

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

WORCESTER, ss.

NO. _____

JOAO DEPINA,

v.

WORCESTER COUNTY
DISTRICT ATTORNEY'S
OFFICE, et al.

**JOAO DEPINA'S MEMORANDUM IN SUPPORT OF PETITION
FOR INTERLOCUTORY RELIEF PURSUANT TO G.L. c. 231, § 118,
SECOND PAR. and G.L. c. 211, § 3.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF ISSUES.....	5
STATEMENT OF CASE.....	5
PROCEDURAL HISTORY	5
STATEMENT OF FACTS.....	7
LEGAL STANDARDS	11
SUMMARY OF ARGUMENT.....	11
ARGUMENT	12
1.0 THE COMMONWEALTH DEFENDANTS ARE NOT ENTITLED TO STAY DISCOVERY PENDING A MOTION TO DISMISS, AND THE COMMONWEALTH DEFENDANTS’ REPLY BRIEF SHOULD BE IGNORED ON APPEAL.....	12
2.0 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE COMMONWEALTH DEFENDANTS’ MOTION TO STAY DISCOVERY AND FOR A PROTECTIVE ORDER.	17
3.0 THE SINGLE JUSTICE OF THE APPELLATE COURT ERRED IN REVERSING THE TRIAL COURT’S ORDER	20
CONCLUSION	23
CERTIFICATE OF SERVICE.....	24
CERTIFICATION PURSUANT TO APPEALS COURT RULE 20.0	24

TABLE OF AUTHORITIES

CASES

<i>Bucchiere v. New England Telephone Telegraph Co.</i> , 396 Mass. 639 (1986).....	20
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993).....	15
<i>Buster v. George W. Moore, Inc.</i> , 438 Mass. 635 (2003).....	11
<i>C.M. v. Comm’r of Dep’t of Children & Families</i> , 487 Mass. 639 (2021).....	15
<i>Cronin v. Strayer</i> , 392 Mass. 525 (1984).....	20
<i>Dinsdale v. Com.</i> , 424 Mass. 176 (1997).....	14
<i>E.A. Miller, Inc. v. South Shore Bank</i> , 405 Mass. 95 (1989).....	11, 18
<i>George W. Prescott Pub. v. Reg. of Probate for Norfolk</i> , 395 Mass. 274 (1985).....	20
<i>Hornibrook v. Richard</i> , 488 Mass. 74 (2021).....	13
<i>Hudson v. Commissioner of Correction</i> , 46 Mass. App. Ct. 538 (1999).....	11
<i>L.L. v. Commonwealth</i> , 470 Mass. 169 (2014).....	22
<i>MacKnight v. Leonard Morse Hosp.</i> , 828 F.2d 48 (1st Cir. 1987).....	18
<i>Rodriques v. Furtado</i> , 410 Mass. 878 (1991).....	14

<i>Solimene v. B. Grauel & Co.</i> , 399 Mass. 790 (1987).....	11, 22
<i>Symmons v. O'Keeffe</i> , 419 Mass. 288 (1995).....	11
<i>Zahrey v. Coffey</i> , 221 F.3d 342 (2d Cir. 2000).....	15

STATUTES

G.L. c. 12, § 11	5
G.L. c. 268, § 13	8, 9

RULES

Mass. R. Civ. P. 34	15, 19
Mass. R. Civ. P. 26	11, 12, 17, 22
Massachusetts Rules of Professional Conduct Rule 3.8.....	10
Superior Court Rule 9A.....	7, 16, 21

CONSTITUTIONAL PROVISIONS

Amendments to the Massachusetts Constitution Article 77.....	5
Massachusetts Declaration of Rights Article 16	5

STATEMENT OF ISSUES

Whether the Appellate Court Single Justice erred in reversing the Superior Court's decision to deny Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins Motion to Stay Discovery and for a Protective Order.

