COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO.
2016-0969

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, INC., MOUSSA ABBOUD, SOLEDADE GOMES DEBARROS, ANAHIT FLANAGAN, NORMA V. 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 DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction

Defendants' have moved for summary judgment on the issue of whether plaintiffs may represent a class of *per-diem* court interpreters and whether Plaintiff, Massachusetts Association of Court Interpreters ("MACI") may be a party plaintiff. As will be described below, the court should rule against defendant's motion because it has already considered, and rejected these two arguments, and thus these issues, already decided, constitute the law of the case. There has been no change in the law regarding the issues defendant seeks to have reconsidered, nor any changed factual matters that would justify a changed decision. Defendant cannot have "two bites of the apple."

Background

This court, in an opinion of November 3, 2016, while dismissing other claims[1] brought by plaintiffs, left open in this case the issue of whether the Standards and Procedures ("S & P") constituted a contract. Prior to the Court's ruling Plaintiffs had submitted document discovery requests to the defendant needed to prove their allegations in the complaint. These requests are attached as Exhibit C.

While these requests were pending, both plaintiffs and defendants submitted motions to the court regarding substitution of named defendants and other matters. Included in defendant's submission was a request to deny the class allegations and to strike MACI as a party defendant. The parties briefed these issues and had argument before this Court on July 19, 2018. Both plaintiffs' and defendant's arguments were briefed and are a part of the court record. The court denied defendant's motion to deny the class claims and to strike MACI as a party plaintiff regarding the claim that the S & P is a contract and was violated by defendant.

Importantly, the court decided that it would proceed to trial on the claims of the named plaintiffs and, should the court rule in their favor, then, and only then, would the class claims be considered. If plaintiffs prevailed, then discovery could be taken regarding the members of the purported class. If plaintiffs did not prevail at the trial of the named plaintiffs, the S & P claim would be dismissed and the case would be over. These matters are reflected in the transcript of the hearing of July 19, 2018. Plaintiffs ordered a transcript of the hearing, the original was filed

[1] Plaintiffs' wage act claims of misclassification as independent contractors, instead of as employees, G.L. c. 149, §148B, their claims under the Fair Labor Standards Act, unjust enrichment, quantum meruit, and retaliation.

by with the Court by DH Reporting Services, Inc. and a copy is attached here as Exhibit A.[2] A follow-up decision was issued on August 21, 2018, Exhibit B.

Based on the Court's rulings to bifurcate the discovery process on July 19, 2018, plaintiffs submitted substitute document discovery, Exhibit C. Defendant started to provide documents in response to this substitute discovery request, but they have not even completed responding to discovery and now they seek summary judgment on one issue that the Court has said will not be addressed at this stage (the class) and another which the Court has denied (MACI as party plaintiff). Most of the documents provided by defendant related to the Daily Service Reports ("DSRs"), which report the hours worked and amount owed. Defendant's responses to other document requests were either refused or responded to the effect that that Defendant cannot locate them. That discovery on behalf of the five individual plaintiffs is not complete is evidenced by plaintiffs' counsel's letter to defendant's counsel, attached hereto as Exhibit D. Plaintiffs do not want to submit piecemeal motions to compel until defendants have completed their responses to the document requests, as that would be duplicative, premature, and waste valuable court time.

Valuable court time is now being wasted on duplicative motions that have already been decided and constitute the law of the case.

The Law of the Case Doctrine

Both the Supreme Judicial Court and the United States Supreme Court agree on the doctrine known as "the law of the case." In Kitras v. Town of Aquinah, 474 Mass. 132 (2016), owners of landlocked lots sued abutting neighbors for an "easement by necessity" The Superior

[2] Defendant omits any discussion of this hearing and how the Court said the case will proceed in its Statement of Undisputed Material Facts, affidavit of counsel (though it was she who brought the earlier motion and argued the case on July 19, 2018, decided by the Court), or in its Memorandum in Support for Partial Summary Judgment.

Court ruled that only certain lots could be included in the litigation and owners of the lots excluded tried to have that issue reconsidered when the case was remanded after appeal. The Court described the doctrine of "law of the case" as follows:

> "The 'law of the case' doctrine reflects this court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case' " (citation omitted). *King v. Driscoll,* 424 Mass. 1, 7–8, 673 N.E.2d 859 (1996). An already decided issue should not be reopened "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* at 8, 673 N.E.2d 859, quoting *United States v. Rivera–Martinez,* 931 F.2d 148, 151 (1st Cir.), cert. denied, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991). In this case, the issue only could have been reopened if the Appeals Court decision in *Kitras I, supra,* clearly was erroneous and would work a manifest injustice. We see no reason to reopen the issue regarding lot 178.

This decision was a reiteration of the principle enunciated in King v. Driscoll, 424 Mass. 1, 673 N.E. 2d 859 (1996), where t Court reviewed the issue of whether it should review the lower court judge's determination that the defendant shareholders were liat for violating the duty of good faith and loyalty they owed to their fellow shareholder in a close corporation, and declined to do s stating:

> The "**law** of the **case**" doctrine reflects this ***8** **court's** reluctance "to reconsider questions decided upon an earlier appeal in the **same case**." *Peterson v. Hopson,* 306 Mass. 597, 599, 29 N.E.2d 140 (1940). An issue "once decided, should not be reopened 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.' *White v. Murtha,* 377 F.2d 428, 432 (5th Cir.1967)." *United States v. Rivera–Martinez,* 931 F.2d 148, 151 (1st Cir.), cert. denied, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991). None of those circumstances is present in this case.

