COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

 CIVIL ACTION NO. 2016-00969

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MASSACHUSETTS ASSOCIATION OF COURT )

INTERPRETERS, INC., MOUSSA ABBOUD, )

SOLEDADE GOMES DEBARROS, ANAHIT )

FLANAGAN, NORMA V. ROSEN-MANN, and )

MICHAEL R. LENZ, individually, and on behalf )

of other persons similarly situated, )

 )

Plaintiffs, )

 )

v. )

 )

EXECUTIVE OFFICE OF THE TRIAL COURT, )

 )

Defendant. )

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**PLAINTIFFS’ MOTION TO COMPEL DISCOVERY**

Plaintiffs move that this Court issue an order compelling discovery in this case regarding only the discovery needed to demonstrate whether plaintiffs can maintain this action as a class action. As will be shown, Plaintiffs have requested discovery records that include their Daily Service Records (“DSRs”),[[1]](#footnote-1) that includes payment records, dates and hours worked and other information necessary that were requested in Plaintiffs’ document requests, but which Defendant refuses to provide. First, Plaintiffs will provide a procedural history of the litigation, then their efforts to obtain discovery related to the class and those results. Plaintiffs’ other document requests are not the subject of this motion because, as will be seen below, in the Procedural History, the Court wants to determine the issue of whether this action can be maintained as a class action first.

1. **Procedural History**

This litigation began on October 15, 2015 with Plaintiffs filing their Complaint directly in the Supreme Judicial Court (“SJC”) pursuant to G.L. c. 211, §3. Plaintiffs argued that the issues in this case affected the operations of the Trial Court and that the SJC should resolve them for the continued operation of the Trial Court. The SJC Single Justice disagreed and the case was sent to the Superior Court, where it remains pending resolution.

 Defendant filed a motion to dismiss and this motion was granted except for the contract claim,[[2]](#footnote-2) to which the motion to compel relates.[[3]](#footnote-3) Plaintiffs submitted their First Request for Production of Documents and Defendant submitted its Responses. [[4]](#footnote-4) Because of the dismissal of Plaintiffs’ claims of misclassification, Plaintiffs brought procedural motions, one of which was to redefine the class and this was granted. Defendants were permitted to substitute The Trial Court as the defendant for the various individuals Plaintiffs had named in the Amended Complaint. The Defendant objected to the granting of class-wide discovery and the Court that had ruled on the Motion to dismiss proposed that discovery proceed for the individually named Plaintiffs, and if they proved violations of the “contract” then relief could proceed against members of the class. Thereafter, Defendant took the depositions of each of the individually-named Plaintiffs, submitted interrogatories to each, to which Plaintiffs responded, including the organizational Plaintiff, Massachusetts Association of Court Interpreters (“MACI”).[[5]](#footnote-5) Defendant provided some, but not all, of the discovery related to the individually-named Plaintiffs. However, Defendant never provided the signature page of the OCIS S&P (see Exhibit A) for any of the individually-named Plaintiffs, though requested by Plaintiffs in its Request for Production of Documents. Defendant has stated that it has some of these signature pages for other *per-diem* court interpreters and will provide them.

 After conforming the pleadings in a Substituted Amended Complaint, Defendant provided an Answer and also moved for Partial Summary Judgment on the issue of the existence of a class. Judge Campo, on February 10, 2020, following a hearing on February 5, 2020, denied Defendant’s Motion and amended the way the case would proceed. Instead of limiting discovery to the individually-named Plaintiffs and MACI, the Court said that first it will determine the class issues and proceed from there. The Court ordered the parties to submit a proposed Joint Report and scheduled a follow-up hearing on March 17, 2020. In light of the decision denying Defendant’s Motion for Partial Summary Judgment related to the class issues,[[6]](#footnote-6) Plaintiffs re-drafted their document requests and sent them to Defendant on February 15, 2020. Defendant responded on August 17, 2020[[7]](#footnote-7) and submitted its own Request for Production of Documents and Interrogatories on the same date. Plaintiffs responded to Defendants’ discovery requests on November 15, 2020[[8]](#footnote-8). The parties submitted their Joint Report to the Court on August 6, 2020 and it was approved on August 17, 2020.

