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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY, JR., WILLIAM S. LEBOV, JOHN C. MINNEY AND JOHN SAPUNOR,

Plaintiffs,

vs.

JUDICIAL COUNCIL OF CALIFORNIA, CHIEF JUSTICE TANI G. CANTIL-SAKAUYE, and DOES ONE through TEN,

Defendants.

Case No.: CGC-19-575842

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITY IN OPPOSITION TO DEFENDANTS' DEMURRER TO THIRD AMENDED COMPLAINT

DATE: April 12, 2022
TIME: 9:30 a.m.
DEPT: 302
Judge: Hon. Richard B. Ulmer, Jr.

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I.

INTRODUCTION

Plaintiffs are retired superior court judges, each over 70 years old, who have long participated in the Assigned Judges Program ("AJP'). They filed suit against the Chief Justice and the Judicial Council challenging changes to the program, and defendants' enforcement of those changes. Plaintiffs alleged disparate impact age discrimination under the Fair Employment and Housing Act (FEHA). Govt. Code § 12940(a).

Upon defendants' demurrer, the trial court (Judge Schulman) entered a judgment of dismissal of the First Amended Complaint,[1] without leave to amend, having concluded that legislative immunity barred the suit.

In July, 2021, the Court of Appeal reversed that judgment, *Mahler v. Judicial Council* (2021) 67 Cal.App. 5th 82 ("*Mahler*"). The Court held that while legislative immunity protected defendants from challenges to their "promulgation" of the changes to the program, it did not foreclose suit based upon a claim of defendants' enforcement of those changes through individual judicial assignment.[2]

Moreover, in a ruling of first impression which rejected defendants' argument to the contrary, the Court of Appeal also held that a disparate impact FEHA age discrimination claim may, as a matter of law, be predicated upon disparate impact on an older subgroup within the class of persons protected under FEHA, i.e., persons 40 years of age and older. *Mahler* at 93.

As permitted by the Court of Appeal, plaintiffs filed a Second Amended Complaint, which Judge Schulman also dismissed, but with leave to amend. *See* Order on Defendants' Demurrer to Second Amended Complaint, January 26, 2022. ("Order").

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[1] This first amendment served only to add additional plaintiffs.

[2] The Court of Appeal also noted that judicial immunity applied to "the Chief Justice's assignment of individual judges," Mahler at 92. The parties neither briefed, nor did the Court of Appeal specifically address, whether the Judicial Council was entitled to assert a judicial immunity defense to plaintiffs' claim for damages. See plaintiffs' opposition to Motion to Strike, filed concurrent herewith.

On February 15, 2022, Plaintiffs filed their Third Amended Complaint ("TAC"), to which Defendants have again demurred, in addition to filing a Motion to Strike.

As noted below, much of what defendants argue is based upon material mischaracterizations or omissions of the allegations of the TAC; improper reliance upon factual assertions and contentions not within the four corners of the TAC; and careful exclusions of those portions of *Mahler* which belie their position.

II.

THIRD AMENDED COMPLAINT

The TAC alleges, *inter alia*, that each plaintiff is over 70 year of age and has participated in the AJP for more than 1,320 days. Each plaintiff is said to be fully qualified for the position of Assignment Judge, and each of their applications for participation has been accepted. TAC ¶ 36.

The TAC also alleges that each of the plaintiffs is part of a subgroup of retired judges who have participated in the AJP and who are over 70 years of age. TAC ¶ 35.

Defendant are alleged to have long administered and enforced the requirements of the AJP. TAC ¶ 2.

According to the TAC, until May 21, 2018, no provision of California law limited the number of days a retired judge could participate in the AJP. But on that date, defendants changed the eligibility criteria to serve as a retired judge by imposing and enforcing a limit of 1,320 days he/she could participate in the AJP ("lifetime cap"). *See* TAC ¶ 11.

Of particular significance is that the lifetime cap was made retroactive by defendants a few days after it was announced. TAC ¶ 12. Defendants have enforced this retroactive application. As a result of this enforcement, plaintiffs (all of whom, as noted, had completed 1,320 days of service) were adversely impacted immediately because it "effectively imposes a lifetime participation cap on Plaintiffs and other similarly situated absent their securing an 'onerous to obtain' exception." TAC ¶ 3.