424 Mass. at 7-8, 673 N.E. 2d at 863.

Though the Court in Kitras said that this doctrine did not apply to the facts in that case, in Mustaccio v. United States, 136 S.(709, 716 (2016), in a case where defendant was convicted for conspiracy and substantive violations of the Computer Fraud and Abu Act. the Court stated that the doctrine is the same:

> The law-of-the-case doctrine generally provides that " 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *Pepper v. United States,* 562 U.S. 476, 506, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) (quoting *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). The doctrine "expresses the practice of courts generally to refuse to reopen what has been decided," but it does not "limit [courts'] power." *Messenger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Thus, the doctrine may describe an appellate court's decision not to depart from a

ruling that it made in a prior appeal in the same case. See C. Wright et al., 18B Federal Practice and Procedure § 4478, p. 646, and n. 16 (2d ed. 2002) (collecting cases).[3]

There was no legal error in the Court's July 19, 2018 ruling and there no manifest injustice that has occurred since the Court hearing of July 19, 2018; there have not been any

[3] This was a case where the jury instructions added an additional element to the elements of a crime that appellant failed to object to below, and only did so on appeal, but the jury instructions included all of the elements so it was sufficient to support the conviction. The Court distinguished between "the law of the case" doctrine and the issues in this case:

> When an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines such as waiver, forfeiture, and estoppel, as well as by the type of challenge that it is evaluating. But it is not bound by district court rulings under the law-of-the-case doctrine. That doctrine does not bear on how to assess a sufficiency challenge when a jury convicts a defendant after being instructed—without an objection by the Government—on all charged elements of a crime plus an additional element.

136 S.Ct. at 716. See also, Pepper v. United States, 562 U.S. 476, 131 S. Ct. 1229 (2011) where the Court earlier addressed the issue and stated the governing principles in a case involving a downward adjustment in the length of the sentence in a drug conviction, on appeal the Court reiterated the principle of "law of the case."

> Although we have described the "law of the case [a]s an amorphous concept," "[a]s most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). This doctrine "directs a court's discretion, it does not limit the tribunal's power." *Ibid.* Accordingly, the doctrine "does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and ***507** would ****1251** work a manifest injustice.' " *Agostini v. Felton,* 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Arizona,* 460 U.S., at 618, n. 8, 103 S.Ct. 1382; alteration in original).

562 U.S. at 506-507 and 131 S.Ct. at 1250-1251.

There are many cases that could be cited on this issue in Courts: Previous Decisions in Same Case as Law of Case, 106 Key 99, et seq. Those cited above state the principles of the "law of the case" that are applied by the state and federal courts. This principle applies not only to decisions of an appellate court reviewing a lower court, but also within the lower court's conduct of proceedings. In Commonwealth v. Clayton (No. 1), 633 Mass. App. Ct. 608 (2005), even though the defendant's conviction was remanded on different grounds, the defendant could not raise grounds considered before and rejected by the Trial Court. The Court stated:

> The "**law** of the **case**" doctrine reflects a "reluctance 'to reconsider questions decided upon an earlier appeal in the same **case**.' " *King v. Driscoll,* 424 Mass. 1, 7–8, 673 N.E.2d 859 (1996), quoting from *Peterson v. Hopson,* 306 Mass. 597, 599, 29 N.E.2d 140 (1940). "An issue [,] once decided, should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary **decision** of the **law** applicable to such issues, or the **decision** was clearly erroneous and would work a manifest injustice." *King v. Driscoll,* 424 Mass. at 8, 673 N.E.2d 859 (quotations and citations omitted). See *Chase Precast Corp. v. John J. Paonessa Co.,* 409 Mass. 371, 379, 566 N.E.2d 603 (1991).

changes at all, and during that time, defendant has refused to give certain discovery, has agreed to give other documents, but has not completed its submissions to plaintiffs. Defendant's arguments on why a class should be denied assumes that plaintiffs could have conducted discovery about the class, but the transcript of the July 19, 2018 hearing prohibited that.

Class Allegations

This issue arose because, after the Court's decision of November 3, 2016, where all of the issues were dismissed except the contract claim, plaintiffs sought to redefine the class pursuant to Mass.R.Civ.P. 15 to refer to the contract claim instead of the misclassification claim in the original complaint. Defendant responded as if the plaintiffs had sought class certification, which they had not, especially since they had not received any discovery which would permit them to evaluate whether such a motion was appropriate. Compare defendant's arguments in its memorandum, Exhibit E, with its present arguments in its memorandum.[4]

Plaintiffs' original discovery, Exhibit C, sought documents for approximately 180 *per-diem* court interpreters. See the discussion with the Court on pages 4-7, and particularly what the Court said on the bottom of page 6 and top of page 7:

> THE COURT: ... So if it's sufficient with the five, if you win, can you bring in a class for – for a class of damages now?
>
> MR. ROM: Not without discovery, Your Honor.