 Since then, the parties realized that they needed to request a change in the tracking order and Defendant wanted a protective order regarding their production of documents related to individual *per-diem* court interpreters. Plaintiffs could not agree to a set date for the end of discovery because of the discovery issues that are now the subject of this Motion to Compel, but did agree to seek a Status Conference to discuss this with the Court and Plaintiffs and Defendants agreed to a Motion for a Protective Order and content of the Proposed Protective Order regarding individual *per-diem* court interpreter discovery. Should Plaintiffs’ Motion to Compel be granted and the information received, Plaintiffs are amenable to having the Proposed Protective Order affect those documents.

1. **Discovery Issues**

There are several outstanding discovery issues that make it impossible to comply with the Joint Report. The following are the subjects of Plaintiffs’ document requests contained in Exhibit G:

1. Statement Pursuant to S&P Section 4.02: When the case was limited to only examining whether the named plaintiffs could demonstrate violations of the S&P, Plaintiffs asked for all documents that showed that plaintiffs had signed the statement required by Section 4.02 of the S&P. See Exhibit A. None were produced, not even the ones signed by the individually-named Plaintiffs. When the scope of the case was expanded pursuant to Judge Campo’s February 10, 2020 Order, Plaintiffs requested all such documents for everyone in the potential class. See Exhibit G, Request No. 5. None have yet been produced, though Defendant has stated that it will produce those found as of now. Plaintiff proposed a solution regarding these requests for which copies have not been found nor provided and that was that a stipulation be entered into which said that all court interpreters signed this document. Defendant did not respond to this proposal until December 16, 2020 when it proposed an edit to Plaintiffs’ proposed Stipulation that would have added the words, “As a matter of general practice,” a proposal that is unacceptable, given the mandatory wording of Section 4.02.[[9]](#footnote-9) Had Defendant’s proposed language been accepted by Plaintiffs, Defendant could (and would) argue that the provisions of the S&P that Plaintiffs argue give them a contractual right were merely hortatory. Therefore, the parties are at an impasse as to this issue.

After that, the Defendant agreed to produce the Section 4.02 documents it found and the Parties agreed to the proposed Motion for a Protective Order. Plaintiffs have still not received the documents and do not know how many of these documents there will be when produced. The requested status conference will address this issue, along with whatever stipulation that can be reached regarding those that are not produced.

1. Contact Lists of *Per-Diem* Court Interpreters. If it is possible for Plaintiffs to demonstrate a class (or several sub-classes) they would have to have the lists of *per-diem* court interpreters from the date the class could begin, which is October 15, 2012. Therefore, they asked for the lists kept by the Office of Court Interpreters (“OCIS”) similar to the only one in Plaintiffs’ possession.[[10]](#footnote-10) In a telephone conversation with Defendant’s counsel to try to resolve discovery issues, Defendant’s counsel said that Plaintiffs had not requested contact information, such as e-mail addresses that are contained on Exhibit H. In any event, Defendant has not provided the lists going back to October 15, 2012 and therefore, it is impossible for Plaintiffs to contact potential class members whose rights under the 2009 S&P might have been violated.
2. Defendant’s Confusion of the Issue of Class with MACI Membership. In each of Defendant’s discovery requests, it sought the names of MACI members. This issue is the subject of Defendant’s Motion to Compel and Plaintiffs’ Opposition, treated separately from Plaintiffs’ Motion to Compel.
3. Defendant Has not Provided Class Discovery Requests. As stated above, when this case was going to be decided on the basis of the individually-named Plaintiffs, Defendant did provide some, but not all, of the discovery request that only related to them. Since Judge Campo decided that the case would first determine the class issue, and Plaintiffs submitted discovery for documents related to the class, not one document has been received. Plaintiffs now realize the futility of determining resolution of the class issue without the documents that are only in the possession of the Defendant and request that the Court abrogate the earlier Joint Report order that would have put the burden on Plaintiffs to provide evidence without receiving the BEST evidence of whether a class exists, namely, the records Defendant has on each person who worked as a *per-diem* court interpreter since October 15, 2012.

