COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

WORCESTER, ss. NO. 2022-J-0613

JOAO DEPINA,	)
	)
v.	)
	)
WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE, et al.	)
	)

PLAINTIFF'S RESPONSE TO COMMONWEALTH DEFENDANTS' PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO G. L. c. 231, § 118, FIRST PAR.

Marc J. Randazza, BBO# 651477
Jay M. Wolman, BBO# 666053
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: (978) 801-1776
mjr@randazza.com
jmw@randazza.com
ecf@randazza.com

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STATEMENT OF ISSUES

Whether the Superior Court abused its discretion by denying 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.

STATEMENT OF FACTS

On November 9, 2021, DePina heckled District Attorney Rachael Rollins while she was giving a press conference on a public street. RA/11/¶¶12-14. At the time of the incident, Defendant Rollins was the Suffolk County District Attorney. *Id.* For heckling Defendant Rollins, three days later, on November 12, 2021, a felony charge for attorney intimidation in violation of G.L. c. 268, § 13B was filed against DePina. 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…." RA/15/¶43.

You read that right. 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." And now, she and her cronies are upset at being "inconvenienced."

We know, beyond any doubt, that Rollins knew that this was wrong. In an almost identical situation, DePina heckled former Police Chief William Gross during a press conference. RA/16/¶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 by stating that "there 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." RA/16/¶50.

When Defendant Rollins was on the receiving end of DePina's heckling, her knowledge of the Constitution seemed to take a secondary role. She had DePina charged with a felony for the obvious exercise of his First Amendment rights – speaking on the street and petitioning his government. RA/12/¶¶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." RA/15/¶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. RA/15/¶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." RA/15/¶46.

Ms. Rollins already knew that. RA/16/¶50.

After the Commonwealth filed criminal charges against DePina, the Suffolk County District Attorney's Office recused itself from prosecution and farmed the case out. RA/12/¶26. Norfolk County District Attorney's Office, mindful of its obligations under the Massachusetts Rules of Professional Conduct Rule 3.8(a), declined to take the case. RA/13/¶27. On the other hand, Worcester County District Attorney's Office, for an as-of-yet undisclosed reason, accepted it. RA/13/¶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. There were communications and discussions between the Defendants. 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.[1]

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,

[1] Separately, Plaintiff has requested information from the Worcester County District Attorney's Office through a public records request. RA/56. Unfortunately, Worcester County District Attorney's Office refused to provide the requested documents by citing to a non-existent litigation exception. RA/58. The denial of DePina's public records request was appealed to the Secretary of the Commonwealth. RA/60-89. The Secretary of the Commonwealth "decline[d] to opine" on Plaintiff's appeal. RA/90. 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.

Rachael Rollins (collectively the "Commonwealth Defendants"), Boston Police Department, and Dante Williams. RA/9-23.

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. RA/42-47. On October 21, 2022, Plaintiff served the Commonwealth Defendants with his opposition to motion to stay discovery and for a protective order. RA/48-92. On October 26, 2022, the Commonwealth Defendants filed their Rule 9A Packet for the motion to stay discovery and for a protective order. RA/7. In the Rule 9A Packet, the Commonwealth Defendants included a reply in support of their motion to stay discovery and for a protective order and their motion to dismiss as an exhibit. RA/93-120. On October 27, 2022, the court denied the Commonwealth Defendants' motion to stay discovery and for a protective order by entering a margin order. RA/7 & 124.

On October 24, 2022, the Commonwealth Defendants filed a 9E notice that they served Plaintiff with a motion to dismiss, which raises the defenses of absolute prosecutorial immunity, qualified immunity, and sovereign immunity. RA/6.

LEGAL STANDARD

"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.*, *Symmons v. O'Keeffe*, 419 Mass. 288, 302 (1995). Appellate courts uphold discovery rulings unless the appellant can demonstrate 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 based merely on their position as government officials. The trial court did not abuse its discretion when denying the Commonwealth Defendants' Motion to Stay Discovery

and for a Protective Order. The Commonwealth Defendants failed to prove "good cause" pursuant to Mass. R. Civ. P. 26(c) to the trial court. Here, the Commonwealth Defendants fail to demonstrate an abuse of discretion that resulted in prejudicial error. DePina respectfully requests that the Single Justice deny the Commonwealth Defendants' petition and uphold the Superior Court's decision.

ARGUMENT

1.0 The Commonwealth Defendants Are Not Entitled to Stay Discovery and for a Protective Order

The Commonwealth Defendants appear to argue that their position as prosecutors presumptively entitles them to immunity and, by extension, a stay of discovery and for a protective order. *See* Commonwealth Defendants' Memorandum in Support of Petition for Interlocutory Relief Pursuant to G.L. c. 231, § 118, First Par ("Petition") at 7-12.

