffs’ proposed class demonstrates that individual issues far outweigh the common issues and that a class action would not be superior to other available methods of adjudication.

1. Questions of Law or Fact Common to the Members of the Proposed Class Do Not Predominate over Questions Affecting Individual Members.

The predominance test in Rule 23(b) “expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context.” *Salvas*, 452 Mass. at 363 (quoting 2A Conte & H.B. Newberg, *Class Actions* § 4.23 (4th ed. 2002)). The court “must engage in an individualized, pragmatic evaluation of the relationship between and the relative significance of the common and individual issues.” *Salvas*, 452 Mass. at 364 (internal citations

and quotation marks omitted). Here, the Complaint proposes the following common questions: (1) “whether the S&P constitutes a contract between the class of plaintiffs and defendants,” and (2) “whether defendants violated provisions of that contract.” Compl. ¶ 14. Neither question is “common” to the members of the proposed class.

To answer the first question—whether the S&P constitutes a contract—requires individualized factfinding regarding the intentions of each per diem court interpreter at the time he or she agreed to provide interpreter services to the Trial Court. *See Jackson v. Action for Boston Community Development, Inc.*, 403 Mass. 8 (1988) (an implied contract based on a personnel manual requires conclusions of fact regarding the conduct and relations of the parties) (citing *LiDonni, Inc. v. Hart*, 355 Mass. 580, 583 (1969)).

To answer the second question—whether such a contract, if it existed, has been violated—would require individualized factfinding regarding the assignments and compensation of individual per diem court interpreters. Plaintiffs allege “[w]ide variations” with respect to how per diem court interpreters are paid for work. Compl. at p. 2(a). The Individual Plaintiffs themselves have a lack of commonality among their claims. *See supra* Part I.A.1 (only two of the five Individual Plaintiffs claim they were not paid for cancellations of assignments within 24 hours of the hearing; only two Individual Plaintiffs claim that they, as Certified Interpreters, were not offered assignments that were given to Screened Interpreters; only one Individual Plaintiff claims being denied an assignment because a court used Language Line; only two Individual Plaintiffs claim that they were not paid a rate 25% greater than the standard rate when they were given assignments to interpret in more than one language but did not in fact interpret in more than one language). There is also lack of commonality between Individual Plaintiffs and other putative class members, in that the Individual Plaintiffs claim that the Trial Court has assigned

Screened Interpreters to assignments when Certified Interpreters were available, Compl. ¶¶ 49-50, while also seeking to include Screened Interpreters in their proposed class. *Id.* ¶ 7; *see supra* Part I.A.3.

These concerns highlight the individualized questions about each per diem court interpreter's history of assignments and compensation with the Trial Court. To answer these questions would require a series of individual trials about each putative class member. Where the issues involve actions of alleged misconduct that occurred inconsistently, and affected individuals differently, the class action mechanism becomes less useful because there are fewer issues "common" to the putative class. *See, e.g., Fletcher v. Cape Cod Gas Co.*, 394 Mass.595, at 604, n.8 (1985) ("The usefulness of the class action mechanism is even less apparent in cases, such as the one before us, which involve allegations of misconduct by one or more defendants over an extended period of time."); *Waters v. EarthLink, Inc.*, No. CIV.A. 2001-00628, 2006 WL 1549685, at *6 (Mass. Super. May 10, 2006) (denying class certification for breach of contract claim, and citing cases) ("When the court must inquire not only into the extent of harm but also into whether any harm actually resulted, then individual questions predominate and class certification is not appropriate.").

2. The Class Action Is Not the Superior Mechanism for Resolving Common Questions.

The class action is not the superior mechanism for resolving the dispute not only because individual questions of law or fact predominate over any common questions, *see supra* Part II.B.1, but also because the class members themselves cannot be readily identified. Though not expressly identified in Rule 23, an implicit element of class certification is that the class is "ascertainable." *Kwaak v. Pfizer, Inc.*, 71 Mass. App. Ct. 293, 300-01 (2008). When "class members [are] impossible to identify prior to individualized factfinding and litigation, the class

fails to satisfy one of the basic requirements for a class action under Rule 23.” *Shanley v. Cadle*, 277 F.R.D. 63, 68 (D. Mass 2011); *see also Kwaak*, 71 Mass. App. Ct. at 300-01 (class certification reversed when individual proof would be required to determine whether a particular purchaser of Listerine was exposed to deceptive advertising). For a class to exist, “it must be administratively feasible for the court to determine whether a particular individual is a member,” and to be “ascertainable ... the class need ... be determinable by stable and objective factors.” *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 9 (D. Mass. 2010). A defendant in a class action “has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.” *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

Here, Plaintiffs define their proposed class not in terms of an objective standard or event, but rather, in terms of a legal conclusion: the proposed class is defined as “both certified and screened court interpreters whose rights under the S&P have been violated by Defendants.” Compl. ¶ 7. By incorporating a legal conclusion into the definition, Plaintiffs’ proposed class has two fatal defects. First, the identity of the members is ambiguous. The amorphous description of putative class members as those whose “rights under the S&P have been violated” lacks both stability and objectivity, *see Donovan*, 268 F.R.D. at 9, and would require identification of each interpreter’s particular claims, and an individualized litigation of the merits of such claims in light of facts pertaining to that interpreter. Second, identifying the individuals who qualify for the class under that definition would require a judgment that rights have been violated—which could not be done unless a class exists that would enable that judgment to be reached on a classwide basis. Hence, Plaintiffs’ proposed class is tautological. Ascertaining the

identity of class members under such a definition and process is infeasible. A class is therefore not the superior mechanism through which to resolve these claims.