Indeed, applied retroactively, defendants' enforcement of the lifetime cap adversely

affected all members of the protected subgroup who had reached the lifetime cap, for they have thereafter been treated differently than all AJP Judges who had not reached the lifetime cap. The rate of defendants' denials of judicial assignment to plaintiffs resulting from defendants' enforcement of the lifetime cap was statistically significant compared to younger judges not part of the subgroup who were AJP participants. TAC ¶ 35.

The TAC makes clear that plaintiffs have been denied appointments to serve as assigned judges as a direct result of defendants' enforcement of the lifetime cap, i.e., because they had "reached or exceeded" the lifetime cap. TAC ¶ 35 and TAC ¶¶ 16-34 *passim*.[3]

As a direct result of defendants' retroactive enforcement of the lifetime cap, plaintiffs have been and are disproportionately unable to participate in the AJP and receive assignments from defendants under the "same terms, conditions and privileges" of employment as existed prior to the challenged change, and as are applicable to retired judges not part of the subgroup. TAC ¶ 36.

III.

STANDARDS APPLICABLE TO CONSIDERATIONS OF DEMURRER AND CHALLENGES TO FEHA COMPLAINT

Because defendants are silent as to the standard by which this demurrer must be considered by this Court, we note what the Court of Appeal said, to wit: The TAC allegations must be read as a whole and "in the light most favorable to plaintiff and liberally construed with a view to obtaining substantial justice . . ." *Mahler* at 112, fn. 16. All properly pleaded facts must be accepted as true, and the court may not consider evidence or other extrinsic matters. *Blank v.*

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[3] In a manner typical of their reading of the TAC on demurrer, defendants wrongly and misleadingly assert that what plaintiffs really complain about is that "they are now receiving assignments to those courts with the greatest need for judicial assistance." Defendants' Memoranda of Points and Authorities at page 6, lines 9-12. In fact, the clear gravamen of their complaint is that, as a result, and because of, defendants' enforcement of the lifetime cap, plaintiffs have been repeatedly and systematically disproportionately denied individual assignments as Assigned Judges as compared to younger judges not in their subgroup. *See*, e.g., TAC ¶ 51.

Kirwan (1985) 30 Cal.3d 311, 318. *See* CCP § 430.30.

So, too, with respect to the FEHA allegation. The Court of Appeal recognized "our Legislature's stated intent that the FEHA age discrimination provisions be liberally construed to achieve its salutary purposes." *Mahler* at 93. *See, also,* Gov. Code § 12933(a) (". . . the phrase 'terms, conditions or privileges of employment' must be interpreted liberally and with a reasonable appreciation of the realities of the workplace . . .").

Application of these hornbook principles is particularly apropos here due to defendants' insistence on reciting misleading characterizations of the TAC.[4]

Defendants' Memorandum also references factual matters outside the four corners of the TAC, *see* p. 6, ll 7-15; p. 7, ll. 15-22; p.8, ll 3-21 and fn. 1, ignoring another hornbook principle. In ruling upon a demurrer, the court may consider neither material outside the complaint, nor contentions, deductions or conclusions of the moving party. *Moore v. Conliffe* (1994) 7 Cal.App.4th 634, 638.[5]

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[4] Defendants quote Twain's phrase "facts are stubborn things," Defendants' Memorandum at p. 5. But a demurrer is no place for the moving party to substitute its version of the facts for the factual allegations of a complaint, or to otherwise ignore them altogether. *See*, for example, p. 5, misleadingly contending plaintiffs complain only that they are receiving assignments to "less desirable courts," Defendants' Memorandum at p. 4; or that plaintiffs' focus is on "promulgation and not enforcement," Defendants' Memorandum at p. 11; or that plaintiffs are receiving "fewer" assignments because of new allocation policy, Defendants' Memorandum at p. 6; or that the TAC fails to allege defendants' enforcement of the lifetime cap has a disproportionate adverse impact on plaintiffs or caused them no injury; or that the TAC does not compare adverse impact of enforcement of the lifetime cap upon plaintiffs with retired AJP judges outside of the subgroup, Defendants' Memorandum at p. 14; or that plaintiffs do not allege that enforcement of the lifetime cap disproportionately affects judges over 70 compared to younger AJP Judges not within the subgroup. Defendants' Memorandum at p. 19; or that plaintiffs' statistics measure only "the effect of promulgation." Defendants' Memorandum at p. 17.