The SJC has stated in dictum that the Massachusetts Civil Rights Act claims adopt "the standard of immunity for public officials developed under § 1983." *Duarte v. Healy*, 405 Mass. 43, 46 (Mass. 1989); *see also Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (Mass. 1997). 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." *Rodriques v. Furtado*, 410 Mass. 878, 882 (Mass. 1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The SJC has noted a "desirability of resolving immunity issues quickly." *Brum v. Town of Dartmouth*, 428 Mass. 684, 688 (Mass. 1999); *see also Caron v. Silvia*, 32 Mass. App. Ct. 271, (1992) ("Consistent with the reasons underlying the qualified immunity defense, it was important that the immunity issue be resolved at the earliest possible stage of litigation, preferably before any discovery, on a motion

to dismiss or for summary judgment.") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985). While the SJC admonishes the importance of resolving immunity issues quickly, the Superior Court has discretion in determining whether to stay discovery before a motion to dismiss is resolved.

In the federal system, the U.S. Supreme Court has ruled that defendants raising qualified immunity defenses are entitled to dismissal before the commencement of discovery, except where a plaintiff alleges violations of clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."). Even if Massachusetts followed federal policy, the Commonwealth Defendants are not entitled to a stay of discovery prior to a ruling on a motion to dismiss because Plaintiff's complaint alleges conduct that violates clearly established constitutional rights. Moreover, an official who commits a patently "obvious" violation of the Constitution is not entitled to qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

If freedom of speech includes the right to curse at a public official, then it surely includes the right to question whether a public official is competent to perform their job them during a press conference. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) ("'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' "); *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) ("In 1990 when [the defendant] was arrested for his use of the 'f-word,' it was clearly established that speech is entitled to First Amendment protection."); *Buffkins v. City of Omaha*, 922 F.2d 465, 467 (8th Cir. 1990) ("I *will* have a nice day, *asshole*.").

A first year law student with poor study habits would have understood that prosecuting DePina for "question[ing Defendant Rollins] ability to be the district

attorney" clearly violates the First Amendment. RA/15/¶43. A reasonably well-trained and experienced prosecutor would be in a position to teach that law student's class on the subject. "A government official may not base her probable cause on an 'unjustifiable standard' such as speech protected by the First Amendment." *Mink v. Knox*, 613 F.3d 995, 1003-04 (10th Cir. 2010) (quoting *Wayte v. United States*, 740 U.S. 598, 608 (1985)); *see also Swiecicki v. Delgado*, 463 F.3d 489, 498 (6th Cir. 2006)("[A]n officer may not base his probable-cause determination on speech protected by the First Amendment.") And no reasonable person could have found probable cause under G.L. c. 268, § 13B in any event. *See Villareal v. Laredo*, U.S. Ct. App., No. 20-40359, slip op. (5th Cir. Aug. 12, 2022) ("It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment.")

The Commonwealth Defendants prosecuted DePina for an interaction between DePina and Rollins on a public street, the pinnacle of an open forum, where the right to speak freely and petition the government is at its apex. *Cornelius v. NAACP Legal Defense Ed. Fund*, 473 U.S. 788, 817 (1985) ("[T]he quintessential public forums, includes those places which by long tradition or by government fiat have been devoted to assembly and debate, such as parks, streets, and sidewalks.") (quotation marks and citations omitted). For exercising his constitutionally protected right to speak freely and petition his government, the Commonwealth Defendants retaliated against DePina through an unjust abuse of the criminal justice system. RA/19-20/¶¶71-78. The criminal charge against DePina was dismissed for lack of probable cause, and the court noted that "[DePina's] speech is within the First Amendment's protective reach." RA/15-16/¶46. There is no reasonable argument that the defense of qualified immunity applies to all of the Commonwealth Defendants. *Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The Constitution does not allow such speech to be made a crime. The freedom of

individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

Moreover, there is no presumption that the Commonwealth Defendants are entitled to absolute immunity. "In determining the scope of prosecutorial immunity, our inquiry must thus focus not merely on the status or title of the officer, but also on the nature of the official behavior challenged." *Chicopee Lions Club v. Dist. Attorney for Hampeden Dist.*, 396 Mass. 244 (1985). DePina is suing three separate prosecutors. But, the Defendants' fail to address the various roles each prosecutor is alleged to have performed in this unconstitutional tale.