[4] Defendant is not arguing for summary judgment on the merits, but yet are citing excerpts from plaintiffs' depositions to argue that a class is not appropriate. The excerpts from their depositions are consistent with their original affidavits attached to the Substituted Amended Complaint and are not probative of whether they are inconsistent with the amended class allegation approved by the Court last year. Defendant confuses the invitation by the Court to revisit this issue at the close of discovery in the August 2018 decision and this is unfortunate, because, not only is discovery not complete as to the named plaintiffs, but the Court's July 19, 2018 decision bifurcated the case, so discovery about the class cannot begin until there is a decision on the merits regarding the individual plaintiffs' claims about the S & P constituting a contract and that the contract was violated by defendant.

THE COURT: No, but then – but then you would get the discovery at that point in time.

MR. ROM: Well, so that –

THE COURT: So that could be bifurcated – but could it be bifurcated for that?

THE COURT: … So, for discovery, dealing with the five individual plaintiffs, you win, and then – then it becomes a class. But if you lose -- …

THE COURT: -- then everyone didn't have to go through all the – the expense and the like of discovery and dragging this out.

It is clear from this colloquy that the Court was limiting discovery to the five individual plaintiffs, and was not permitting it, at this time, for the class, so, based on this hearing, plaintiffs redrafted their document requests, Exhibit D, to apply only to the named plaintiffs.[5] For defendant to suggest, indeed argue, that because plaintiffs did not seek discovery about the class that summary judgment about the class is appropriate is to ignore how this case was to proceed as stated by the Court or pretend that the hearing in July 2018 did not happen.

Defendant raises certain claims that certain issues did not apply to them. In its memorandum, Defendant makes statements such as this or that issue does not apply to three of

[5] Later, on page 12 of the Transcript, in a colloquy with defendant's counsel, the Court reiterated what it said to plaintiffs' counsel":

> THE COURT: … as to why not just agree to bifurcate it fo the issue of liability if – if he wins on liability, then it stands to reason that he might be able to expand it to a class and allow him discovery for that – and just agree to the discovery.

While not coming out and stating "yes," defendant's counsel explained why getting documents for the class would be so difficult. See her comments to the Court on pages 12-13 of Exhibit A. It is a reasonable inference from this discussion that defendant did not object to giving discovery as to the individually-named plaintiffs, but to the class. But now she argues, in effect, that because plaintiffs did not seek discovery about the class, defendant should be granted summary judgment on the class claim.

the five plaintiffs (See examples in Defendant's Memorandum at page 10. On the face of it, by implication, is that the violation *did* occur, or might have occurred, involving the other two plaintiffs. At no time did plaintiffs, individually, or as to the class, claim that each and every violation of the S & P that is detailed in the Substituted Amended Complaint happened to each of them. Different things happened to different plaintiffs and to different members of the class. Because the Court limited the trial of whether the S & P is a contract would only focus on the five individuals, the only relief will be for the violations found by the Court, if the Court deems the S & P to constitute a contract. If it is a contract, then the members of the class will be permitted to show which violations pertained to them. The results will not be the same for everyone.

Plaintiffs support these statements by their affidavits which are attached to the Substituted Amended Complaint and are incorporated by reference herein. And, what defendant fails to mention is that there was a time period when OCIS was paying some *per-diem* court interpreters, i.e. the class, in two-hour increments, instead of the S & P's full-day/half-day formula, docking earnings for being late (despite the fact that nothing in the S & P provides that this may be done), not providing time for *per-diem* court interpreters to eat lunch, didn't pay those interpreters having more than one language the 25% extra when ***assigned*** to more than one language (that is the language of the S & P; it does not state that such second assignment must have taken place), paid half-days instead of full days, invoking 'misinterpreted' compensation calculations, contrary to what is clearly provided for in the S & P as to what constitutes a half-day and what constitutes a full-day, and other issues detailed in their affidavits. And defendant avoided the issue as to whether the plaintiffs were paid according to their DSRs, but how could they, as they have not provided all of plaintiffs' DSRs as of this date.

MACI as Plaintiff

It should be sufficient to repeat what Plaintiffs said in its brief before the Court on July 19, 2019. Nothing in the law has changed on this issue since then and the doctrine of "law of the case" governs here as well as on the class claims. Plaintiff stated the law as follows:

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 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.

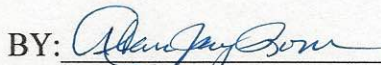
Plaintiffs only add the Affidavit of Norma V. Mann, attached hereto as Exhibit F, that demonstrates how MACI is representing its members and advocating on behalf of all *per-diem* court interpreters, regardless of whether they are members of MACI. Compare defendant's arguments now with its arguments in July 2018, as reflected in Exhibit E and see also the discussion on page 18 of Exhibit A.

CONCLUSION

For the reasons stated above, plaintiffs pray that defendants' Motion for Partial Summary Judgment on the class issue and whether MACI can be a party plaintiff be denied.

Respectfully submitted,

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, MOUSSA ABBOUD, SOLEDADE GOMES DEBARROS, ANAHIT FLANAGAN, NORMA V. MANN, and MICHAEL LENZ,
PLAINTIFFS

BY: 

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DATED: AUGUST 7, 2019

CERTIFICATE OF SERVICE

I, Alan Jay Rom, hereby certify that the original and one copy of the aforegoing Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment was served on defendant by mailing the original and a copy to Katherine Dirks, Esq., Assistant Attorney General, Office of the Attorney General, Government Bureau/Trial Division, One Ashburton Place, Room 1813, Boston, Massachusetts 02108 this 7th day of August 2019.