Even if Plaintiffs had the names and contact information (home address, telephone number, e-mail address, etc.) of each per-diem court interpreter, how could these interpreters remember what they were paid, what they were short-changed, etc. from their memories or records they likely no longer have? What most would say is that whatever it was, it is contained in their DSRs, which is under the possession and control of the Trial Court. Many, if not most, of *per-diem* court interpreters who served the Trial Court since 2012 would also say that they were then, and are now, unfamiliar with the particular provisions of the 2009 S & P. Some of the individually named Plaintiffs had records for a short period of coverage of this case. Compare the information contained in the individually named Plaintiffs’ Affidavits, attached to the Substituted Amended Complaint with the records requested. Their records, however incomplete they are, are better organized than the hundreds of *per-diem* court interpreters’ records who have worked since 2012.

What Defendant will argue is that the DSRs should be the subject of liability and not of class determination. They are only partially correct. The DSRs, when coupled and compared with the periodic submissions to OCIS of their monthly availability, will determine both whether their class claims (see No, 5 below) are viable, and will also answer the question of liability as to any one or more of Plaintiffs’ class claims. What Defendant will also argue is that it is too burdensome to retrieve these records and the Court should rely on the distant memories of *per-diem* court interpreters dating back to 2012. To adopt this rationale would be to, in effect, deny Plaintiffs’ class claims. And that is what Defendant seeks to accomplish.

1. Examples of Requested Discovery. Among the 2009 S&P provisions that Plaintiffs claim were violated by Defendant are:
2. Section 7.02: whether the class was compensated on a half-day/full day basis when members of the class worked, or were available for the half-day or full-day;
3. Section 7.02: whether members of the class were compensated for the full-day after working more than four hours or available for working more than four hours;
4. Sections 7.02/7.09: whether members of the class were compensated when the assignments were cancelled within 24 hours of the scheduled proceeding, including cancellation of the afternoon session;
5. Section 7.03: whether members of the class were compensated at a rate of 25**%** greater than the standard rate when they were scheduled to an assignment to interpret in more than one language, but did not in fact interpret in more than one language for any reason not of their own fault;
6. Section 9.01: whether members of the class who are certified court interpreters did not receive an assignment because it was first offered to screened *per-diem* court interpreters;
7. Sections 9.01/9.07: whether members of the class who were available for assignments were passed over in favor of the use of Language Line telephonic interpreters;
8. Whether members of the class were docked pay for being more than 15 minutes late to an assignment which is not authorized by any section of the S&P;
9. Whether members of the class were not able to take lunch because they were traveling to an afternoon assignment, kept after 1 pm by the court or for any other reason, and whether they were compensated for that time;
10. Section 7.02: whether members of the class were paid by the hour because Defendant scheduled them to start after 10 am even though they indicated their availability to start at 9 am and the later start time is not authorized by the S&P;
11. Section 7.02: whether when compensating members of the class for travel and lunch time, they were paid an hourly rate less than the rate would be per hour when working a full-day or half-day as per the requirements of the S&P.
12. Section 11.08: This section states, “A summary sheet of what OCIS has approved and processed for payment will be sent to each *per-diem* court interpreter,” but the class of per-diem court interpreters did not receive them after a certain date, or did not receive them timely when they were sent; and
13. Section 12.01: *Per-diem* court interpreters, including Plaintiff Michael Lenz, have been taken off the list without the process delineated in this section being followed.

There are other issues concerning violations of the S&P for which documents were sought, but to date, not provided, except some, but not all, relating to the individually-named plaintiffs. Plaintiffs are not in control of this class-based information, but Defendant is.

The Court should compare Defendant’s response to Request No. 2 in Defendant Trial Court’s Responses and Objections to Plaintiffs’ Second Request for Production of Documents, Exhibit G, with its response to the Plaintiffs’ First Request for Production of Documents, Exhibit D. Defendant uses well-known boilerplate objections and responses, and the result is that no documents were produced, except as to some, but not all, documents related to individually-named plaintiffs. If the Court compares other requested documents and compares the later responses, Exhibit F, with the earlier responses, Exhibit D, it will see that the result is the same.

This case is in its sixth year, and to date, with the exception of some, but not all, of the discovery records of the individually-named plaintiffs being provided, no other discovery, repeatedly requested by Plaintiffs has been received. Defendant, and not the individually named Plaintiffs, are in possession, custody and control of the records that will prove whether their class allegations, in whole or in part, can be confirmed. The individual depositions taken by Defendant shows that MACI has sufficient numbers to provide for certification of a class and/or sub-classes and that there have been hundreds of *per-diem* court interpreters who have come and gone since the permissible effective coverage date of the statute of limitations, October 15, 2012. It may be that individual Plaintiffs’ claims qualify for representation of a class or sub-class – or not, but only by receiving the requested documents can this be determined.

