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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 SECOND AMENDED COMPLAINT

DATE: December 29, 2021
TIME: 9:30 a.m.
DEPT: 302
JUDGE: Hon. Ethan P. Schulman

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

This disparate impact matter is on remand from the Court of Appeal, which in July 2021 reversed this court's judgment of dismissal, without leave to amend ("with prejudice" as defendants say).[1] That dismissal was based upon this court's conclusion that defendants' alleged actions were protected by legislative immunity. *Mahler* v. *Judicial Council of California* (2021) 67 Cal.App.5th 82 (hereafter *Mahler*). The Court of Appeal permitted plaintiffs to amend their complaint and on October 19, they filed their Second Amended Complaint, ("SAC"). Defendants now return with another demurrer, once again seeking dismissal; once again without leave to amend.

I

PRELIMINARY STATEMENT

Much of Defendants' Memorandum of Points and Authorities in Support of Demurrer to Second Amended Complaint ("Memorandum") repeats that only "enforcement" (what the defendants also call "implementation") of the challenged provisions of the AJP through "individual judicial assignments" is at issue here, as distinct from its "promulgation" (or "enactment") of those provisions. Memorandum at page 10.

Defendants repeatedly insist that plaintiffs do not really complain about defendants' assignments.[2] Instead, defendants assert that the SAC challenges only the "promulgation" of the 1,320-day lifetime cap and therefore they assert that plaintiffs have ignored *Mahler*. But defendants are very wrong.

Defendants' failure to provide plaintiffs with assignments of the nature and substance they had previously received (which, it is alleged, have gone in the vast majority of cases to judges not in plaintiffs' subgroup of retired judges over 70) is a direct result of the retroactive application of the 1,320-day lifetime cap, and is indeed at the heart of what the SAC

[1] Remitter was filed September 30.

[2] Defendants claim that plaintiffs "continue to predicate their claims . . . on *promulgation* of the lifetime cap . . . rather than on *enforcement* . . ." (emphasis in original.). Memorandum, p. 10.

complains about. SAC ¶¶32, 34. And precisely because of defendants' "post lifetime cap" assignments, the SAC alleges plaintiffs have fallen victim to age discrimination under FEHA.

Of course, if the 1320-day lifetime cap had not been both "promulgated" and retroactively applied (or "enforced or "implemented') we would not be here. For plaintiffs' injuries, the SAC makes clear, have been the result of the manner of AJP judicial assignments made by defendants pursuant to the new challenged policy, in much the same way that the Virginia Supreme Court "enforced" Virginia's State Bar Rules after having "promulgated" those Rules. *Supreme Court of Virginia* v. *Consumers' Union* (1980) 446 US 719 ("*Consumers' Union"*).

Defendants' demurrer is predicated upon numerous and material mischaracterizations of the SAC, all in support of their meritless contention that plaintiffs have failed to comply with defendants' unique view of pleading requirements. Defendants' tortured reading of the SAC gives not the slightest lip service to the well-established standards their demurrer must be measured against. Similar is defendants' distortion of case law they rely upon. And for good measure, defendants' selectively misstate what the Court of Appeal actually said.

Conveniently failing to acknowledge the procedural posture of much of their "supportive" case law, defendants freely cite a bevy of summary judgment and other cases featuring robust pre-trial discovery without, of course, telling us such was the case. In fact, defendants do not cite to a single case decided on a demurrer.[3] This is no small matter; *Mahler* specifically criticized defendants' attempt to use a case featuring a fully developed trial record, *Carter* v. *CB Richard Ellis, Inc.* (2004) 122 Cal App. 1313, for their proposition that leave to amend the Complaint should be denied in "a pleading case." *Mahler* concluded that "defendants are ahead of themselves . . ." *Mahler*, at 115. They still are.

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[3] By way of example, *Jumaane* v. *City of Los Angeles* (2015) 241 Cal.App.4th 1390 was decided after two trials.

II

PLAINITFFS HAVE YET TO RECEIVE NECESSARY DISCOVERY, ALTHOUGH THE PARTIES HAVE EXCHANGED INITIAL DISCOVERY REQUESTS

Another salient point is left unmentioned by defendants. Unlike the parties' first appearance in this Department, this time both plaintiffs and defendant Judicial Council have commenced merits discovery.

On October 23, plaintiffs served their first document request under CCP 2010.010 seeking exactly the sort of information (contained in defendants' files) which defendants complain should have been made part of the SAC. But defendants have objected to production of many of these documents.[4] *See* Defendants' Responses and Objections, dated November 23, 2021, attached hereto as Exhibit A.