Alan Jay Rom

EXHIBIT A

Volume I
Pages: 1-22
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
MASSACHUSETTS ASSOCIATION OF *
COURT INTERPRETERS, INC., *
ET AL *
Plaintiff *
*
v. * DOCKET NUMBER 1684CV00969
*
LEWIS HARRY SPENCE, ADMIN. *
OF TRIAL COURT, ET AL *
Defendant *
****

HEARING
BEFORE THE HONORABLE ROBERT N. TOCHKA

APPEARANCES:
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Boston, Massachusetts
July 19, 2018

Recording produced by digital audio recording system. Transcript produced by Approved Court Transcriber, Donna Holmes Dominguez

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
None - Hearing				

1 **P R O C E E D I N G S**

2 (Court called to order.)

3 THE CLERK: Calling Civil Action No. 2016-969,

4 Massachusetts Association of Court Interpreters v. Spence.

5 Counsel, please identify yourselves for the record.

6 MR. ROM: Yes, Alan Jay Rom for the plaintiffs.

7 MS. DIRKS: Katherine Dirks from the Attorney General's

8 Office here for the Trial Court, Your Honor.

9 THE COURT: All right. Good afternoon. So I think it's

10 your motion first; correct?

11 MR. ROM: Yes.

12 THE COURT: Go ahead. Both motions. All right.

13 MR. ROM: Your Honor, you may recall that you ruled on

14 the defendant's motion to dismiss back in November –

15 THE COURT: 2016, wasn't it?

16 MR. ROM: 2016. After that, the defendant's answered the

17 complaint, and after that, plaintiff submitted discovery.

18 After we submitted discovery, we had gotten to a lengthy

19 period of discussions to see whether we could resolve the

20 case, and we found that we were, I'll put it ocean's apart,

21 and so we went back, and by that point, we realized -- we both

22 realized we had to adjust the tracking order to give us more

23 time to do this. So we did, and the Court granted it.

24 So, we filed a motion to substitute defendant -- party

25 defendants, and to redefine the class. And what I did in the

1 submission, Your Honor, is --
2 THE COURT: The original class was?
3 MR. ROM: Was about the difference between interpret --
4 per diem Court interpreters who should have been treated as
5 employees but who were not.
6 The redefined complaint talks about the one issue that
7 you left in the case, and the issue was whether the standards
8 and procedures that every single per diem Court interpreter
9 has to sign is a contract. And if it's a contract, then was
10 the contract violated. So, that's really why we're here
11 today.
12 We -- none of our -- the response we got to the
13 submission for discovery is that, well we'll give it to you
14 about the five named individuals, but nobody else. We deny
15 that a class exists. So -- and to date, they haven't even
16 given it about the five named individuals.
17 But the more important issue is that could we redefine
18 the class under -- pursuant to Rule 15 of the Rules of Civil
19 Procedure to enable us to be able to get documentation so that
20 we can determine whether we should go forward with a motion
21 for class certification. We don't want to put the cart before
22 the horse. If the evidence isn't there, it isn't there. But
23 if it is, then we -- then you should be able to consider
24 whether the -- whether they -- whether it was a contract and
25 whether it was violated. A couple of -- the real issue that

1 is here today is that if we're not allowed to pursue a class
2 -- a class to find out through discovery, then it's basically
3 what you're doing is granting them the motion to dismiss that
4 you denied in November of 2016.
5 THE COURT: How is that?
6 MR. ROM: Well, it's that because then we can't prove
7 that other than five individuals, whether something was
8 violated or not.
9 THE COURT: Well, but for the five individuals you could
10 prove that, and then that would go to everyone else in the
11 class -- assuming you win, the -- everyone in the class that's
12 in the similar situated, it's the same -- they'd have --
13 MR. ROM: That's not so, Your Honor. And in a case that
14 the defendants cited, and they cited Bellerman v. Fitchburg
15 Gas and Electric Light Company, that only went to the issue of
16 equitable relief. Our complaint seeks damages. And for that,
17 it's a matter of how -- what the damages were for every single
18 person whose a member of that class. And it will be
19 different. Some -- for certain --
20 THE COURT: Right. But the issue of liability will have
21 been established. The only question is then -- it's a limited
22 issue as to damages for those people; right?
23 MR. ROM: Well, that's -- that's right. And if class --
24 if there's enough evidence from the discovery, then we should
25 be able to show that it applied to many or few and maybe

1 there's no class. I don't know. But until we get the
2 discovery, we won't know. What I would like to do, Your
3 Honor, if you would permit me, may I approach?
4 THE COURT: In terms of the class, how many individuals
5 are we talking about that you're asking for --
6 MR. ROM: It's around 180.
7 THE COURT: 180.
8 MR. ROM: Yeah.
9 THE COURT: So you're -- so you're talking extending the
10 discovery, it would be voluminous discovery at this point --
11 MR. ROM: It may be.
12 THE COURT: -- when if you succeed on the five, that
13 could be limited because it's the same issue as to the
14 contract, the only issue as to damages. So can't it be
15 bifurcated or something like that? Decide on this, and then
16 should that happened, then you have a class as to damages.
17 MR. ROM: Well, if a class would be considered after that
18 point, that -- that -- the -- the question is, is it
19 sufficient with the five to determine that liability about the
20 contract. We have affidavits that --
21 THE COURT: Yeah. So if it's sufficient with the five,
22 if you win, can you bring in a class for -- for a class of
23 damages now?
24 MR. ROM: Not without discovery, Your Honor.
25 THE COURT: No, but then -- but then you would get the