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). "Where the activity in question is closely related to the judicial phase of a criminal proceeding, or involves the skills or judgment of an advocate, the activity will be subject to absolute immunity." *Chicopee Lions Club*, 396 Mass. at 248. "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." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). "[A]ctions taken as an investigator enjoy only qualified immunity." *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000). DePina's complaint plausibly pled the Commonwealth Defendants' conduct involved investigative and administrative functions which are not protected by absolute immunity.

Even if there were no jurisdiction over some defendants, DePina is entitled to third-party discovery from those defendants as third-parties to Plaintiff's case against the remaining defendants. *See* Mass. R. Civ. P. 34(c)(2).

In some circumstances, government actors may act to deal with an exigent threat, and in doing so, they may understandably get sloppy. The heat of the moment could cloud their judgment. However, in this case, three days lapsed between DePina's speech the filing of criminal charges. During that time, the Defendants not only had time to cool off, if they were enraged, but they engaged in conversations and communications regarding DePina. Communication between the Defendants was necessary to transfer DePina's case to the Worcester District Attorney's Office, and that took *months* (months in which the Norfolk D.A. declined to take such an unconstitutional case). These communications served the common goal of using government authority to retaliate against DePina for exercising his constitutionally protected rights. None of that activity enjoys absolute immunity.

Perhaps some of the Defendants conduct can avail itself to absolute prosecutorial immunity (a doctrine this case seeks to challenge), but qualified immunity does not apply to the Commonwealth Defendants. DePina respectfully requests this Court 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. Moreover, robust discovery will allow the Supreme Judicial Court a wider lens when this case is taken up again on appeal. *See* RA/24-28.

2.0 The Trial Court Did Not Abuse Its Discretion When Denying the Commonwealth Defendants' Motion to Stay Discovery

The burden is on the Commonwealth Defendants to prove the trial court abused its discretion. Pursuant to Mass. R. Civ. P. 26(c), the trial court may enter a protective order only for good cause shown "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The trial court did not find good cause to grant a stay of discovery and for a protective order. RA/7 & 124.

The Commonwealth Defendants appear to take issue because "the Superior Court has offered no rationale to support its order." Petition at 13. However, docket orders are routinely upheld on appeal. *Bishop v. Klein; Fuller*, 380 Mass. 285, 288 (1980) ("It might have been helpful to the trial judge if the judges who heard and denied the defendant's motions to compel discovery had given reasons for their rulings. However, we see no reason to reverse their exercise of discretion in the instant case since justification for the rulings appears in the applicable law and in the record before us." (citations omitted).

The applicable law and record support the trial court's decision to deny the Motion. In Plaintiff's Opposition to the Motion to Stay, DePina argued that the caselaw "does not support the Commonwealth Defendants' assertion that discovery can not be had until a motion to dismiss is decided." RA/5. On appeal, the Defendants acknowledge that there is no case law that mandates trials courts stay discovery until a motion to dismiss is decided, even where government officials intend to allege immunity defenses. Petition at 13 ("The Superior Court has thus acted against the Supreme Judicial Court's admonition to decide immunity defenses prior to allowing discovery."). In essence, the Commonwealth Defendants' admit the trial court did not abuse its discretion. *Id.* The Commonwealth Defendants seek to strip the Trial Court of any discretion, such that raising the immunity defenses mandates a stay in every case. But, that is not the law, and the Trial Court's mere exercise of discretion cannot be an abuse of that discretion.

The Commonwealth Defendants rely on two cases to argue that Massachusetts courts prohibit discovery prior to resolving questions of immunity. *See Hudson v. Comm'r of Correction*, 431 Mass. 1, 7 n.8 (2000); *see also Hornibrook v. Richards*, 488 Mass. 74 (2021). In *Hudson*, the Appeals Court of Massachusetts held the trial court did not abuse its discretion in granting a motion for 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. *Hudson v. Commissioner of Correction*, 46 Mass. App. Ct. 538, 549 (1999), aff'd 431 Mass. 1.

Here, the Commonwealth Defendants' entire argument on appeal is premised on procedural indulgences granted to government litigants. The Commonwealth Defendants are asking this Court for special treatment based entirely on their position as government officials. The Superior Court did not abuse its discretion in denying the Commonwealth Defendants a procedural indulgence. And, no prejudice has resulted to the Commonwealth Defendants from denial of its motion.