STATEMENT OF CASE

This case is a civil action brought by Plaintiff Joao DePina against Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins (collectively the "Commonwealth Defendants"), Boston Police Department, and Dante Williams. DePina brought claims under G.L. c. 12, § 11 for Defendants' malicious prosecution, abuse of process, and violation of DePina's freedom of speech rights under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, as well as for Negligent Infliction of Emotion Distress and Intentional or Reckless Infliction of Emotional Distress.

PROCEDURAL HISTORY

On August 24, 2022, Plaintiff Joao DePina filed a complaint against Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins, Boston Police Department, and Dante Williams (the latter two, collectively, the "City Defendants"). PRA/6-20.

On August 24, 2022, Plaintiff submitted a Notice of Plaintiff's Certification Pursuant to Rule 11(a)(1) stating his intent to abolish the doctrine of absolute prosecutorial immunity through this lawsuit. PRA/21-25.

On October 6, 2022, Plaintiff served the Commonwealth Defendants with discovery requests.

On October 11, 2022, the Commonwealth Defendants served Plaintiff with a motion to stay discovery and for a protective order ("Motion to Stay"). PRA/39-44.

On October 21, 2022, Plaintiff served the Commonwealth Defendants with his opposition to motion to stay discovery and for a protective order ("Opposition to Motion to Stay"). PRA/45-89.

On October 24, 2022, the Commonwealth Defendants served Plaintiff with their motion to dismiss, raising defenses of absolute prosecutorial immunity, qualified immunity, and sovereign immunity ("Motion to Dismiss"). PRA/4.

On October 26, 2022, the Commonwealth Defendants filed their Rule 9A Packet for the Motion to Stay. RA/7. In the Rule 9A Packet, the Commonwealth Defendants included a Reply in Support of their Motion to Stay ("Reply Brief"), and they attached their Motion to Dismiss as an exhibit.¹ PRA/90-94.

¹ On October 21, 2022, Plaintiff served his Opposition to Motion to Stay to the Commonwealth Defendants. In the Reply Brief, the Commonwealth Defendants attached their Motion to Dismiss and included it as part of their argument. The Court should reject arguments in the Reply Brief that cite to the Motion to Dismiss as it

On October 27, 2022, the Superior Court denied the Commonwealth Defendants' Motion to Stay by entering a margin order ("Order Denying Motion to Stay Discovery"). PRA/4 & 118.

On November 1, 2022, the Commonwealth Defendants appealed the Order Denying Motion to Stay Discovery. PRA/149-172. The Commonwealth Defendants filed a petition and memorandum in support of petition ("Petition") pursuant to G.L. c., § 118, First Par. for interlocutory relief, requesting a Single Justice vacate the Superior Court's Order Denying Motion to Stay and instruct the trial court to stay discovery until after a ruling on their Motion to Dismiss. *Id.*

On November 9, 2022, Plaintiff filed his response to the petition ("Response"). PRA/173-192.

On November 16, 2022, a Single Justice of the Appeals Court reversed the Superior Court's decision and ordered the trial court to stay discovery pending the disposition of the Commonwealth Defendants' Motion to Dismiss. PRA/193-196.

STATEMENT OF FACTS

On November 9, 2021, DePina heckled Defendant District Attorney Rachael Rollins while she was giving a press conference on a public street. PRA/8/¶¶12-14. At the time of the incident, Defendant Rollins was the Suffolk County District

does not raise any arguments that "were not and could not reasonably have been anticipated and addressed" in their initial memorandum and should be ignored on appeal. Superior Court Rule 9A(a)(3).

Attorney. *Id.* On November 12, 2021, in retaliation for DePina’s First Amendment protected activity, he was charged with attorney intimidation in violation of G.L. c. 268, § 13B. RA/12/¶17. In the words of Defendant Assistant District Attorney Anthony Melia, DePina was prosecuted for “questioning [Defendant Rachael Rollins] ability to be the district attorney....” PRA/11/¶43.