1 discovery at that point in time.
2 MR. ROM: Well, so that --
3 THE COURT: So that could be bifurcated -- but could it
4 be bifurcated for that?
5 MR. ROM: Perhaps it could be, but could I show you the
6 discovery that we're talking about?
7 THE COURT: Wait -- well, perhaps could you follow up on
8 that? Perhaps --
9 MR. ROM: Sure.
10 THE COURT: I mean since -- I'm sure you know much better
11 than I do. Could that happen, it be bifurcated on that issue?
12 So for discovery, dealing with the five individual plaintiffs,
13 you win, and then -- then it becomes a class. But if you lose
14 --
15 MR. ROM: Well, I --
16 THE COURT: -- then everyone didn't have to go through all
17 the -- the expense and the like of discovery and dragging this
18 out.
19 MR. ROM: Perhaps, Your Honor if -- if the five is enough
20 for the Court to determine whether a contract exists, that
21 might do it. And -- and the other issue, Your Honor, which I
22 addressed in our --
23 THE COURT: Okay. Yeah, go ahead.
24 MR. ROM: -- memorandum and I'll briefly talk about here,
25 is the defendants are suggesting that the organization cannot

1 be a plaintiff representing its members.
2 THE COURT: Right.
3 MR. ROM: And the case law --
4 THE COURT: But are you finished on the first one?
5 MR. ROM: I believe so.
6 THE COURT: Okay. Go ahead.
7 MR. ROM: And the case law is pretty clear that that's
8 not the case. And I've detailed cases -- case law about it,
9 and I think that should be enough said about it.
10 And the last remaining issue, which should have been
11 first --
12 THE COURT: Well, the question is, did they waive that
13 issue by not raising it in their motion to dismiss to begin
14 with, or no? Is it no?
15 MR. ROM: I don't know.
16 THE COURT: Okay.
17 MR. ROM: I don't want to get -- the issue of
18 substituting plaintiffs, we said on -- on page -- just a
19 moment. On page three of our memorandum in support of our
20 motion to substitute parties, that it goes by operation of law
21 but I neglected to cite Rule 25D. Rule 25D really resolves
22 that issue as far as I'm concerned. We're not -- we agree on
23 adding the Trial Court as a defendant, that's not a problem
24 for us, but for purposes of discovery, we may want to take the
25 depositions of some of the people who were individually named.

1 THE COURT: And how is that though, those people came on
2 afterwards. Whoever replaced Spence came on after the
3 contract, after this whole issue.
4 MR. ROM: Right.
5 THE COURT: So how -- so what -- what -- what relevancy
6 -- and can you just add a party simply because you want to
7 take discovery as opposed to whether they're a party to the
8 case?
9 MR. ROM: A lot of the violations that we allege in the
10 original complaint are still going on. So we want to talk --
11 we -- we may want to take depositions to discover, is this a
12 problem, have you fixed it, what have you done? I mean all of
13 that goes --
14 THE COURT: But how is that though, because the issue is
15 the contract. It's whether the --
16 MR. ROM: It goes to the issue of the contract because if
17 -- if there weren't violations of the standards of procedures,
18 we wouldn't be here arguing that that was a contract.
19 THE COURT: But why do you want to take out Spence when
20 you're just saying you want discovery for the people who were
21 involved? Spence was the person involved, so I think he would
22 be -- and you're saying -- so you'd want to keep him in there
23 I'd assume?
24 MR. ROM: I don't have a choice in the matter, Your
25 Honor. But Rule 25 --

1 THE COURT: And you don't have a choice because --
2 MR. ROM: Rule 25D says they're gone. If they were only
3 sued in their official capacity, and they were only sued in
4 their official capacity, when they are no longer in that
5 capacity, there automatically substituted.
6 THE COURT: Okay. So they're gone.
7 MR. ROM: They're gone by their --
8 THE COURT: But now you want to put somebody in that was
9 not in that capacity at the time this complaint was filed.
10 MR. ROM: Not there at the beginning, but has control
11 over the employees doing the work that plaintiffs are
12 complaining about. Now --
13 THE COURT: I'm not sure that you allege that in your --
14 MR. ROM: We allege it.
15 THE COURT: Maybe you did in the complaint. Okay.
16 MR. ROM: We allege that, and we should have an
17 opportunity to prove whether that was -- what happened.
18 THE COURT: Well, why can't you depose them whether or
19 not they're added or not?
20 MR. ROM: Well, it's my understanding, if they're a party
21 defendant they must attend, and if not you have to serve --
22 THE COURT: Right. Yeah. Discretion.
23 MR. ROM: -- a subpoena.
24 THE COURT: Right. So what's the big deal?
25 MR. ROM: It's not a big deal, but why not? Since