[5] *Mahler* did grant defendants' motion to take judicial notice of four specific documents, only two of which are the subject of the pending Request for Judicial Notice. *See* Mahler, p. 97, fn. 6. But even as to those, the Court may not, at this stage of the case, consider the truth of those judicially noticed documents, nor of hearsay statements contained within them. *Guarantee Forklift, Inc. v. Capacity of Texas, Inc.* (2017) 11 Cal.App.5th 1066, 1075; *Lockley v. Law Offices of Cantrell Green* (2001) 91 Cal.App.4th 875, 882; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605. This principle applies even to judicial notice taken of public records. *Beckley v. The Reclamation Board* (1962) 205 Cal.App.2d 734. To so do constitutes improper consideration of evidentiary matters. *Mangini v. R.J. Reynolds Tobacco Co*. (1994) 7 Cal. 4th 1057, 1063.

IV.

THE TAC ADDRESSES THE SHORTCOMINGS OF THE SECOND AMENDED COMPLAINT AS DETERMINED BY JUDGE SCHULMAN, WHICH RESULTED IN DEFENDANTS' DEMURRER BEING SUSTAINED

In sustaining the demurrer to the second amended complaint, Judge Schulman determined that it "contains literally no factual allegations regarding defendants' enforcement of the challenged provisions of the TAJP through individual assignments to Plaintiffs. . . sufficient to show significant disparate impact. . .." Order at p. 5. Judge Schulman characterized this as a "central flaw." *Id.* The Court also stated that plaintiffs had not alleged "that they received no appointments since the adoption of the changes to the TAJP . . ." nor do they "even allege they have been denied exceptions . . ." Order at p. 6.[6]

But the TAC now addresses each of these issues. It is replete with factual allegations that, as a result of defendants' enforcement of the lifetime cap, plaintiffs were denied repeated appointments to serve as assigned judges. *See,* e.g., TAC ¶¶ 3, 12, 19, 21, 22, 24, 26-30, 32, 34-36.

The TAC further notes that plaintiffs "were not denied appointments because of their unavailability or unwillingness to accept such appointments." Nor was denial of individual appointments "due to lack of necessity for retired judges to participate in the AJP." TAC ¶ 3. *See*, e.g., following paragraphs of the TAC: ¶¶ 21-22 (Judge Mahler) ¶ 24 (Judge Poole); ¶ 29 (Judge Conger); ¶¶ 32-33 (Judge Minney); ¶ 30 (Judge Lacy).[7]

The TAC also sets forth requests for "exceptions" that defendants denied plaintiffs: ¶ 19 (Judge Mahler); ¶ 24 (Judge Poole); ¶ 28 (Judge Conger); ¶ 32 (Judge Lebov). Notably, as a

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[6] Judge Schulman also suggested that the plaintiffs improperly focused on "promulgation" of the lifetime cap, and not enforcement. Order at p. 4. Whatever the merits of that assertion, such is not the case with the TAC: *See,* e.g., TAC ¶¶ 12, 13, 45.

[7] One of the original plaintiffs is now deceased.

result of defendants' enforcement of this "exception," presiding judges may seek exceptions only where the calendar clerk of the requesting court has determined that there are no non-1320 Assigned Judges available for specific appointments. TAC § 5. An exception is not even granted to the 1320 Assigned Judge until this search proved to be unsuccessful. So even the availability of "exceptions" is no panacea for plaintiffs. Rather, this laborious process serves only to burden those retried Judges in the protected subgroup—including plaintiffs—with additional discriminatory treatment irrespective whether or not they were ultimately denied any appointments.

The TAC also specifically addresses Judge Schulman's concern that statistical evidence be presented to demonstrate that the practice in question has caused the plaintiffs to be denied appointments as Assigned Judges by defendants' enforcement of the lifetime cap because of their membership in a protected group. *See* TAC ¶¶ 44-55 and pp. 12-16, *infra*.