A citizen questioned Rollins’s ability to serve as D.A., so she had him cast into the gears of the justice system, seeking up to 10 years in prison for this “crime.” We know, beyond any doubt, that Rollins knew that this was wrong. In an almost identical situation a year prior, DePina heckled former Police Chief William Gross during a press conference. PRA/13/¶49. There, Defendant Rollins intervened and deescalated the situation by handing DePina her badge and cell phone. *Id.* Defendant Rollins issued a press release stating she intervened on behalf of DePina to protect his constitutionally protected right to freedom of speech stating, in relevant part, that

[T]here were about five to ten white police officers standing off camera that were about to ‘remove’ Joao from the scene for yelling. As I am sure you are aware, yelling your opinion is free speech. It may be annoying but it is protected. Had those officers gone over to remove Joao and that situation potentially escalated into a struggle with five to ten white police officers restraining and arresting a Black man in front of multiple news media outlets, how is that helpful?

PRA/13/¶50.

When Defendant Rollins was on the receiving end of DePina’s heckling, she shelved her clear knowledge of the Constitution in favor of retaliation and silencing

a critic. She had DePina charged with a felony for the obvious exercise of his First Amendment rights – protesting in a public forum, speaking his mind to his fellow citizens, and petitioning his government. PRA/9/¶¶17-21.

In the criminal case, at the hearing on DePina’s motion to dismiss for lack of probable cause, when pressed by Justice Fraser on evidence of attorney intimidation in violation of G.L. c. 268, § 13B, Defendant Assistant District Attorney Melia stated “I don’t think there’s a veiled reference directly to his cases, Judge. My only argument would be that Mr. DePina questioning [Rollins] ability to be the district attorney, he’s indirectly referencing her ability to fairly prosecute him as a defendant.” PRA/11-12/¶43. In response, Justice Fraser asked, “So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?” *Id.* Defendant Melia answered, “If they’re under prosecution by that district attorney, yes.” *Id.*

On May 25, 2022, the criminal charge against DePina was dismissed for lack of probable cause. PRA/12/¶45. The trial court held that “[t]here exists no probable cause or references, direct or indirect, to [DePina’s] pending criminal cases. [DePina’s] speech is within the First Amendment’s protective reach.” PRA/12/¶46. Ms. Rollins already knew that. PRA/13/¶50.

After the Commonwealth filed criminal charges against DePina, the Suffolk County District Attorney’s Office farmed the case out. PRA/9/¶26. Norfolk County

District Attorney's Office, mindful of its obligations under the Massachusetts Rules of Professional Conduct Rule 3.8(a), and an office that respects the First Amendment, declined to take the case. PRA/10/¶27. Worcester County's D.A., for an as-of-yet undisclosed reason, accepted it. PRA/10-11/¶¶29-37.

There was a three-day window between the filing of criminal charges against DePina and his encounter with Defendant Rollins. There was also time between the filing of criminal charges and Worcester County District Attorney's Office accepting the case. Neither of these timeframes involved split-second decisions, where one might accidentally color outside the Constitution's clear lines. The Defendants had time to deliberate, lie, and cook up their scheme – thinking that DePina would be unable to defend himself against the unlimited might of the Government. There were communications and discussions between the Defendants to cook up this plan. It is inequitable for the Commonwealth Defendants to have put DePina through a criminal prosecution for the obvious exercise of his right to speak freely and petition his government, and then for the Commonwealth Defendants to turn around and slam the door shut on discovery of exactly how all that transpired.²

² Separately, Plaintiff requested information from the Worcester County District Attorney's Office through a public records request. PRA/54. Worcester County District Attorney's Office refused to provide the requested documents by citing to a non-existent litigation exception. PRA/56. The denial of DePina's public records request was appealed to the Secretary of the Commonwealth. PRA/58-86. The Secretary of the Commonwealth "decline[d] to opine" on Plaintiff's appeal.