1 they're there anyway by operation of law, it should -- it
2 should --
3 THE COURT: I didn't see that footnote in the rules, "Why
4 not."
5 MR. ROM: That's -- that's my characterization of it.
6 THE COURT: I like that. Okay.
7 MR. ROM: And it's really about whether this case goes
8 forward, Your Honor. You said it could, and we want to take
9 the opportunity to do that.
10 THE COURT: Right. And that's -- I denied the motion so
11 the case would go forward, so -- so despite whatever my
12 ruling, it still goes forward.
13 MR. ROM: Right.
14 THE COURT: Okay. Got it.
15 MS. DIRKS: Your Honor, so there are these three --
16 THE COURT: Can you -- can you just address, what about
17 allowing it to go forward on the splitting it up, in terms of
18 whether there's an issue of a contract, should there be a
19 contract, and then -- then allow them discovery as to a class?
20 MS. DIRKS: Well, more generally speaking, we have no
21 objection, in fact we would agree that it makes sense to
22 address the issues -- to divide it up in some way. It doesn't
23 necessarily require class relief in any way. What we propose
24 in our briefs is that a -- any individual could come forward
25 and ask for a declaration that this document, the standards

1 and procedures document --
2 THE COURT: Why --
3 MS. DIRKS: -- is a contract.
4 THE COURT: But I'm trying to actually help out the
5 plaintiff in some ways on that issue, as to why not just agree
6 to bifurcate it for the issue of liability if -- if he wins on
7 liability, then it stands to reason that he might be able to
8 expand it to a class and allow him discovery for that -- and
9 just agree to the discovery.
10 MS. DIRKS: My --
11 THE COURT: Your point is, you think that he doesn't have
12 a shot on the contract, and so you're never going to get to
13 that stage anyways.
14 MS. DIRKS: That's one point, Your Honor, but just from a
15 resource position alone, it makes sense to -- to sequence
16 this. Even if the next step isn't class relief, it might just
17 be issue preclusion. A nonparty to the case could come
18 forward and say, look, we have a judgment that there's a
19 contract and that the contract has been violated by the
20 following practices. We're now seeking relief pursuant to
21 that, and we need an assessment -- we need some sort of
22 judgment on damages. So that could be -- that second step
23 could be a class, or it could be just from issue preclusion.
24 But that doesn't change the fact that this first step which --
25 what makes most sense is just to focus on the existence of a

1 contract and any violation of the contract based on certain
2 practices by the Trial Court. Now, to get a -- give the Court
3 a sense of the -- the burden here, in order to assess damages
4 on this sort of case, if there were in fact liability, what
5 we'd have to do is go through individual records that are
6 submitted on a daily basis by these interpreters that list out
7 the compensation that they're awarded. This is mostly on
8 paper. It is spread out in multiple storage locations, even
9 for these five individuals, it is required going into the
10 bowels of documents and pulling papers, scanning them, which
11 is one reason why it's taking some time. If you multiple that
12 by a hundred and eighty, Your Honor, this is going to take a
13 very long time, and is not the best use of Commonwealth
14 resources or plaintiff resources in reviewing those documents.
15 So from a practical point of view --
16 THE COURT: But the viewpoint is, is just let the
17 individuals come forward to say whether or not they want to
18 have a claim.
19 MS. DIRKS: And we have. And we have no objection to
20 that, Your Honor, and that's what we're currently litigating
21 and -- and working on discovery for that --
22 THE COURT: No, it's not -- I'm not saying the five
23 individuals who are part of this complaint. But you're saying
24 if there's liability, then you're saying the other individuals
25 would know about the liability and they could file their own

1 case, and then you could on a case-by-case go through the
2 discovery and look at it to see whether or not -- right?
3 MS. DIRKS: Depends on what the judgment looks like, Your
4 Honor, but, yes, I think at a minimum there would be a
5 judgment that -- that there's in fact a contract, a binding
6 contract.
7 Second, depending on what the judgment would say about
8 liability, how broad or how specific, that might be something
9 that other individuals could come forward as well. So that's
10 -- that's a practical point of view, but that doesn't even
11 address all of the legal reasons, Your Honor, that we spell
12 out in your briefs what class certification is not -- and
13 maybe it's unclear what the plaintiff is asking for, he said
14 to -- plaintiffs counsel has said today that he's not asking
15 for class certification --
16 THE COURT: Right. Just discovery.
17 MS. DIRKS: -- he's just asking for discovery. Well
18 that's not how it works, Your Honor. You have to get a class
19 certified before you're entitled to that sort of relief, and
20 that's what has not been established yet here today, Your
21 Honor.
22 Are there any other questions about relief? I think -- I
23 think the elements of class certification are spelled out
24 fairly clearly in the briefs.
25 The second issue, Your Honor, is the substitution of

1 individuals. The -- the defendant here based on the -- the
2 consequences of the ruling is the Trial Court. That is if
3 there were a contract, the party to that contract would be the
4 Trial Court. There is no other proper defendant here. We
5 didn't come forward and ask to conform the pleadings to the
6 order because we -- it's all understood. Even plaintiffs'
7 counsel said these are official capacity claims against the
8 individuals. What that means is, that this is a claim against
9 the Trial Court. We don't feel that there's any need to
10 substitute parties or have any individuals named in the
11 caption at all.
12 And -- and respectfully, we think if we are doing this
13 housekeeping at this point, Your Honor, we think it makes
14 sense to just have those individuals dismissed from the case.
15 Finally there's the issue of whether MACI, the
16 organization is a proper plaintiff, and again, the issue here
17 is that MACI is not a party to the contract, the case law is
18 clear that to --
19 THE COURT: Well why didn't you bring motion two years
20 ago when you filed the motion to dismiss?
21 MS. DIRKS: I was not in the office at that time, so I
22 can't speak to their thinking --
23 THE COURT: Yeah, but you --
24 MS. DIRKS: -- but I know that there were several claims
25 in the complaint. It was a very complex brief, and the focus