It's not as if defendants believe there should be no merits discovery at this time. For on November 12, ten days before filing their demurrer, defendant Judicial Council initiated its own discovery, serving upon each plaintiff twenty-one separate requests for production of documents, seeking the same sort of documents from plaintiffs which defendants have themselves balked at producing to plaintiffs, no doubt their version of "having your cake and eating it too." *See* Defendant Judicial Council's Request for Production of Documents to Plaintiffs, attached as Exhibit B. (As the same Request was served on each plaintiff, only one of the Requests is attached).

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[4] As noted *infra* at pp. 14-17, disparate impact cases place a premium on the need to obtain accurate and current statistical information to assist proving causation. Such information will invariably be within defendants' control. *See Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1428; *Coleman v. Quaker Oats* (9th Cir. 2000) 232 F.3d 1271, 1299 (Fletcher, J., dissenting on other grounds*)*.

III

STANDARDS APPLICABLE TO CONSDERATIONS OF
DEMURRER AND CHALLENGES TO FEHA COMPLAINT

As noted by the Court of Appeal, in considering the demurrer the Court must read the SAC's allegations "in the light most favorable to plaintiff and liberally construed with a view to obtaining substantial justice . . ." *Mahler*, at 112 fn.16.

So, too, with respect to the SAC'S FEHA (Gov. Code §§12900 *et seq.*) allegations. The Court of Appeal recognized "our Legislature stated intent that the FEHA age discrimination provisions be liberally construed to achieve its salutary purpose." *Mahler* at 93. Accord *Yanowitz* v. *L'Oreal USA Inc.* (2005) 36 Cal. 4th 1028, 1054 and fn. 14 *citing* 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 . . ."). One would have thought all this was hornbook law, but defendants repeatedly ignore both admonitions.

Defendants' memorandum also references factual matters outside the four corners of the SAC, *see* Memorandum, pp 6-7, 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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[5] *Mahler* did grant defendants' motion to take judicial notice of four specific documents. 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

SAC'S ALLEGATIONS CHALLENGE DEFENDANTS' RETROACTIVE ENFORCMENT OF THE LIFETIME CAP IN VIOLATION OF FEHA, AND ADEQUATELY ALLEGE THAT, AS A RESULT, PLAINTIFFS HAVE FAILED TO RECEIVE AJP ASSIGNMENTS UNDER THE SAME TERMS AND CONDITIONS AS IN THEIR PRIOR SERVICE

As noted above, *supra* p. 2, much of defendants' argument is based upon their repeated canard that the SAC fails to complain about defendants' enforcement (as distinct from enactment or promulgation) of the challenged 1,320-day lifetime service cap, and its retroactive application. *See* Memorandum p. 10. This assertion is specious, as even the slightest perusal of the SAC demonstrates. See pp. 8-11, *infra*.

The SAC alleges that each plaintiff is over 70 years 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 Assigned Judge, and each of their applications for participation has been accepted. SAC, ¶¶12-20.

Defendants are alleged to have long administered and enforced the requirements of the AJP. SAC, ¶2.

The SAC further alleges that each of the Plaintiffs is part of a subgroup of retired judges who have participated in the AJP and are over 70 years of age. SAC, ¶ 19.[6]

According to the SAC, 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 a limit of 1,320 days he/she could participate in the AJP. *See* SAC ¶¶ 42-49).

Of particular significance is that the lifetime cap was made retroactive by defendants, without notice or explanation, a few days after it was announced. SAC, ¶¶37-41. As

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[6] *Mahler* rejected defendants' contention that there can be no subgroups under the FEHA. *See Mahler* at pp. 116, *et seq.*

a result of this retroactive application, plaintiffs (all of whom, as noted, had completed 1,320 days of service with the AJP) were immediately and adversely impacted, SAC ¶¶ 3-4, 37-41, because it "effectively imposes a lifetime participation cap on Plaintiffs" absent their obtaining an "onerous to obtain" exception. SAC ¶3.

Defendants are alleged to "have enforced and continue to enforce the new eligibility requirements against plaintiffs, including its retroactive application." SAC ¶ 40. Moreover, it is alleged that the "exceptions" do not cure the adverse impact on plaintiffs of the lifetime cap. SAC ¶ 41. Rather, the exception process itself constitutes an adverse employment action that treats Plaintiffs and others similarly situated materially worse than younger judges not in the protected subgroup. SAC ¶¶42 – 49.

According to the SAC, as a direct result of the retroactive imposition and enforcement of the lifetime cap, plaintiffs are unable to participate in the AJP, and receive assignments from defendants, under the "same terms, conditions and privileges of employment as existed prior to that change, and as are applicable to judges who are not part of the subgroup of retired judges over the age of 70." SAC ¶ 20.