Judge Schulman observed that the Court of Appeal had identified "several infirmities" in plaintiffs' initial pleading of disparate impact allegations. *See Mahler* at 115. But he acknowledged that many had been addressed in the Second Amended Complaint. Order at pp.6-7. This included the Second Amended Complaint's allegation regarding the number participants in the TAJP (349); the number of participants adversely impacted by defendants 'retroactive enforcement of the lifetime cap (59 out of 65); and the age group adversely affected (70 and over). Order at p. 7. As explained, *infra*, at p. 12, these are defendants' figures, as of May/June 2019.

But Judge Schulman found these allegations still lacking in that "plaintiffs do not allege a single instance in which defendants refused a TAJP assignment because a particular judge had reached or exceeded the 1,320-day limit." Order at 7. But as noted above at pp. 5, 8, the TAC now recites numerous instances where such was the case.

Further, Judge Schulman referenced defendants' speculative examples of "alternative" reasons plaintiffs might not have been provided with individual judicial assignments, noting, for

instance, where no position was available or where plaintiffs failed to even apply for such a position, in which cases age would not have been a factor. Order at p. 8. Again, however, the TAC now makes clear that defendants' enforcement of the lifetime cap against plaintiffs was the reason defendants failed to make such assignments -- and not due to either lack of available position or plaintiffs' failure to apply. TAC ¶ 3. "Defendants have enforced (the lifetime cap) against plaintiffs because they had reached or exceeded the lifetime cap."[8]

Defendants assert that the TAC is lacking because "no plaintiff alleges, for example, that the Presiding Judge of Orange County made an exception request, that the exception was denied and yet a judge under 70 years of age was assigned . . ." Defendants' Memorandum at p. 18.

To this, we note the following admonition of the Court of Appeal in *Mahler*, which Defendants ignore:

> "(G)iven the way in which temporary appointments are made—a retired judge applies to be a participant in the TAJP and awaits call by the Chief Justice—generally the most a plaintiff can allege with respect to implementation or enforcement of the new TAJP provisions is that he or she applied for and was accepted into the program but then, in contrast to his or her prior service, received no appointment." *Mahler* at 107.

While also ignored by defendants, plaintiffs do allege, *inter alia*, that each plaintiff applied for participation in the AJP; that these applications were accepted; that the plaintiffs were thereafter denied appointments, in contrast to their prior service, to a statistically significant degree; and further, that defendants' enforcement of the lifetime cap disproportionately and significantly adversely impacted plaintiffs because of their membership in their protected subgroup, compared to younger judges in the AJP not

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[8] Defendants' improper factual assertion that plaintiffs have suffered reduced workloads because of defendants' need to review assignment requests is similarly refuted by the TAC.

within that subgroup. *See*, e.g., TAC ¶¶ 35, 47-48, 54-55, 57.[9]

Judge Schulman also surmised that plaintiffs would not have "suffered an adverse employment action" if they had either decided not to apply for a temporary position, or such was not available. Order at p. 8. But not only should such surmise not be part of the court's consideration of a demurrer, it is directly contrary to the allegations of the TAC. *See*, pp. 5, 8, *supra*; TAC ¶¶ 14 and 46. *See, Moore v. Conliffe, supra* at p. 7 (contentions, deductions or conclusions by moving party cannot support demurrer).

Defendants' attempt to take plaintiffs to task for presenting allegedly insufficient statistical information supporting their claim of disparate impact. But the TAC presents a sufficiently robust statistical analysis, even given the limited statistical information that was available to them. *See*, TAC ¶¶ 44-56; p. 12 l. 21 through p. 16, l. 8, *infra*. Further, plaintiffs believe a preliminary comment on this issue is in order.

Courts well recognize that defendants' statistical information will invariably be within the defendants' control. *See, Alch v. Superior Court* (2008) 165 Cal.App.4th 1428; *Coleman v. Quaker Oats* (9th Cir. 2000) 232 F.3d 1299 (Fletcher, J., dissenting on other grounds). As we are only at the pleading stage, plaintiffs have been unable to obtain defendants' relevant current statistical information, but not for lack of seeking.

Plaintiffs have obtained defendants' statistical information through June or July, 2019,

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[9] In a notable passage, *Mahler* addressed the pleading of disparate impact allegations. *Mahler* explained that "the complaint must allege facts or statistical evidence demonstrating a causal connection between the challenged policy (here retroactive imposition of the lifetime cap) and a significant disparate impact on the allegedly protected group (here the subgroup, including plaintiffs)." *Mahler* at 114.