1 I believe was on the status of the interpreters as employees
2 and on the sovereign immunity arguments. It could be that it
3 -- when you go through all of the counter factuals and all the
4 points in the decision tree, perhaps it wasn't contemplated
5 that there would be solely a breach of contract claim
6 remaining, in which case organizational standing is not the
7 proper mode of relief. You just have the parties to the
8 contract. In a contract claim, you don't need an organization
9 who would bring claims on behalf of interests in --
10 THE COURT: But you could have brought that claim to
11 dismiss at the same time, this claim that you're bringing now.
12 You could -- it could have been brought.
13 MS. DIRKS: You mean a motion to dismiss MACI as part of
14 the motion to conform the pleadings?
15 THE COURT: Right.
16 MS. DIRKS: Well, I think that's basically the relief
17 that's being sought in the motion, Your Honor.
18 THE COURT: I'm saying you could have sought to dismiss
19 them back in 2016.
20 MS. DIRKS: That's true, Your Honor, but I -- whether
21 it's resolved in 2016, now at summary judgment at trial, it
22 doesn't change the fact that MACI is not a party to the
23 contract, Your Honor. And whatever relief is available can be
24 provided to the individuals.
25 THE COURT: But so my question is, can you just file a

1 motion, and then file another motion later on and another
2 motion? Don't you have to file them all if they were
3 available to you at that time, and not just charade them --
4 MS. DIRKS: We have tried to avoid multiple motions, Your
5 Honor, which is why this -- these issues have not been briefed
6 earlier. Why it wasn't briefed on a Rule 12 motion to dismiss
7 I can't speak to, but -- but it doesn't change the fact that
8 MACI is not a party to the contract, Your Honor. And the
9 organizational standing cases, those are about organizations
10 that are bringing claims that an individual member of the
11 organization doesn't need to be a party to the claim to bring,
12 that's not the case here. You would actually need an
13 individual party to the contract to be part of the case in
14 order to get a judgment. And the -- the organization -- MACI
15 wouldn't be able to do that for any individual unless the
16 individual is in fact a member and in fact a party to the
17 case. So MACI can't really serve any purpose here, because
18 it wouldn't get any sort of relief.
19 THE COURT: Well, they collect anything, so.
20 MS. DIRKS: That's right, Your Honor.
21 THE COURT: Okay. I know you wanted to say something.
22 MR. ROM: Your Honor --
23 THE COURT: Yeah, go ahead.
24 MR. ROM: Can I just have one final word?
25 THE COURT: Sure.

1 MR. ROM: On the last point first. The law about
2 organizational representation is clear and it is not as
3 limited or narrow as is suggested by my sister. You can
4 represent your members even though you don't have any
5 particular claim yourself. If you look at -- there's two
6 cases I cited at the end, NAACP and LUCHA v. HUD. Your Honor,
7 I was counsel for the plaintiffs in both of those cases in the
8 First Circuit, so I remember it well. And I remember the
9 arguments well, and I remember what the First Circuit said
10 very well. It's not limited. You can stand and represent your
11 membership even though you as an organization don't have an
12 individual claim. And it doesn't matter whether it was a
13 civil rights claim or a contract claim. Any claim. That's the
14 law of organizational representation.
15 Going back to the other question, you posed a reasonable
16 solution to this in bifurcating, and then when we get all the
17 discovery that we want about these five individuals, then you
18 can entertain the issue of law whether that was a contract
19 based on all the evidence of those five, and rule.
20 And then, where my sister is mistaken, is that what would
21 happen then is what you suggested. Then it would be -- it
22 would be time to seek class action certification, and then the
23 records of each and every member of the class would be needed
24 in order to determine what relief the class would get.
25 The law of class actions -- class action under Rule 23

1 either in the Mass -- under the Mass Rules or Federal Rules
2 does not require every individual to file a case, that's the
3 whole purpose of having the Rule 23 to dispose of it all at
4 one time.
5 So I -- I would agree with you, that makes the most sense
6 in proceeding. Let them give us the discovery about the
7 five, and then let's see what we have. Thank you.
8 MS. DIRKS: To the extent plaintiff is not currently
9 seeking certification of a class, we're content, Your Honor.
10 But that's not to say that we wouldn't oppose future attempts
11 to try to certify a class.
12 THE COURT: Okay. So let me bring you both up at sidebar
13 because -- to save me some work.
14 (DISCUSSION AT SIDEBAR)
15 THE COURT: So -- so just so I make sure that there's not
16 going to be any disagreement, I'm going to suspend on this,
17 let you go out and talk, see if you can come up with some type
18 of agreement on that, and --
19 MS. DIRKS: Okay.
20 THE COURT: Okay. And then have you come back. I'll
21 just take the next case and have you come back, okay?
22 MS. DIRKS: Okay.
23 THE COURT: Thank you.
24 MR. ROM: Thank you.
25 (END OF DISCUSSION AT SIDEBAR)

