COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
C.A. NO. 1684-CV-00969-A

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	:

OPPOSITION TO DEFENDANT'S RENEWED MOTION TO DISMISS

Defendant seeks another bite at the apple to dismiss Plaintiffs Second Cause of Action of Retaliation for the exercise of their Federal and State constitutional rights. This renewed motion should be dismissed based on the facts, the law of sovereign immunity, the requirements of 42 U.S.C. §1983 and G.L. c. 12, §11 I, and the doctrine of "the law of the case."

A. The Facts

Defendant misstates or ignores important procedural facts in this case. Defendant ignores the fact that when this case was filed, several individually-named officers of the Trial Court, including the then-Trial Administrator, the late Lewis "Harry" Spence, were named as defendants. (See Docket #6.) And there were counts in the complaint other than the contract claim that were not dismissed. (See Counts V and VI – Unjust Enrichment and Quantum

Meruit).[1] Because there were changes in those individually-named individuals, who were only named in their official capacity, Plaintiffs sought to substitute them with their successors in office. (See Docket #15.) It was Defendant who opposed Plaintiffs' motion to substitute these officers (see Docket #16) and the Court agreed with Defendant, denying Plaintiffs' motion and ordering that the Executive Office of the Trial Court be the only defendant. See Docket #10, attached hereto as Exhibit A. Therefore, the fact that the individually-named officers who would thereby satisfy the requirements to maintain a Section 1983 action for declaratory and equitable relief pursuant to Note 10 of *Will v. Michigan*, 491 U.S. 58 (1989) are missing from this case is not due to Plaintiffs' oversight, but to Defendant's efforts to try to dismiss the case due to sovereign immunity.[2] The Court can solve this factual problem by granting Plaintiffs' Replacement Second Substitute Amended Complaint, being filed as a part of this Rule 9A package, and attached hereto, without the exhibits, for the Court's convenience, as Exhibit C.[3]

The Law

Defendant repeats the same arguments it made before the Court at the February 28th hearing. See Docket # 37, where Defendant raised the same cases it raises now about why the Court should dismiss the Retaliation claim due to sovereign immunity. And at that hearing, Defendant raised two other cases not cited in its memorandum, *Kentucky v. Graham*, 473 U.S. 159 (1985) and *Wright v. Department of Correction*, 93 Mass. App. Ct. 1112 (2018). The Court gave

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[1] Those dismissed claims will be the subjects of appeal after final judgment on the existing claims.

[2] While Plaintiffs did name individual officers, the lack of them is the only possible argument Defendant can raise, but it can be cured by approving Exhibit C. And see Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion to Amend Complaint, Docket #38 where Plaintiffs documented that the doctrine of sovereign immunity, as applied to declaratory and equitable relief, is an equitable one, not found in the constitution or statute. *Morash v. Commonwealth of Massachusetts*, 363 Mass. 612 (1973) cited in Docket No. 37, on p. 4. And see Note 10 in *Will v. Michigan, supra.*

[3] Defendant also suggests that when Plaintiffs dropped their claim for damages, they did not seek injunctive relief. But see Plaintiffs' Prayer for Relief in their Second Substitute Amended Complaint, Docket # 41. One does not have to use the word, "injunctive" for that concept to be part of "equitable" relief, which is the word Plaintiffs used.

counsel one week following the hearing to submit any other authority for the positions they were advocating. Plaintiffs submitted a memorandum, (see Docket #39) to assist the Court and Defendant submitted nothing further. The Court issued its decision on March 11, 2022 (see Docket #40, attached hereto as Exhibit B). Not willing to take "no" for an answer, Defendant repeats the arguments rejected by the Court and adds a novel additional argument, namely, that a requirement for a First Amendment retaliation claim under Section 1983 requires "that the plaintiff spoke as a citizen on a matter of public concern, that the plaintiff experienced an adverse action, and that the protected speech was a substantial or motivating factor in the adverse action." See Defendant's Memorandum in Support of The Trial Court's Partial Motion to Dismiss, at page 2. While Defendant accurately states the standard, it obfuscates the standard by suggesting that the filing of a complaint against the Trial Court for the denial of any right does not constitute protected speech, as Defendant attempts to do by saying that the complaint about *contractual* violations does not constitute protected speech. It is the exercise of the First Amendment rights that matters when retaliation occurs, not the subject matter of the complaint or that an "official" is the party who engaged in the retaliation. See the recent cases of *Doe v. Hopkinton Public Schools*, 19 F.4th 493 (1st Cir. 2021) (To prevail on a First Amendment claim under § 1983, the plaintiffs bear the burden of showing that (1) they were engaged in constitutionally protected conduct, (2) they were subjected to adverse actions by the defendant, and (3) the protected conduct was a substantial or motivating factor in the adverse actions.)(the court held that the second and third prongs were satisfied but the first was not (bullying was not protected speech in a school setting); *Davison v. Rose*, 19 F.4th 626 (4th Cir.2021) (Plaintiff claiming First Amendment retaliation must demonstrate that: (1) he engaged in protected First Amendment activity, (2) defendants took some action that adversely affected

