COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 2016-00969

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO CONFORM PLEADINGS

INTRODUCTION

Plaintiffs oppose Defendants' Motion to Conform Pleadings[1] for the following reasons:

[1] The Motion to Conform Pleadings is a misnomer because what Defendants seek to do is have this Court treat their motion as a second "bite of the apple" after this Court rejected their Motion to Dismiss Plaintiffs' Claim that the Standards and Procedures ("S&P") is a contract and plaintiffs' claim that their rights under this contract were breached. It is also an attempt to deny class action claims before discovery can be had to determine whether a class claim exists, in fact, and to dismiss Plaintiff Massachusetts Association of Court Interpreters ("MACI") under its mistaken assumptions about organizational representational standing principles.

1. Defendants fundamentally confuse and conflate actions on pleadings with actions on the merits.
2. Defendants fundamentally misstate the law about who can be parties.
3. Defendants fundamentally misstate the law about organizational representational standing.

ARGUMENT

1. This opposition must be considered in conjunction with Plaintiffs' Motion to Substitute Party Defendants and to Re-Define the Class and Defendants' Opposition to that motion. The easiest way to consider these competing motions is to first assume that the prior events in this case did not happen and plaintiffs have just filed a new complaint alleging that the Standards and Procedures ("S&P") governing court interpreters constitutes a contract and plaintiffs allege that defendants breached this contract. Consider Plaintiffs' Substituted Amended Complaint as the "Complaint" with no other claims. This "Complaint" alleges that defendants' actions violated the S&P in various ways as described in the named plaintiffs' affidavits that are attached to the "Complaint." The violations of the S&P in their affidavits do not purport to be an exhaustive list of violations, but examples of them. Moreover, plaintiffs claim in the "Complaint" that there are other *per-diem* court interpreters whose rights are also being abridged by defendants violations of the S&P. All per-diem court interpreters must sign a document, Exhibit G to the "Complaint," agreeing to abide by the terms of the S&P before they are permitted to work. Plaintiffs, and other *per-diem* court interpreters, are members of an organization formed to assert the rights of *per-diem* court interpreters. Plaintiffs allege that there are many *per-diem* court interpreters who have similar claims that can be revealed through

discovery. The question for this court to resolve is whether plaintiffs may PLEAD these allegations in the "Complaint."[2]

If this had not already happened, Defendants could then move to dismiss on the basis that plaintiffs state no claim upon which relief can be granted, M.R.Civ.P. 12 (b)(6). The issue would be briefed and argued and the court would make a decision. In the facts of the case before it, this issue has already been briefed and argued, and this Court has already made a decision and defendants' Motion to Dismiss was denied. They want a second "bite at the apple."
Given that this Court has permitted plaintiffs' claim that the S&P constitutes a contract that defendants violated to go forward in its November 2016 order in this case, the next step is to determine the facts. This calls for the discovery process, after which this Court can make an informed decision as to whether the evidence is there to support plaintiffs' claims that defendants violated the rights of plaintiffs' and others similarly situated, and the court can then have sufficient information to determine whether the S&P constituted a contract, as a matter of law.

The Court obviously did not (and could not) have had sufficient factual information when it ruled on – and denied - Defendants' Motion to Dismiss on this issue. And in its ruling denying defendants' Motion to Dismiss the contract claim, the Court had to presume that all of plaintiffs' allegations were true. For purposes of a motion to dismiss pursuant to Mass. R. Civ. P. 12(b), the allegations of fact in the complaint must be treated as true and the plaintiff is entitled to all favorable inferences. General Motors Acceptance Corp. v. Abington Casualty Ins. Co., 413

[2] Departing from the example being provided to show how the analysis should be made, the original complaint and Amended Complaint, and their description of the class, was framed on the basis of legal claims dismissed from the case. All plaintiffs seek here is to conform the pleadings with the legal issue left in the case, i.e. whether the S&P constitutes a contract and whether plaintiffs can prove a violation of that contract, on behalf of themselves and others similarly situated. The standard for determining the appropriateness for permitting a revision of the pleadings is measured by Rule 15(a) and the Plaintiffs analysis of this standard is found in Plaintiffs' Memorandum in Support of Motion to Substitute Party Defendants and to Re-Define the Class, filed most recently (mailed on 29 May 2018).

Mass. 583, 584, 602 N.E.2d 1085 (1992). This is sufficient for plaintiffs to pursue this claim, but not sufficient at this stage to rule on the merits or even on summary judgment.

Plaintiffs have already sent out discovery for the production of documents and defendants' response was to deny any documents other than those that pertain to the five individually named plaintiffs, and they have not even provided those documents. Defendants presumptuously conclude that plaintiffs cannot be correct that other *per-diem* court interpreters were treated as they were; in other words, even if plaintiffs were treated in the way alleged in their affidavits, it is impossible for other *per-diem* court interpreters to have been treated in a similar way and plaintiffs should not be able to even **assert** a class action. Plaintiffs submit that defendants know they are wrong, but do not want to have to do the work discovery would entail. Plaintiffs submit that if, after discovery, the evidence is what they believe it to be, then, and only then, will be the appropriate time for plaintiffs to move for class action certification. Put another way, if after discovery, it is learned that many, if not most, of the *per-diem* court interpreters were treated in similar ways as the five named plaintiffs, it will be appropriate for this Court to designate the case as a class action because the law in Massachusetts concerning class actions would support class action certification.