DePina was prejudiced by the Commonwealth Defendants using the criminal justice system to unjustly prosecute him without probable cause. DePina is now prejudiced by the Commonwealth Defendants' unsupportable appeal of a discovery order, and Defendant Worcester County District Attorney's Office citing a non-existent litigation exemption to deny his lawful public records request.[3]

In *Hornibrook* , the defendant appealed from the Superior Court's denial of a motion to dismiss. 488 Mass. at 77. The SJC transferred the case on its own motion and held that a conservator is entitled to absolute immunity for conduct that is ordered by a probate court. *Id.* at 75-77. In *dicta*, the SJC addressed the lower court regarding discovery. *Id.* at 83-84. The lower court had ordered narrowly tailored discovery to *aid the court* in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded the defendant. *Id.* at 83 ("We briefly address the Superior Court judge's ruling ordering "narrowly tailored discovery" to *aid the court* in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded to the defendant.") (emphasis added). The SJC noted that "whether a defendant is entitled to absolute immunity is not one that should be determined through "narrowly tailored discovery" based on

[3] *Supra* 1.

what the judge described as "paper-thin" allegations in the complaint . . . it is incumbent on the plaintiff to set forth factual allegations plausibly suggesting that the defendant acted outside her jurisdiction." *Id.* at 83-84. The issue on appeal in *Hornibrook* was a motion to dismiss, not discovery. There was only one defendant in *Hornibrook*, a conservator. The problem in *Hornibrook* was that the plaintiff failed to plead allegations "that plausibly suggest[ed]" the defendant acted outside her role as a conservator." *Id.*

Here, the issue on appeal is not a motion to dismiss. The issue on appeal is a motion to stay discovery and for a protective order. The trial court did not order narrowly tailored discovery to decide immunity issues. The trial court denied the discovery motion because the Commonwealth Defendants failed to show good cause to stay discovery pursuant to Mass. R. Civ. P. 26(c).

Moreover, unlike *Hornibrook*, DePina's allegations are not paper-thin – in fact, the record is strongly in his favor, even at this early stage, and there is more than one defendant. The Commonwealth Defendants consist of three prosecutors spanning two separate district attorney's offices that have varying roles as outlined in the Complaint. Only one of the prosecutors, Defendant Melia, actively prosecuted DePina. RA/6-7/¶¶39-44. Meanwhile, all of the Commonwealth Defendants presumably seek to stay discovery. At the same time, administrative and investigative duties are not protected by absolute immunity, and DePina has plausibly pled that the Defendants performed these duties in his Complaint.

3.0 The Single Justice Should Award Attorney's Fees and Costs to Plaintiff for Defending this Appeal of a Discovery Order

DePina, a private plaintiff, is forced to shoulder the burden of the costs in this appeal while the Commonwealth Defendants ride on the backs of taxpayers.

Pursuant to G.L. c. 231, § 118, where a petition is filed with respect to a discovery order and the discovery order is denied, the Single Justice may order

reasonable expenses for opposing the petition, including attorney's fees, unless the court finds that the filing of the petition was substantially justified or that other circumstances make an award of expenses unjust.

The Commonwealth Defendants' interlocutory appeal of a discovery order was not substantially justified. The Commonwealth Defendants appealed to this court for procedural indulgences based on their position as government officials. The Commonwealth Defendants failed to cite any case law that either mandates a Massachusetts trial court must stay discovery prior to ruling on a motion to dismiss or supports an argument that the trial court abused its discretion. In fact, the Commonwealth Defendants acknowledged that the trial court acted within its discretion. Petition at 13 ("The Superior Court has acted against the Supreme Judicial Court's admonition to decide immunity defenses prior to allowing discovery.") In *arguendo*, even if the Commonwealth Defendants showed that the trial court abused its discretion, they have not provided any explanation as to how the trial court's decision resulted in prejudicial error.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Single Justice deny the Commonwealth Defendants' appeal and uphold the Superior Court's order denying a motion to stay discovery and for a protective order.

Respectfully Submitted,

/s/ Marc J. Randazza
Marc J. Randazza, BBO# 651477
mjr@randazza.com, ecf@randazza.com
Jay M. Wolman, BBO# 666053
jmw@randazza.com
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: (702) 420-2001

Counsel for Plaintiff, Joao DePina

Dated: November 9, 2022.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all parties through the Court's e-filing system on this 9th day of November, 2022 or otherwise caused for service via email, as follows:

Thomas E. Bocian Assistant Attorney General Criminal Bureau/Appeals Division One Ashburton Place 18th Floor Boston, MA 02108 thomas.bocian@mass.gov	Jesse M. Boodoo Assistant Attorney General Government Bureau/Trial Division One Ashburton Place 18th Floor Boston, MA 02108 Jesse.Boodoo@mass.gov	Hannah C. Vail Assistant Attorney General Government Bureau/Trial Division One Ashburton Place 18th Floor Boston, MA 02108 Hannah.Vail@mass.gov

/s/ Marc J. Randazza
Marc J. Randazza

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 3,832 non-excluded words in 14-point Times New Roman font, as counted in Microsoft Word.

/s/ Marc J. Randazza
Marc J. Randazza