LEGAL STANDARDS

Standard for Motion for a Stay of Discovery and for a Protective Order

Mass. R. Civ. P. Rule 26(c) requires good cause for a protective order. *E.A. Miller, Inc. v. South Shore Bank*, 405 Mass. 95, 100 (1989). Litigants may be denied discovery if their complaints and affidavits lack “even a minimal showing warranting the requested discovery.” *Hudson v. Commissioner of Correction*, 46 Mass. App. Ct. 538, 549 n.20 (1999) (citations omitted). DePina made a proper showing.

Standard for Appellate Review of Discovery Orders

“In general, discovery matters are committed to the sound discretion of the trial judge.” *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 653 (2003); *see, e.g., Simmons v. O’Keeffe*, 419 Mass. 288, 302 (1995). Appellate courts uphold discovery rulings unless the appellant shows an abuse of discretion that resulted in prejudicial error. *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 799 (1987).

SUMMARY OF ARGUMENT

The Commonwealth Defendants are not entitled to stay discovery pending a motion to dismiss. The Commonwealth Defendants’ Reply Brief was procedurally

PRA/88. Worcester County District Attorney’s Office has caused undue burden on DePina. The Superior Court’s order denying the motion to stay discovery and for a protective order was in the interest of judicial economy as it rendered separate litigation unnecessary.

defective and should be ignored on appeal. The Superior Court did not abuse its discretion when denying the Commonwealth Defendants' Motion to Stay. The Commonwealth Defendants failed to prove "good cause" pursuant to Mass. R. Civ. P. 26(c). The Appellate Court Single Justice erred by incorrectly applying the standard for discovery orders, substituting her own judgment for the trial court's, including the Reply Brief in her analysis, and failing to find prejudicial error. DePina respectfully requests that the Supreme Judicial Court Single Justice reverse the Appellate Court Single Justice and affirm the Superior Court's Order denying the Commonwealth Defendants' Motion to Stay.

ARGUMENT

1.0 The Commonwealth Defendants Are Not Entitled to Stay Discovery Pending a Motion to Dismiss, and the Commonwealth Defendants' Reply Brief Should Be Ignored on Appeal.

The Commonwealth Defendants are not presumptively entitled to immunity and, by extension, a stay of discovery until a motion to dismiss is resolved. The Commonwealth Defendants include three prosecutors, who performed legally distinct roles. They may plead immunity defenses, but they are not entitled to them.

The Commonwealth Defendants argued:

- First, their intent to raise defenses of absolute and qualified immunity precluded discovery prior to adjudication of the defenses. PRA/41-42/¶6.

- Second, their intent to raise a lack of subject matter jurisdiction precluded discovery until the issue was resolved. PRA/42-43/¶7.

- Third, they asserted that DePina had a burden to justify discovery now instead of them bearing the burden of changing the rules and showing why it should not take place. PRA/43/ ¶8.

At its essence, the Commonwealth Defendants argued that they are presumptively entitled to immunity simply based on their status as prosecutors and, by extension, that the Superior Court is duty bound to grant a stay of discovery until their “substantial defenses” are raised and resolved. This argument fails.

First, case law—even that cited by the Commonwealth Defendants—does not support an entitlement to a stay of discovery until immunity defenses are resolved. PRA/47-49. The Commonwealth Defendants cited the following three case:

- *Hornibrook v. Richard*, 488 Mass. 74, 83-84 (2021) (“[T]he question of whether a defendant is entitled to absolute immunity is not one that should be determined through narrowly tailored discovery”) (internal citations and quotations omitted);

- *Hudson v. Comm’r of Correction*, 46 Mass. App. Ct. 538, 549 (1999), *aff’d*, 431 Mass. 1 (2000) (protective order properly entered to stay discovery until after a ruling on motion to dismiss raising qualified immunity);

- *Dinsdale v. Com.*, 424 Mass. 176, 181 n.10 (1997) (questions of immunity for government officials are to be “resolved at the earliest possible stage of litigation” as “the entitlement is an immunity from suit, rather than a mere defense to liability”) (internal citations and quotation marks omitted). PRA/41-42/¶6.