C. In the Alternative, the Trial Court Moves to Strike the Class Allegations Pursuant to Rule 12(f) for Failure to Satisfy Rule 23 Requirements.

If this Court were inclined to deny summary judgment for the Trial Court as to the class claims, then in the alternative, the Trial Court moves to strike the class allegations in the Complaint pursuant to Rule 12(f) for failure to satisfy the requirements of Rule 23. In the federal context, the First Circuit has found that, although courts should “exercise caution” when reviewing motions to strike, lower courts may use their authority under Fed. R. Civ. P. 12(f) to delete the complaint’s class allegations “if it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis.” *Manning v. Boston Med. Center Corp.*, 725 F.3d 34 (1st. Cir. 2013). Those circumstances apply here, where Plaintiffs have not pursued class discovery, have not served interrogatories, have not served notices of deposition, and have not moved for class certification. Moreover, their proposed class cannot meet the requirements of Rule 23, and the definition of the class is tautological with its members not readily ascertainable. *See supra* Part I.A, I.B & I.C. In these circumstances, it is well within the Court’s discretion to strike the class allegations from the Complaint.

II. MACI HAS NO STANDING TO ASSERT ITS BREACH OF CONTRACT CLAIM.

Because MACI has no standing to assert a breach of contract claim against the Trial Court, it must be dismissed from the action. MACI is not a party to any alleged contract with the Trial Court, and is not referred to or involved in the S&P. SMF ¶¶ 24, 25. Presumably MACI’s only purported basis for its claim is associational standing on behalf of its members, but MACI does not satisfy the requirements for associational standing.

An association has standing to bring suit on behalf of its members when: (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. *Modified Motorcycle Ass'n of Mass., Inc. v. Commonwealth*, 60 Mass. App. Ct. 83, 85 (2003) (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).⁵ Courts treat standing as an issue of subject matter jurisdiction. *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322 (1998). And courts "must take note of the absence of standing, whenever it appears." *Litton Bus. Sys., Inc. v. Comm'r of Rev.*, 383 Mass. 619, 622 (1981). See *Statewide Towing Ass'n, Inc. v. City of Lowell*, 68 Mass. App. Ct. 791, 794 (2007).

MACI fails to satisfy this standard because the claim asserted (breach of contract) requires the participation of individual MACI members in the lawsuit. Specifically, to prove the elements of its breach of contract claim, MACI has to establish that the Trial Court's Standards & Procedures—which addresses a diverse audience, not just court interpreters, and covers a range of topics, including judicial expectations, ethical obligations, and general policies and guidelines—constitutes a binding agreement between the Trial Court and MACI members, and that the Trial Court violated these terms vis-à-vis MACI members. To prove MACI's claim, individual members of MACI would have to adduce evidence regarding their understanding and acceptance of the terms of the S&P, as well as how the Trial Court breached the terms of the

⁵ Related to associational standing is Mass. R. Civ. P. 17(a), which requires that "every action shall be prosecuted in the name of the real party in interest." Rule 17(a) and the principles of associational standing are closely intertwined. See *Mass. Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 373 Mass. 290, 296-97 (1977). MACI is not the real party in interest as required by Rule 17(a) because it does not have rights provided by an agreement with the Trial Court. But because MACI also lacks standing, which is a jurisdictional requirement, the Court may dismiss MACI from the action on that basis alone.

S&P for those individual MACI members. *See Cigal v. Leader Dev. Corp.*, 408 Mass. 212, 215-16 (1990). As the Supreme Judicial Court has acknowledged, courts here and “in other jurisdictions have recognized that breach of contract claims are individual and are separable from collective claims.” *Cigal*, 408 Mass. at 216. MACI’s meritless pursuit of associational standing is analogous to *Cigal*, which addressed whether a condominium association could pursue a breach of contract claim on behalf of its individual unit owners. The Court concluded that “a breach of contract claim has an ‘individual character’ and is the sort of action that we have ruled may be brought or settled only by an individual unit owner.” *Id.* at 215. MACI’s breach of contract claim is therefore an individual claim for which MACI has no associational standing to pursue.

MACI’s zeal for ensuring that per diem court interpreters obtain benefits from the Trial Court does not suffice to establish standing to bring this claim. Standing is “not measured by the intensity of the litigant’s interest.” *Sch. Comm. of Hudson v. Bd. of Educ.*, 448 Mass. 565, 579 (2007). Because MACI cannot prove its contract claim without the participation of individual members in the litigation, MACI does not have associational standing to assert this claim.

CONCLUSION

For the foregoing reasons, the Trial Court respectfully requests that this Court (1) dismiss the class claims against the Trial Court, or in the alternative, strike the class allegations from the Substituted Amended Complaint, and (2) dismiss the claims asserted by MACI for lack of standing. If this motion is granted, what would remain in dispute is whether the S&P constitutes a contract between the five Individual Plaintiffs and the Trial Court, and whether the Trial Court breached the terms of such a contract in its assignments to and calculation of compensable time for the five Individual Plaintiffs, both of which the Trial Court denies. A trial on such issues

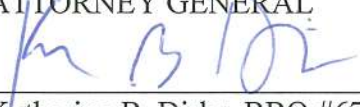
would have a much narrower scope than issues pertaining to the proposed class or to all MACI members. Resolving these issues at this time would conserve judicial resources and limit the scope of triable issues in dispute.

Respectfully submitted,

THE TRIAL COURT

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