Mahler then examined the sort of allegations which various courts had found lacking. E.g. *Adams v. City of Indianapolis* (2014) 742 F.3d 720, 733; (no allegations about the number of applicants); *Garay v. Lowes Home Centers, LLC*, (D. Or., Nov. 14, 2017), No. 1:17-cv-00269-MC (lack of basic allegations regarding statistical methods and comparison); wholly conclusionary allegations regarding impact which lacked number of people employed or quit or had been fired; *Jianqing Wu v. Special Counsel, Inc*., (D.D.C. 2014), 54 F.Supp.3d 48, 55 (speculative correlation between age and experience; lacking statistical evidence). *See, Mahler* at 114. The difference between the shortcomings of the forgoing and the allegations of the TAC are striking.

(only six months after the effective date of the lifetime cap) because defendants submitted these statistics to the trial court in 2019. Plaintiffs have utilized this information in undertaking their statistical analysis of disparate impact. Defendants have nevertheless sought to criticize that analysis without advising the Court of the foregoing. Indeed, defendants cite *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1324 in support of their contention that plaintiffs' statistical analysis is lacking. But *Mahler* pointedly declined to apply that case to this one, noting that (unlike this case at the moment) it "was not a pleading case". *Mahler* at 115; rather, said the Court of Appeal, it involved "a fully developed trial record."[10] *Id*. *See,* also, *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, also relied upon be defendants, which was decided after two trials.

Mahler's observation that "disparate impact allegations need not be as specific as the evidentiary showing required to overcome a defense motion for summary judgment" is particularly apt given the foregoing. *Mahler* at 114.

V.

PLAINTIFFS HAVE SET FORTH A STATISTICAL ANALYSIS ADEQUATELY ALLEGING DISPARATE IMPACT RESULTING FROM DEFENDANTS' ENFORCEMENT OF THE LIFETIME CAP THROUGH INDIVIDUAL JUDICIAL APPOINTMENTS

Defendants' assertion that plaintiffs have failed to allege disparate impact resulting from defendants' enforcement of the lifetime cap through individual judicial appointments is plainly incorrect.

First, the TAC alleges that defendants have enforced the lifetime cap against plaintiffs "by repeatedly and systematically denying them individual judicial assignments by defendants'

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[10] The Court of Appeal, in rejecting application of *Carter*, noted that defendants are ahead of themselves. *Mahler* at 115. They still are.

enforcement of that lifetime cap." ¶ 47.

With respect to plaintiffs' statistical analysis, the TAC dramatically highlights the material reduction in the number of appointments each plaintiff received from defendants to serve as an Assigned Judge as a result of their enforcement of the lifetime cap. TAC ¶¶ 44-46.

The following analysis, set forth in the TAC at ¶ 46, makes clear the substantial adverse impact that this enforcement had upon plaintiffs' ability to secure such appointments from defendants. It contrasts the average annual days each plaintiff worked as an Assigned Judge prior to defendants' enforcement of the lifetime cap, commencing in January, 2019, with the number of days plaintiffs worked as an Assigned Judge in the two years after commencement of defendants' enforcement of the lifetime cap. The difference is clearly striking, and the TAC alleges that this dramatic reduction in individual judicial assignments was caused neither by a lack of available assignments, nor to plaintiffs' lack of desire to accept such assignments.

Judge	Year entered AJP	Average Annual Days Worked From Entry to 2018	Days Worked in 2019	Days Worked in 2020
Conger	2008	156	6	0
Lacy	2002	187	66	51
Lebov	2003	144	116	58
Mahler	2008	187	34	24
Minney	2005	118	10	0
Poole	2009	205	85	139
Sapunor	2008	170	56	29

As further demonstrated by the following chart at ¶ 47 of the TAC, plaintiffs' assignments as a percentage of assignments they received before defendants' enforcement of the lifetime cap highlights the significance of the downward departure.

Judge	Year entered AJP	Average Annual Days Worked Pre-1320	Days Worked in 2019 as a percentage of average days worked pre-1320	Days Worked in 2020 as a percentage of average days worked pre-1320
Conger	2008	156	3.8%	0%
Lacy	2002	187	35%	27%
Lebov	2003	144	80%	40%
Mahler	2008	187	18%	12.8%
Minney	2005	118	8.5%	0%
Poole	2009	205	41%	69%
Sapunor	2008	170	33%	17%

But the statistical analysis does not end there.