Notably (and honorably), the Commonwealth Defendants acknowledged that binding precedent does not entitle government officials to a stay of discovery. PRA/143 (“The Superior Court has thus acted against the Supreme Judicial Court’s admonition to decide immunity defenses prior to allowing discovery.”).

Second, the Commonwealth Defendants are not likely to succeed on a qualified immunity defense. *See* PRA/47-48; *see also* *Rodrigues v. Furtado*, 410 Mass. 878, 882 (1991) (Qualified immunity is a judicially created doctrine that shields public officials from liability for performing discretionary functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”) (citation omitted). Plaintiff’s Verified Complaint alleges that the Commonwealth Defendants violated Plaintiff’s constitutional rights to speak freely on a public street and petition his government—rights that are clearly established that a reasonable person would have known. *Id.*; *see also* PRA/8-9/¶¶12-24.

Third, there is no presumption that absolute immunity applies. *See* PRA/48-50. The Commonwealth Defendants “bear the burden of showing that such immunity is justified for the function in question.” *C.M. v. Comm’r of Dep’t of Children & Families*, 487 Mass. 639, 646 (2021) (quotation marks and citations omitted). Notably, “the Commonwealth Defendants consist of three prosecutors spanning two separate district attorney’s offices that have varying roles as outlined in the complaint.” PRA/49. Only one of the prosecutors, Defendant Melia, actively prosecuted Plaintiff. PRA/49. Meanwhile, all of the Commonwealth Defendants sought to stay discovery. At the same time, administrative and investigative duties are not protected by absolute immunity and DePina plausibly pled that the Commonwealth Defendants performed these duties. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (“A prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.”); *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000) (“[A]ctions taken as an investigator enjoy only qualified immunity.”).

Fourth, even if there was no jurisdiction over some defendants, pursuant to Mass. R. Civ. P. 34(c)(2), Plaintiff is entitled to third-party discovery from those defendants as third-parties to Plaintiff’s case against the remaining defendants. PRA/50.

Fifth, the discovery DePina seeks relates to activity that does not enjoy absolute immunity. PRA/50. Three days lapsed between DePina's altercation with Defendant Rollins and the filing of criminal charges. *Id.* During that time, the Defendants engaged in conversations and communications regarding DePina. *Id.* Communications between the Commonwealth Defendants was also necessary to transfer DePina's case to Worcester County District Attorney's Office. *Id.* These communications served the common goal of using government authority to silence DePina for exercising his constitutionally protected rights. *Id.*

The Court should allow discovery to continue in the normal course, allowing him to gain a full and complete picture of the behind-the-scenes communications between the Defendants to understand their roles more fully. RA/50. Moreover, robust discovery will allow the Supreme Judicial Court a wider lens if this case is taken on appeal. *Id.*

Additionally, in their reply brief to the Superior Court, the Commonwealth Defendants attached their Motion to Dismiss. PRA/90-117. While the Commonwealth Defendants could have submitted their then-unserved Motion to Dismiss as an exhibit in their Motion to Stay, including the Motion to Dismiss in their Reply Brief ambushed DePina and violated Superior Court procedure. *See* Superior Court Rules 9A(a)(3) ("The moving party may file a reply memorandum

limited to matters raised in the opposition that were not and could not reasonably have been anticipated and addresses in the moving party's initial memorandum.”).

The Commonwealth Defendants set up a strawman. They asserted that Plaintiff “characterize[ed] . . . prosecutorial immunity and qualified immunity defenses as fact-bound questions that cannot be answered prior to discovery.” PRA/91. DePina made no such assertion. Rather, he argued that the Superior Court has discretion to grant discovery prior to resolving immunity issues and that the Commonwealth Defendants failed to show good cause pursuant to Mass. R. Civ. P. 26(c). Discovery is not about withstanding a motion to dismiss — it is about ordinary procedures applying to the Commonwealth Defendants as it applies to every other litigant.