1 (Recess taken.)
2 THE CLERK: Recalling Civil Action 2016-969, Mass
3 Association of Court Reporters [sic] v. Spence.
4 (Discussion off the record.)
5 MS. DIRKS: Your Honor, we really were focusing our
6 conversations on the class issue, because on those other two
7 issues we don't have agreement. And it was unclear to us from
8 the papers what plaintiffs were requesting, were they were
9 requesting to actually certify a class or simply to amend
10 their pleadings and certify the class at a later date. But at
11 the end of the day, Your Honor, we would oppose it regardless.
12 Class certification we oppose obviously for the reasons in our
13 papers. The reason we oppose the motion to amend is because
14 that amendment would be futile for those very same reasons,
15 and that's the standard that -- that is used.
16 THE COURT: Okay. All right. So I'll take it -- take
17 it under advisement, I just wanted to see if you could work
18 something out.
19 MR. ROM: And, Your Honor, I could summarize it in one
20 sentence, what we're asking for. If you take a look at the
21 attached substituted amended complaint, we would like that
22 under Rule 15A to be operative document in this case.
23 THE COURT: Okay.
24 MR. ROM: And we have no agreement -- we don't even have
25 an agreement about the discovery that I said being limited to

1 the five.

2 THE COURT: Right. Okay.

3 MR. ROM: That's where we're at.

4 THE COURT: All right.

5 MS. DIRKS: I disagree, but I'll leave it at that, Your

6 Honor.

7 THE COURT: Leave it at that.

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25 (Adjourned)

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EXHIBIT B

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NOTIFY

Massachusetts Association of Court Interpreters v. Lewis "Harry" Spence

Suffolk Superior Court Civil Action No. 2016-00969-A

Endorsement regarding Plaintiffs' Motion to Add Defendants and Re-Define the Class (Docket No. 15) and Defendants' Motion to Conform Pleadings (Docket No. 16):

The Plaintiffs in this action are per diem court interpreters and the Massachusetts Association of Court Interpreters ("MACI"), a non-profit corporation that advocates for court interpreters' working conditions. The Defendants are Lewis "Harry" Spence ("Spence"), in his capacity as Administrator of the Trial Court, Maria Fournier ("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 ("OCIS") Coordinator for the Administrative Office of the Trial Court, and Bruce Sawayer ("Sawayer"), in his capacity as Manager of Accounting of the Fiscal Affairs Department of the Trial Court, as well as their respective successors. The Plaintiffs allege that the Defendants breached their contract with the per diem court interpreters by violating the terms of the Standards and Procedures of the OCIS.

The Plaintiffs now move to amend their Amended Complaint ("Complaint") to redefine their proposed class and to substitute party defendants. See Mass. R. Civ. P. 15(a). The Defendants, in turn, move to conform the pleadings with this Court's ruling on the Defendants' Motion to Dismiss.

With respect to the Plaintiffs' proposed class, the Complaint describes the class as "both certified and screened court interpreters who regularly make themselves available to and provide court interpreter services for OCIS in the Commonwealth of Massachusetts, yet are or may in the future be treated as per diem court interpreters by OCIS." In light of this Court's dismissal of the Plaintiffs' challenge to their classification as per diem workers, and that their only surviving claim is for breach of contract, the Plaintiffs seek to redefine their class as "consist[ing] of all certified and screened per-diem court interpreters whose rights under the Standards and Procedures have been violated by Defendants."

The Defendants contend that the Plaintiffs' motion should be denied as a futile request because the record does not support the certification of the proposed class. Given that discovery is not yet concluded, the Defendants' argument is premature. This Court concludes that there is no good reason to deny the Plaintiffs' motion to redefine their class. See *Mathis* v. *Massachusetts Electric Co.*, 409 Mass. 256, 264 (1991) (finding that a party's motion to amend his or her pleadings should be granted unless there are good reasons for denying the motion). Accordingly, the Plaintiffs' motion to redefine their proposed class is **ALLOWED**.

The Plaintiffs next move, unopposed, to add the Executive Office of the Trial Court ("Trial Court") as a party defendant. Because the Trial Court was a party to the contract at issue, the Plaintiff's motion to add the Trial Court is **ALLOWED**.

With respect to the individual defendants in this lawsuit, the Plaintiffs move to substitute Spence and Fournier with their respective successors. The Defendants, in turn, filed a separate motion to dismiss the individual defendants from the lawsuit because they were not parties to the contract at issue. Here, the Trial Court is the true party in interest for the breach of contract claim. The Plaintiffs' concern that they will be precluded from deposing the individuals if they are not named as party defendants is unwarranted. See Mass. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."). For these reasons, the Plaintiffs' motion to substitute Spence and Fournier is **DENIED**, and the Defendants' motion to conform the pleadings by dismissing Spence, Fournier and Sawayer is **ALLOWED**.

Finally, the Defendants seek to dismiss MACI as a plaintiff because its members, not the association, are parties to the contract. The Complaint sufficiently alleges that MACI has associational standing. See *Massachusetts Ass'n of Cosmetology Schs., Inc. v. Board of Registration in Cosmetology*, 40 Mass. App. Ct. 706, 708 (1996). While MACI's standing may be appropriate for review again after the close of discovery, at this stage, the Defendants' motion to conform the pleadings by dismissing MACI must be **DENIED**.

(Robert Tochka, J.)

Date: August 21, 2018