his First Amendment rights, and (3) there was causal relationship between his protected activity and defendants' conduct. Again, while the second and third prongs were met, the court held that the school board's policy prohibiting all personal attacks at board meetings, regardless of viewpoint, did not violate the First Amendment, and therefore the no trespass order issued was upheld); *Riley's American Heritage Farms v. Elsasser*, 29 F.4th 484 (9th Cir. 2022) (Plaintiff establishes adverse action element of prima facie case of retaliation under First Amendment by demonstrating that governmental action threatened or caused pecuniary harm, or deprived plaintiff of some valuable governmental benefit; this element is satisfied when government cancels for-profit contract with contractor. School officials' act in severing ties with vendor due to social media postings were not protected governmental speech); *DeRossitte v. Correct Care Solutions, LLC.*, 22 F.4th 796 (8th Cir. 2022) (To prevail on claim alleging retaliation for exercising First Amendment rights, plaintiff must show: (1) he engaged in a protected activity, (2) officials took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. While the prisoner engaged in protected First Amendment activity, he did not establish the existence of a policy, custom or action by the provider of medical services that inflicted the injury actionable under §1983); *Villarrreal v. City of Laredo*, 17 F.4th 532 (5th Cir. 2021) ("If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned. Yet that is exactly what happened here. Patricia Villarreal was put in jail for asking a police officer a question."). As applied to the present case, this Court already ruled that Plaintiffs had a right to pursue a court complaint for violations of the 2009 S & P under the theory of contract, quantum meruit and unjust enrichment and the very specific claims for the S & P's

violations in their lawsuit were removed in the January 2021 S &P; plaintiffs' Retaliation claim is that this wasn't coincidental. Plaintiffs' written discovery for documents, Exhibit D, plus targeted depositions after receiving those documents will help show whether Plaintiffs have proved that there was retaliation.

B. The Law of the Case Doctrine

Defendant is barred from its attempt to have a second bite at the apple by the doctrine of the "law of the case."

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 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. 1991), cert. den., 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 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 the Court reviewed the issue of whether it

should review the lower court judge's determination that the defendant shareholders were liable for violating the duty of good faith and loyalty they owed to their fellow shareholder in a close corporation, and declined to do so, stating:

> The "law of the case" doctrine reflects this 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).
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> 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*, *supra*, said that this doctrine did not apply to the facts in that case, in *Mustaccio v. United States*, 136 S.Ct. 709,716 (2016), in a case where defendant was convicted for conspiracy and substantive violations of the Computer Fraud and Abuse 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, 755 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).

There are no changed factual issues since the Court's March 11, 2022 ruling, nor any changes in the law that would constitute an exception to the law of the case doctrine's requirements. If the court's ultimate judgment is against Defendants, it may well want to have an appellate court re-examine this Court's March 11, 2022 ruling, claiming this Court's ruling was wrong as a matter of law. But, the logic of having a "second bite of the apple" in the same court that ruled against Defendant on the same issue in the motion to dismiss would allow them to raise this issue over and over again before a final judgment enters.

What Defendant can do on appeal, it can not do on summary judgment in the same court that denied the motion to dismiss on the exact same issue where there were no changes in the material facts or material changes in the law.

While the Court's ruling on Defendant's Motion to Dismiss allows the Plaintiffs to do is to conduct discovery to see if their claim of Retaliation will be upheld. Plaintiffs submitted discovery to Defendant shortly after the Court's March 11, 2022 decision, Exhibit D, attached hereto, and no response was received, as Defendant pursues another attempt to dismiss this claim, perhaps hoping for a sympathetic ear. Avoiding judge-shopping is one rationale for the "law of the case" doctrine.

Perhaps Defendant will argue that the decision denying its Motion to Dismiss did not mean that the issue before the Court was not "decided." However, *Kendall v. Hyannis Restoration, Inc.*, 81 App. Ct. 1118, 2012 WL 694461 (2021),[4] supports Plaintiffs' position that

[4] See Note 3 of Kendall, *supra*, where the Court stated, "Under *King*, appellate courts may only reconsider determinations from previous appeals when '[1] the evidence on a subsequent trial was substantially different, [2]

the ruling on the motion to dismiss is a ruling on the law that the court should not revisit in Defendant's current motion. inappropriately revisited in granting summary judgment, in violation of the rule of "the law of the case" doctrine. In *Kendall*, *supra*, there were no changes in the law about the statute of limitations and because the facts had not changed and, indeed, discovery was not over at the time summary judgment was granted.

There is not a different standard for reviewing a motion to dismiss and a motion for summary judgment. In a motion to dismiss the moving party says that it doesn't matter what the facts are because there are no set of facts that will prove all of the elements of the legal violation. In a motion for summary judgment the facts have been determined and those facts do not prove a violation of the law. In both cases the facts are construed in favor of the non-moving party. In the present case, there are two exact motions for summary judgment and the Court listened to the arguments, read the memoranda submitted by both counsel, gave the issue thought and wrote a thoughtful and well-reasoned opinion in support of its rejection of Defendant's Motion for Summary Judgment.

C. Conclusion

The Court should deny Defendant's second bite at the apple for all of the reasons discussed above. It can solve the issue of whether individual officials are named by allowing Plaintiffs Replacement Second Substitute Amended Complaint, thereby mooting Defendant's argument properly rejected by the Court in its March 11, 2022 ruling and enable discovery to proceed to give Plaintiffs the opportunity to prove that Defendant's actions were in retaliation for their filing the Complaint pending before the Court.

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controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work a manifest injustice.' Id. at 8, quoting from *United States v. Rivera-Martinez*,931 F.2d 148, 151(1st Cir.), cert. denied, 502 U.S. 862 (1991)."

Plaintiffs request that the Court award costs and attorney's fees for the delay Defendant is causing in this claim to proceed to a resolution on the merits.

Respectfully submitted,

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

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Dated: April 20, 2022

CERTIFICATE OF SERVICE

I, Alan Jay Rom, hereby certify that a copy of the foregoing Plaintiffs' Opposition to Defendant's Renewed Motion to Dismiss was served on Defendant by sending an electronic version to Assistant Attorney General Katherine B. Dirks, at Katherine.Dirks@state.ma.us this 20th day of April 2022.

Alan Jay Rom