While it is premature to engage in an extensive analysis of the law about class actions, it is helpful to state a few basic principles. One of the requirements of M.R.Civ.P. 23(a) is that (1) the class is so numerous that joinder of all members is impracticable. As the Reporter's Notes of 1973 reveal, there are few lines drawn to specify how many members of the class are necessary; mere numbers should not be the sole test of practicality of joinder. "A determination of practicality should depend upon all the circumstances surrounding a case." Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). In a very recent case reviewing the requirement of numerosity,

the court in A.T., a minor by and through Tillman v. Harder, 2018 WL 1635921, reviewed this requirement:

> Ordinarily, a proposed class that exceeds forty members is considered presumptively numerous for purposes of this requirement. Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members."). However, the Second Circuit has cautioned that "the numerosity inquiry is not strictly mathematical" but rather one that should take "into account the context of the particular case, [and] in particular whether a class is superior to joinder based on other relevant factors including: (i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) request for injunctive relief that would involve future class members." Morgan Stanley & Co., Inc., 772 F.3d at 120 (citation omitted).

The second prong is that there are questions of law or fact common to all. Again, the 1973 Reporter's Notes indicate that while this requirement is similar to the requirements of joinder under M.R.Civ.P. 20 and intervention under M.R.Civ.P. 24, it is different in that Rule 23(a) "does not require a single transaction or series of transactions or a single occurrence or a series of transactions or occurrences."

The third prong of M.R.Civ.P. 23(a) is that the claims or defenses of the representative parties are typical of the claims or defenses of the class and the fourth prong is that the representative parties will adequately protect the interests of the class. Both of these prongs, according to the 1973 Reporter's Notes, "state the need for the ability of the representatives of the class to protect its interests." But as the Reporter's Notes explain, "[T]he word "typical" does not require that all members of the class be identically situated," citing Siegel v. Chicken Delight Inc., 271 F. Supp. 722, 726-727. (N. D. Cal. 1967). The court added, citing the Advisory Committee's Notes, 39 F.R.D. 102, 103:

> [T]here is no indication that any other related litigation has been commenced by other members of the class nor is it apparent that the litigation should not be concentrated in a particular forum, Fed.R.Civ.P. 23(b)(3), thus achieving 'economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'

And this principle is similar to the Supreme Judicial Court's long-held view, "It is not essential that the interest of each member of the class be identical in all respects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong." Spear v. H.V. Greene Co. 246 Mass. 259, at 256 (1923). This is the plaintiffs' situation, as the S&P affects all of the per-diem court interpreters, the class plaintiffs seek to represent. Perhaps there is not an identity or equal claims, but the S&P affects them all, and breaches of it by defendants is what is being challenged.

2. Defendants claim that because this is a contract claim, no individual agents of the Trial Court (employees named in their official capacity only) can be party defendants, but they cite no law to support this bald-faced assertion. Because they do not want the Court to have to deal with specific facts in support of their claim, they do not want plaintiffs to have the right to demand the depositions of certain of these employees who they claim were responsible for the breaches of the rights they claim to have. As party defendants, they would be required to attend depositions; as non-parties, there would be no such right. Such depositions might uncover how such decisions were made and by whom. This is not a case, as defendants assert, where an individual official is binding his or her employer to contractual terms, citing Lovering v. Beaudette, 30 Mass. App. Ct. 665, 668-670 (1991);[3] quite the opposite, the officials who

[3] Lovering is inapposite to this case. In that case, although community college knew or should have known through prior transactions with equipment rental agency that rental agency standard form invoice included indemnity clause, college's act of paying bill for rental of well-drilling equipment did not indicate assent by college to indemnity clause contained on invoice form signed by one without actual authority, express or implied, to bind the college. In

plaintiffs claim violated their rights, are agents of the Trial Court and the Trial Court (the principal) is responsible for the acts of its employees (agents). Plaintiffs need to prove that these agents violated their rights under the contract.

3. Again, without citing any authority, defendants allege that the Massachusetts Association of Court Interpreters ("MACI") cannot be a plaintiff, as it "has no cause of action against the individual Defendants or against the Trial Court." See Defendants' Motion to Conform Pleadings at page 4. In order to make this claim, defendants have had to ignore an entire body of law on organizational representational standing.

It has long been established that nonprofit citizens' organizations may have standing to bring a citizen suit. An organization has standing to bring a citizen suit on behalf of its members where: (1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. The organization must show that one or more of its members were directly affected by the pollution. The Supreme Judicial Court treats standing as an issue of subject matter jurisdiction," Ginther v. Commissioner of Ins., 427 Mass. 319, 322, 693 N.E.2d 153 (1998). See Mass.R.Civ.P. 12(h)(3).