2.0 The Trial Court Did Not Abuse Its Discretion in Denying the Commonwealth Defendants' Motion to Stay Discovery and For a Protective Order.

The Superior Court did not abuse its discretion in denying the Motion to Stay. The Commonwealth Defendants failed to show good cause to the Superior Court pursuant to Mass. R. Civ. P. 26(c). In *Hudson v. Comm'r of Correction*, the Appeals Court of Massachusetts held the trial court did not abuse its discretion in granting a motion for a protective order and to stay discovery where a *pro se* litigant's “entire argument” on appeal was premised on procedural indulgences granted to *pro se* litigants. 46 Mass. App. Ct. 538, 549 (1999), *aff'd* 431 Mass. 1.

Similarly, the Commonwealth Defendants' entire argument is premised on procedural indulgences granted to government litigants. *See* PRA/39-44. The Commonwealth Defendants argue that discovery is improper until a motion to dismiss is decided because they are government officials and "[t]he rule in this regard is as straightforward as it is firmly entrenched." PRA/41/¶6. In other words, the Commonwealth Defendants argue the Superior Court must grant their Motion to Stay and that the Superior Court has no discretion on the matter. But, there must be discretion if orders are reviewed for the potential abuse thereof. Caselaw does not support the Commonwealth Defendants' position. PRA/47-49. The trial court has discretion to decide whether to grant pre-Motion to Dismiss discovery, and a government indulgence is not warranted. PRA/46-50.³

Moreover, Plaintiff met his burden for discovery. Litigants generally are not denied discovery unless "their complaints and affidavits have not made even a minimal showing warranting the requested discovery." *E.A. Miller, Inc. v. South Shore Bank*, 405 Mass. 95, 99-100 (1989) (quoting *MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 51 (1st Cir. 1987)) (quotation marks omitted). Plaintiff's

³ On appeal, the Commonwealth Defendants admitted that the case law does not require a stay of discovery pending a motion to dismiss. PRA/143 ("The Superior Court has thus acted against the Supreme Judicial Court's admonition to decide immunity defenses prior to discovery.").

Verified Complaint provides more than the minimal showing, *see* PRA/6-19, and the Commonwealth Defendants did not argue to the contrary. *See* PRA/39-44.

The violation of DePina's constitutional right to speak freely and petition the government while standing on a public street was so clear that qualified immunity is not likely available to the Commonwealth Defendants. *See* PRA/47-48. Neither does absolute prosecutorial immunity apply. *See* PRA/48-50. The Commonwealth Defendants span two district attorney's offices that have varying roles outlined in the Complaint, and only one of the prosecutors, Defendant Melia, actively prosecuted DePina. *See* PRA/49-50. Meanwhile, there were administrative and investigative duties, not protected by absolute immunity, that DePina plausibly pled. *Id.* Thus, the Superior Court was well within its discretion to deny the Defendants' Motion to Stay.

Additionally, even if there were no jurisdiction over some of the defendants, DePina is entitled to third-party discovery as to the remaining Defendants pursuant to Mass. R. Civ. P. 34(c)(2). PRA/50.

Plaintiff met his minimal burden to receive discovery based on the pleadings and showed that discovery was in the interest of judicial economy. The Superior Court rejected the Commonwealth Defendants request for a procedural indulgence based on their position as government officials. Therefore, it was reasonable for the

Superior Court to deny the Commonwealth Defendants' Motion to Stay and reversal by the Single Justice was error.

3.0 The Single Justice of the Appellate Court Erred in Reversing the Trial Court's Order

The Appellate Court Single Justice erred in reversing the Motion to Stay.

"The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *George W. Prescott Pub. v. Reg. of Probate for Norfolk*, 395 Mass. 274, 282 (1985) (quoting *Cronin v. Strayer*, 392 Mass. 525, 534 (1984) (citation omitted)).