Reaching the lifetime cap is a necessary prerequisite for experiencing the negative impact of defendants' enforcement of the lifetime cap. And by demonstrating older judges are statistically more likely to be at the lifetime cap, as explained below, an inference of disparate impact based upon age resulting from defendants' enforcement of that lifetime cap through individual judicial assignments can be reasonably drawn. TAC ¶ 48.

The TAC's statistical analysis set forth at TAC ¶ 52, demonstrates the strong relationship between plaintiffs reaching the lifetime cap, plaintiffs' age, and defendants' enforcement of the lifetime cap. It belies defendants' insistence that plaintiffs' statistics can be easily dismissed as relating only to "promulgation" of the lifetime cap. The TAC's analysis demonstrates that—to a statistically significant degree—older judges in the protected subgroup were disproportionally

negatively affected by the lifetime cap than were younger judges not in the subgroup alleged herein.[11]

Using statistics from defendants, the TAC demonstrates that the odds of a retired judge in the subgroup being at the lifetime limit when 70 years old or older (including all plaintiffs) is more than four times that of an AJP participant not yet 70. TAC ¶53. In addition, a logistic regression on being at the lifetime limit was run and demonstrates that age has a highly statistically significant relationship to a retried judge reaching the lifetime cap. *See* TAC ¶ 52.

The TAC also notes that the statistics demonstrate the disparity is highly unlikely to have occurred at random. TAC at ¶ 53. And that disparity is a function of the lifetime cap's enforcement by defendants. This conclusion was buttressed by a logistical regression analysis confirming that "age has a highly statistical relationship to being at the limit." TAC ¶ 53. Judge Schulman's concern about the bona fides of this analysis was a result of his conclusion, with respect to the Second Amended Complaint, that "Plaintiffs do not allege a single instance in which Defendants refused a TAJP assignment because a particular judge had reached or exceed the 1320-day limit." Order at p. 7. But the TAC recites numerous instances of just that. Similarly, Judge Schulman's concern that plaintiffs may not have received judicial assignments because they either did not apply for one, or none were available, *see* Order at p. 8, is now wholly contradicted by the TAC. *See* TAC ¶¶ 16-34.

In short, defendants' enforcement of the lifetime cap against plaintiffs through individual judicial assignments has resulted in plaintiffs suffering a meaningful decline in judicial assignments received from defendants. Since the protected subgroup of retired judges, including all plaintiffs, are statistically more likely to have reached the lifetime cap, the enforcement of this cap disproportionately and significantly adversely impacts the older judges

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[11] Defendants erroneously state that "plaintiffs do not allege that enforcement of the lifetime cap disproportionately affects judges over 70 . . ." Defendants' Memorandum at p. 19. *See*, e.g., ¶¶ 35 and 51-55.

in the protected subgroup in comparison to retired judges who are not part of the subgroup. Accordingly, the analysis presented in the TAC fully supports the reasonableness of the inference of discrimination against plaintiffs based upon age.

In short, the TAC sets forth the statistical basis supporting the allegation that the protected subgroup of retired judges, including all plaintiffs, are statistically more likely to have reached the lifetime cap. Accordingly, defendants' enforcement of the lifetime cap disproportionately and significantly adversely impacted plaintiffs in comparison to retired Judges who were not part of the subgroup.[12]

VI.

LEAVE TO AMEND

While Plaintiffs believe the TAC states a cause of action, if the Court concludes that allegations are in some way inadequate, plaintiffs submit that they should be granted leave to file a further amended complaint. Leave to amend a pleading is governed by C.C.P. §473(a) (uncited by defendants), which provides: "The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading . . .." Leave to amend should be liberally granted. *See, e.g., California Gasoline Retailers* v. *Regal Petroleum Corp.* (1958) 50 Cal.2d 844. "If there is any reasonable possibility that the plaintiff can state a cause of action, it is error to sustain a demurrer without leave to amend." *Centex Homes* v. *St.*

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[12] These statistics render *Katz v. Regents of the University of* California (9th Cir. 2000) 229 F.3d 831, 836 quite distinguishable. *Katz* had nothing to do with failure of a protected group to receive work assignments. Rather plaintiffs, participants in the PERS retirement system, there complained of their failure to be offered an early retirement incentive program which had been made available to participants in a more recently formed retirement system (UCRP), asserting age discrimination.