The SAC further references a letter sent by Judge Nadler, the former Presiding Judge of Sonoma County and Chair of the Trial Court Presiding Judges Advisory Committee, stating that retired judges "now over the cap limit know all of the court's calendars and practices (and) often this experience is lost due to the preclusion of highly respected judges who exceed the lifetime cap." SAC ¶¶ 45-49.

Defendants' position that plaintiffs do not challenge "enforcement" of the new eligibility requirements is belied by their own document discovery request, which seeks "all documents" regarding plaintiffs' allegation that "Defendants . . . have enforced and continue to enforce, the new eligibility requirements" of the AJP. Defendants' Document Request no. 12. This self-contradiction at the very least puts into question the bona fides of defendants' contention.

In fact, the SAC contains numerous allegations which challenge defendants' retroactive enforcement of the lifetime cap—defendants mention nary a one.

See, for example:

- Paragraph 2, line 3 (TAJP "long in effect and administered and enforced" by defendants);
- Paragraph 3, line 7; (retroactive changes "continue to be enforced by defendants');
- Paragraph 20, line 21; (As a direct result of defendants' *enforcement* (emphasis added) of lifetime cap plaintiffs are unable to participate in the AJP under the same terms, conditions and privileges of employment as existed prior to that change. . .");
- Paragraph 36, line 13, "Defendants "are enforcing this new eligibility policy . . .."
- Paragraph 40, lines 3-5, "Defendants are responsible for and have enforced and continue to enforce the new eligibility requirements against Plaintiffs, including its retroactive application, and have accordingly caused them harm.";
- Paragraph 51, line 26-27 "Defendants intend to continue to enforce such unlawful conduct.";
- Finally, the SAC specifically includes in its prayer for relief a request at page 14, lines 5-7 "for injunctive and prospective declaratory relief prohibiting further enforcement (emphasis added) of the changes in the AJP as alleged herein."

Defendants also assert that Mahler noted a potentially "fatal" omission in that plaintiffs had not alleged their failure to receive appointments, in contrast to their prior service. Defendants claim that "the (*Mahler*) Court ruled plaintiffs should be given "one more opportunity" to so do. Memorandum at p. 9, line 19-20. But *Mahler* gave no such "one more opportunity" warning. Defendants simply make it up. More importantly, they also fail to quote the entirety of what *Mahler* said on this point. Here is what they omit from the Mahler Opinion:

> Further, given the way in which temporary appointments are made—a retired judge does not apply to fill a particular position but rather 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 and/or

> enforcement of the new TAJP provisions is that he or she applied for and as accepted into the program but then, in contrast to his or her prior service, received no appointment. *Mahler* at p. 107.

The SAC'S analogous allegations, at paragraph 20, closely parallel what the *Mahler* Court said:

> At all relevant times, Plaintiffs were qualified for the position of Assigned Judge. As a direct result of the imposition and enforcement of the lifetime cap, they are unable to participate in the AJP under the same terms, conditions, and privileges of employment as existed prior to the change, and as are applicable to judges who are not part of the subgroup of retired judges over the age of 70 years. Plaintiffs failed to receive assignments of the same nature and substance they had received in their prior service in the AJP

In short, defendants' suggestion that plaintiffs failed to allege that defendants refused them TAJP assignments because of the lifetime cap, is plainly incorrect. Defendants multiply their error by claiming—notwithstanding the clear allegation that "Plaintiffs failed to receive assignments"—that Plaintiffs "do not identify any actionable conduct that had a material impact on the terms and conditions of employment." Memorandum at 14. It is difficult to conceive of a clearer allegation.[7]

Moreover, as noted at p. 4, *supra*, on October 23 plaintiffs sought discovery, *inter alia*, relating to AJP assignment and statistics, which will allow a more robust analysis of

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[7] Defendants' insistence on their byzantine reading of the SAC is further reflected in their suggestion that ". . .the only harm Plaintiffs can identify is being assigned to a less desirable division or courthouse ...." Memorandum at 14, lines 23-24. *See, e.g.,* ¶¶ 20, 28-33,42-44 of the SAC identifying additional harm.