Much of the discovery requested will be available from the DSRs, turned in by each *per-diem* court interpreter and kept as official records by the Trial Court, which has custody, possession and control of same. A number of the violations of the S&P noted in 5, *supra*, are interrelated and relate to the meaning of “availability.” When a *per-diem* court interpreter informs OCIS that s/he is available, that means that s/he is barring her/his availability for other employment in order to serve the Trial Court. The 2009 S&P recognizes this and provides that it may cancel the service if done more than 24 hours of the date of service so that the per-diem court interpreter can fill the time with other work opportunities. See Section 7.09 of the S&P. If not cancelled, that means that the *per-diem* court interpreter must be compensated for the full- or half-day that s/he signed up for when indicating his/her availability. This amounts to offer and acceptance in basic contract law principles.

The S&P provisions regarding working beyond the morning session, i.e. past 1 pm, converts the half-day into a full day. This means that if a court interpreter signed up to work in more than one language, s/he must be paid the additional 25% even if the afternoon session using the second language is cancelled, i.e. beyond the control of the interpreter; it means that the half-day rate of $200 for a certified court interpreter must be paid at what would be the hourly rate of $50 (¼ $200 for half-day) for travel time between the morning and afternoon sessions in two different courthouses. It means that when a *per-diem* court interpreter signs up for a half-day morning session and the appointment is not cancelled more than 24 hours ahead of the session, the *per-diem* court interpreter must be paid for the half-day (four hours) even though the court session starts one or two hours later. The DSRs will indicate what the interpreters were actually paid and OCIS records will indicate the availability and assignments actually signed up for and given to the interpreters.

1. **Conclusion**

Plaintiffs respectfully pray that this Court order Defendant to provide the requested documents.

**Plaintiffs request a hearing on this motion**.

 Respectfully submitted,

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

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

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 **CERTIFICATE OF COMPLIANCE WITH SUPERIOR COURT RULE 9C**

 I, Alan Jay Rom, attorney for the Plaintiffs in this action, hereby certify that I attempted to resolve the issues raised by this motion in telephone and e-mail communications with Defendant’s attorney pursuant to Superior Court Rule 9C(a). While those conversations resolved certain issues, the issues raised by this motion were not resolved.

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 Alan Jay Rom

 **CERTIFICATE OF SERVICE**

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

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 Alan Jay Rom

1. A sample copy of the written DSRs that were submitted by per-diem court interpreters is included as Exhibit A. [↑](#footnote-ref-1)
2. The issue being whether the 2009 Standards and Procedures (“S&P”), which all persons working as a court interpreter must sign in order to work in the courts of the Commonwealth, as per Section 4/02 of the S&P, constitutes a contract. A copy of this form is attached as Exhibit B. [↑](#footnote-ref-2)
3. A copy of the Superior Court’s decision on the Defendant’s Motion to Dismiss is attached hereto as Exhibit C. [↑](#footnote-ref-3)
4. Defendant’s Responses to Plaintiffs’ First Request for Production of Documents is attached as Exhibit D. [↑](#footnote-ref-4)
5. Defendant argued that MACI could not be a plaintiff because “it” was not, and could not be a court interpreter seeking relief from the alleged violations of the S&P. The Court disagreed and ruled that MACI could proceed as representative of its members. A copy of the Court’s Order issued on August 21, 2018 is attached as Exhibit E. [↑](#footnote-ref-5)
6. See Order of the Court, dated February 10, 2020, and attached as Exhibit F. [↑](#footnote-ref-6)
7. Defendant’s Response to Plaintiffs’ Restated Request for Production of Documents is attached as Exhibit G. [↑](#footnote-ref-7)
8. Plaintiffs had inadvertently not responded to Defendant’s First Interrogatories to Plaintiff MACI, but have responded to them prior to this motion being filed. [↑](#footnote-ref-8)
9. See Assistant Attorney General Dirk’s edited proposal and Plaintiffs’ counsel’s letter in response, Exhibit H. [↑](#footnote-ref-9)
10. See the list attached as Exhibit I. [↑](#footnote-ref-10)