"There is no error of law amounting to an abuse of discretion simply because a reviewing court might have reached a different result; the standard of review is not substituted judgment." *Bucchiere v. New England Telephone Telegraph Co.*, 396 Mass. 639, 641 (1986) (collecting cases).

The Single Justice applied the incorrect standard and substituted its own judgment. The Single Justice concluded that:

However, merely filing a motion to dismiss with a claim for immunity from suit does not automatically entitle the defendant to stay of the plaintiff's discovery. If there were countervailing considerations requiring discovery to progress notwithstanding the pending motion to dismiss, the trial court judge could determine that a stay is not appropriate. In the case before me, there are no offsetting factors apparent in the record or cited by the judge. In both the plaintiff's response to the petitioners' motion in the trial court and his opposition

to their petition, the plaintiff fails to demonstrate that a delay in discovery would be prejudicial.

PRA/195.

The Appellate Court Single Justice erred by considering the Commonwealth Defendants' trial court Reply Brief and their Motion to Dismiss. *See* Superior Court Rule 9A(a)(3). More important, there is no precedent for a plaintiff to show "countervailing considerations". PRA/195. This is a precedent-setting decision that reverses the requirement of the rules that it is the *movant* who must show good cause. The Single Justice created a rule that gives no guidance as to what a countervailing consideration might even be. It is a rule designed to ensure no plaintiff could prevail. Moreover, here, the Commonwealth Defendants failed to show the absence of countervailing considerations. For example, they failed to show that discovery from the Commonwealth Defendants would not be proper were they merely third parties to the case against the City Defendants.

Further, the Appellate Court Single Justice erred by determining that a non-moving party is required to show why a delay in discovery would be prejudicial. DePina is not required to demonstrate why a delay in discovery would be prejudicial. It is the movant's burden to show a lack of prejudice. Instead, the Single Justice largely glossed over DePina's arguments. *See* PRA/196 ("Much of the plaintiff's oppositions, both in this court and the Superior Court, argue the merits of the motion

to dismiss. Those arguments are best addressed in the context of the motion to dismiss.”).

Moreover, the Appellate Court Single Justice made no finding that the Superior Court’s decision resulted in prejudicial error to the Commonwealth Defendants. *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 799 (1987) (“Appellate courts uphold discovery rulings unless the appellant can demonstrate an abuse of discretion that resulted in prejudicial error.”). The Commonwealth Defendants did not argue that DePina failed to make a minimal showing in his complaint and affidavits to warrant discovery. *See* PRA/157-171. And, the Commonwealth Defendants failed to show prejudicial error. *Id.*

The Appellate Court Single Justice inverted Mass. R. Civ. P. 26(c). There was an undeserved presumption of immunity and then an extension of this presumption to include a presumption of immunity from discovery. The Single Justice substituted her own opinion for that of the trial court. *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014) (“An appellate court’s review of a trial judge’s decision for abuse of discretion must give great deference to the judge’s exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result.”) (citation omitted). Therefore, this Court should honor Superior Court’s discretion. It is in the best position to make decisions

regarding discovery. The Superior Court's Order Denying the Commonwealth Defendants' Motion to Stay should be reinstated.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Supreme Judicial Court Single Justice reverse the erroneous decision on appeal and affirm the Superior Court's Order Denying the Motion to Stay.

Respectfully Submitted,
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By his Attorneys

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Dated: December 6, 2022.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all parties through the email on this 6th day of December, 2022, or otherwise caused for service via U.S. Mail, as follows:

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CERTIFICATION PURSUANT TO APPEALS COURT RULE 20.0

I hereby certify that the foregoing document complies with all of the rules of this Court that pertain to this filing. This document complies with the applicable length limit in Rule 20.0 because it contains 3,810 non-excluded words in 14-point Times New Roman font, as counted in Microsoft Word.

/s/ Marc J. Randazza

Marc J. Randazza