Moreover, their citations to *McRae* v. *Department of Corrections* (2006) 142 Cal.App.4th 377, 386-387 (warning that not "every minor change in working conditions or trivial action" should be the basis of an age discrimination claim so as to discourage "irritable, chip on the shoulder employees" from commencing discrimination suits) and *Akers* v. *County of San Diego* (2002) 95 Cal.App.4th 1441,1455 (change merely "not to employee's liking insufficient basis to bring age discrimination suit."), reflects defendants' continuing condescending approach to plaintiffs' claims and the significantly adverse impact plaintiffs allegedly suffered as a direct result of the retroactive application of the new eligibility criteria.

defendants' assignments made and not made under the new eligibility requirements. As of today, defendants have not provided a date that production may be expected. As noted in *Alch* v. *Superior Court, supra* at p. 1424, this sort of data is essential to plaintiffs, for they "cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis."[8] Perhaps that is why *Mahler* recognized that at the pleading stage the obligation to provide detailed facts – particularly where the salient facts are generally in control of defendants— is less than needed to defeat a summary judgment motion. The allegations should be permitted to stand. *Mahler* at p. 114. *See also* cases cited at pp. 15-16 *infra*.

V

THE JUDICIAL COUNCIL IS NOT IMMUNE
FROM CLAIMS FOR MONEY DAMAGES

Defendants also incorrectly assert that *Mahler* concluded that the Judicial Council was immune from damages due to judicial immunity. As regards the Chief Justice, *Mahler* holds that "legislative immunity" protects the Chief Justice only as to her role in "promulgation" of the challenged AJP requirements. *Mahler* at 107-108.

Plaintiffs have acknowledged that damages (as distinct from declaratory relief) may not be sought against the Chief Justice because of the protection afforded her by judicial immunity and Govt. Code §820.2. But nothing in *Mahler* holds that money damages may not be sought against the Judicial Council, and defendants' unqualified assertion that "plaintiffs cannot seek monetary damages" (Memorandum at p. 9), is wrong insofar as it is meant to encompass the Judicial Council.

Mahler included a footnote citation to *Huminski* v. *Corsones* (2nd Cir, 2004) 396 F.3d 53, 73-75, 77, with the accompanying statement "judicial immunity does foreclose a

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[8] Such data would, for example, be needed to demonstrate that members of the subgroup to which plaintiffs belong were selected for assignment by defendants "In a proportion smaller than their percentage in the pool of actual applicants." *Stout* v. *Potter* (9th Cir, 2002) 276 F.3d 1118, 1122.

damages award." *Mahler* at p. 110, fn. 15. But *Huminski* addressed only application of judicial immunity protection for judges against claims for money damages. It did not address non-judicial entities such as the Judicial Council and was cited by the Court of Appeal only in the context of the Chief Justice's (not the Judicial Council's) immunity from damages. See *Mahler* at pp. 107-112.

Of course, the Judicial Council, unlike the Chief Justice, is neither a jurist nor a judicial officer. Defendants have never contended otherwise. Moreover, neither the Court of Appeal nor defendants have suggested that the Judicial Council is alleged by the SAC to have acted in a judicial or quasi-judicial manner.[9] *Huminski* acknowledged that "we have been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decisionmaking is not directly involved." *Huminski at 76*.

Huminski is telling on the issue of judicial immunity. It was a suit against a Vermont state court judge and the court manager for a Vermont District and Family Courts—both judicial officers in Vermont. The two judges had issued Notices Against Trespass in connection with plaintiffs' claim that the judges had violated his First Amendment right of access to a state courthouse.

The judges in *Huminski* asserted a judicial immunity defense. The Second Circuit noted that judicial immunity does not apply "if the action in question is not judicial in nature, as when the judge performs an administrative, legislative or executive act." *Huminski* at 75. The Court noted also that an important determining factor is whether the challenged conduct is a function normally performed by a judge, "and whether the parties dealt with the judge in his

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[9] *See e.g., Howard* v. *Drapkin* (1990) 222 Cal.App.3rd 843 recognizing the doctrine of "quasi-judicial immunity" which has extended judicial immunity to persons other than judges if they "act in a judicial or quasi-judicial capacity, such as court commissioners administrative law hearing officers, arbitrators and prosecutors." *Id* at 853

or her judicial capacity"[10] *Id.* Here, the Judicial Council's actions in allegedly enforcing the lifetime cap are not acts normally performed by a judge; nor did plaintiffs interact with the Judicial Council in any judicial capacity. There is therefore no basis to apply judicial immunity to acts of the Judicial Council alleged in the SAC as to plaintiffs' claim for damages.

VI

PLAINTIFFS HAVE SUFFICIENTLY

ALLEGED DISPARATE IMPACT.