Katz was decided on the eve of trial after a summary judgment had been denied. *Katz* concluded that the determination of which employees would be eligible for the early retirement program was a function of which retirement plan individuals belonged to, and not age. 229 F.3d at 836.

Plaintiffs here have presented a considerably more enhanced statistical analysis of the available data than occurred in *Katz*, alleging that plaintiffs in the protected group over 70 were more than four times likely to have reached the lifetime cap (as of June, 2019), with the odds significantly increasing every year. See SAC at ¶¶ 28-33. Defendants in large part ignore this analysis.

Paul Fire & Marine Ins. Co. (2015) 237 Cal.App.4th 23. Defendants have not made a showing that there is no reasonable possibility that Plaintiffs can state a cause of action.

We also note that Plaintiffs' First Amended Complaint was filed to add plaintiffs, not to make substantive changes. The Second Amended Complaint was filed pursuant to the Court of Appeals' opinion reversing sustaining of a demurrer without leave to amend. Defendants cite two cases, both readily distinguishable, for the proposition that "rulings denying leave to amend due to the number of amendments are common." Defendants' Memorandum at p. 19. In both cases cited by defendants, one decided 70 years ago, the other 60 years ago, leave to amend was denied after three attempts to remedy defects. *See, Ruinello* v. *Murray* (1951) 36 Cal.2d 687. *Hardy* v. *Admiral Oil Co.* (1961) 56 Cal.2d 836 was decided on plaintiff's motion for judgment on the pleadings after filing a third amended verified answer. The Court found that from all the verified pleadings on file the "defendant must be deemed to have admitted in its pleadings all the facts necessary to entitle plaintiff to recover." *Hardy* at pp. 839-840.

There have been no discovery and defendants do not argue, nor can they, that they would be prejudiced by the granting of leave to amend. Plaintiffs, in good faith, are confident they can remedy any defects to the TAC should it be necessary.

VII.

CONCLUSION

As set forth in the TAC, as of the date defendants commenced retroactive enforcement of the lifetime cap against plaintiffs, the entire protected subgroup was negatively and disproportionately affected. Each member of that subgroup—including all plaintiffs-- was thereafter treated differently, and many have been effectively terminated.

If the lifetime cap had been applied and enforced prospectively, there would have been no disparate impact because all AJP judges would have been treated equally. It is undoubtedly no coincidence that, despite submitting lengthy oppositions and multiple motions, defendants do not even address—indeed, say not even one word about—their discriminatory retroactive application

and enforcement of the lifetime cap.

Defendants' demurrer should be overruled.

Dated this 30th day of March, 2022.

Respectfully submitted,

Furth Salem Mason & Li LLP

/s/ Daniel S. Mason
By: Daniel S. Mason
Attorneys for Plaintiffs

Case No. CGC-19-575842

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I, Thomas W. Jackson, the undersigned, hereby declare as follows:

I am over the age of 18 years and am not a party to the within cause. I am employed by Furth Salem Mason & Li LLP in the County of Sonoma, State of California.

My email and business addresses are tjackson@fsmllaw.com; 640 Third Street, Second Floor, Santa Rosa, CA 95404-4418.

On March 30, 2022, I served true and correct copies of the document(s) listed here:

- PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO THIRD AMENDED COMPLAINT

by e-filing via File & Serve Xpress and transmitting to the recipients designated on the Transaction Receipt located on the File & Serve Xpress website the document(s) listed above to the person(s) at the address(es) set forth below.

Robert A. Naeve (State Bar No. 106095) rnaeve@jonesday.com Cary D. Sullivan (State Bar No. 228527) carysullivan@jonesday.com JONES DAY 3161 Michelson Drive, Suite 800 Irvine, CA 92612 Telephone: +1.949.851.3939	Nathaniel P. Garrett (State Bar No. 248211) ngarrett@jonesday.com JONES DAY 555 California Street, Floor 26 San Francisco, CA 94101 Telephone: +1.415.875.5731

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of March, 2022, at Santa Rosa, California.

Thomas W. Jackson