Where a nonprofit organization asserts associational standing on behalf of its members, it must establish that its members would independently have standing to pursue the claim. Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd., 416 Mass. 635, 638 n. 4, 624 N.E.2d 556 (1993). Thus, MACI must demonstrate that the "challenged action" has caused its independent

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this case, the Trial Court may have known that the acts of its agents (employees) were violating the S&P (contract) but took no corrective action. While the principal is liable for the acts of its agents, discovery of the agents' actions is necessary to show the liability of the principal.

members injury. Slama v. Attorney Gen., 384 Mass. 620, 624, 428 N.E.2d 134 (1981). These cases follow the Supreme Court's own analysis of standing, Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333 (1977), where the Court held,

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." Quoting from Warth v. Seldon, 422 U.S. 490, at 511 (1975).

These principles were effectuated in Massachusetts, N.A.A.C.P, et al v. Harris and Latinos Unidos de Chelsea en Accion ("LUCHA") v. Harris, 607 F.2d 524 (1st Cir. 1979), where, in considering the threshold issue of standing, the court stated:

> it is not, of course, the court's responsibility to pass finally on whether plaintiffs will prevail on their statutory or constitutional claims. Assuming their claims have minimal substance, the question is merely whether These plaintiffs are appropriate parties to raise such claims. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. . . .
>
> . . . As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant His invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."

Quoting from Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (emphasis in original) and both the NAACP, Boston Chapter and LUCHA were permitted to have standing in their organizational capacity under these principles.

MACI is a G.L. c. 180 corporation, organized for the following purposes:

To create an organization of judicial interpreters committed to:

1. providing meaningful language access and equal justice to people of limited English proficiency and a sustained improvement of interpreting services in the courts of the Commonwealth of Massachusetts;

2. Raising awareness about a) the work of judicial interpreters among court administrators, judges, court staff, and attorneys, and the broader community, b) methods to improve the delivery of judicial interpreting services, and c) the effective and proper utilization of in-person and limited remote interpretation in the Trial Court;

3. Seeking direct participation in the development of policies on interpreter services and language access with the Trial Court administration;

4. Advocating for fair and just pay and working conditions of judicial interpreters, including, but not limited to, budgetary issues, review of rates, recognition of merit and seniority, grievance procedures, and other related issues;

5. Advocating for and suggesting appropriate interpreter rates for out-of-court interpreting;

7. Engaging with other interpreter organizations regarding improvements that have been and can be made in our profession and proposing formal ways to improve judicial interpreter services in the Commonwealth;

8. Taking all necessary initiatives to achieve these purposes, including proposing legislation and taking legal action.

Articles of Incorporation filed with the Secretary of the Commonwealth on November 28,

2014.

The issue of standing is not over at this stage, but should be treated in the same way the

First Circuit treated it in NAACP and LUCHA:

> The plaintiffs we have indicated have standing must continue to carry the burden of proof on standing. See Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at 45, 95 S.Ct. 2197; City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1051 (2d Cir. 1976) (en banc). A complaint may suffice to overcome a motion to dismiss and yet fail at summary judgment, when the district court can reasonably expect a more specific factual demonstration of the plaintiffs' entitlement to standing. Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at 45 n.25, 96 S.Ct. 1917. At trial, plaintiffs must prove the facts essential to support their claim to standing. City of Hartford, supra, 561 F.2d at 1051. [citation omitted] In other words, at this stage of the litigation we say only that plaintiffs have alleged sufficient facts to permit them to

> overcome the hurdle of a motion to dismiss for want of standing. Like the plaintiffs in Committee for Full Employment v. Blumenthal, 196 U.S.App.D.C. 155, 606 F.2d 1062 (1979), plaintiffs Roberts, Cobb, Link, Paul, Cruzado, Crespo, Flores and Mercado, and their organizations, are "entitled to conduct discovery to buttress their allegation that there is a substantial likelihood that the relief they request will eliminate their injury." At —-, 606 F.2d at 1067.

607 F.2d at 526.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court approve Plaintiffs' Motion to Substitute Party Defendants and Re-Define the Class and to deny Defendants' Motion to Conform Pleadings and authorize discovery to commence on Plaintiffs' Re-Defined Class claims before any ruling on the merits of those claims or certification of the Re-Defined class.

Respectfully submitted,

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, INC., MOUSSA ABBOUD, SOLEDADE GOMES DEBARROS, ANAHIT FLANAGAN, NORMA V. ROSEN-MANN, and MICHAEL R. LENZ, Plaintiffs

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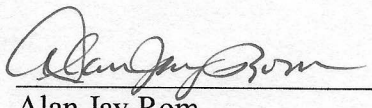
Dated: 30 May, 2018

CERTIFICATE OF SERVICE

I, Alan Jay Rom, hereby certify that the original and one two copies of the foregoing Plaintiffs' Opposition to Defendants' Motion to Conform Pleadings was mailed first class, postage prepaid, to Katherine B. Dirks, Esq. and Janna J. Hansen, Esq., Assistant Attorneys General, Office of the Attorney General, One Ashburton Place, 18th Floor, Boston, Massachusetts 02108 on 30 May 2018.



Alan Jay Rom