Mahler presented the parties with a roadmap to determine the sufficiency of plaintiffs' disparate impact allegations. *Mahler* noted several "infirmities" in the First Amended Complaint's allegations in this regard., *Mahler* at pp. 114-115: "(There were) no specifics as to the total number of participants in the TAJP; failure to note number of participants allegedly adversely impacted by the challenged change to the program; no allegation of the age "group" allegedly adversely impacted; no 'basic allegations of statistical methods and comparisons alleged.'"

The SAC satisfactorily addresses each of these points, at least as of June 2019, some six months after enforcement of the new eligibility requirements commenced, (and the last month for which plaintiffs have received such information):

- Total number of participants in the AJP (349 retired judges), SAC ¶ 20;
- Number of participants allegedly adversely impacted by the challenged change to the program (59), SAC ¶ 32;
- Age of the group allegedly adversely impacted (70 years and older) ¶ 32;

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[10] In an analogous situation, *Mahler* recognized that the Virginia Supreme Court's enforcement of the Virginia state bar rules in *Supreme Court of Virginia* v. *Consumers' Union* (1980) 446 U.S. 719 was "mere administrative enforcement activity." *Mahler* at p. 108.

- Basic allegations of statistical methods and comparisons alleged." (¶¶29-33)

To be sure plaintiffs at this pleading stage do not have the details of what transpired or what went into the assignment/selection process after the lifetime cap limitation on eligibility began to be enforced by defendants, which is why plaintiffs seek this information in discovery. But as alleged in the SAC, defendants' enforcement of the changes rendered plaintiffs ineligible to participate in the AJP program under the same terms and conditions as was the case before defendants commenced enforcement of the lifetime cap, and as such plaintiffs "failed to receive assignments of the same nature and substance they had received in their prior service in the AJP." SAC ¶20.

Citing ADEA federal summary judgment cases[11] defendants urge this Court to apply cases where terminated employees alleging age discrimination were replaced by younger workers, and where those replacement workers could be easily identified. So, defendants cite *France* v. *Johnson* (9th Cir. 2015) 795 F.3d. 1170,1174 and *K.H.* v. *Secretary of Department of Homeland Security* (N.D. CA. 2017) 263 F.Supp.3d 788, 796. And based upon these cases, Defendants suggest that "an age difference of less than ten years (between the new and terminated hire) is presumptively insubstantial."[12] And that a four-year age difference is not statistically significant. Memorandum, p. 16.[13]

Based upon the foregoing, defendants dismiss the statistical analysis presented in the SAC. That analysis concluded that "it is evident that the age distribution of the affected AJP

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[11] See 29 U.S.C. §§621 *et seq.*, making it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual (who is at least 40 years of age . . . because of such individual's age.

[12] Defendants, unsurprisingly, chopped off part of their quote, leaving out the "without more evidence" part. *France*, supra, 795 F.3d at 1174.

[13] Defendants have selectively cited these so-called "age gap" cases; they omit authority unsupportive of their argument, such as *Douglas* v. *Anderson* (9th Cir. 1981) 656 F.2d 528, 533 (replacement of 54-year-old bookkeeper by person 5 years younger is significant). As noted in the text, however, these sorts of cases are inapplicable in situations such as exist here.

participants is neither the same nor similar to the age distribution of unaffected participants" SAC, ¶30, and that these age distributions "demonstrate that older AJP participants had a greater probability of being terminated from the program due to the lifetime cap as did the younger AJP participants." SAC ¶30.

These "age gap" cases are inapposite, and defendants' premise is wrong. Defendants' retroactive enforcement of the lifetime cap through the making of assignments is more akin to cases challenging age discrimination in "reduction in force" (RIF) cases, because the lifetime cap is effectively a reduction in force effort. The new eligibility requirements have adversely affected numerous retired judges who had previously participated in the AJP. "Given the way temporary appointments are made", *Mahler* at 107, and just as in "reduction in force" cases, there will be no specific younger judge who can be identified as a "replacement" for a retired judge victimized by the lifetime cap and denied an assignment.

That is why "the failure to prove replacement by a younger employee is 'not necessarily fatal' to an age discrimination claim where the discharge results from a general reduction in the work force . . .." *Rose* v *Wells Fargo and Co.* (9th Cir. 1990) 902 F.2d 1417, 1421[14], cited in *Coleman* v. *Quaker Oats Co., supra,* at p. 1281. And it is why the rationale of cases such as *K.H.* (replacement of federal air marshals) or *France* (replacement of border patrol agent) are inapplicable.

Indeed, the US Supreme Court has admonished that age discrimination cases—particularly those involving "numerical disparities" -- should be judged on a "case by case" basis, 487 US at fn. 3, properly reflecting that the usefulness of statistics depends on all the surrounding facts and circumstances. *See also Haydon* v. *Rand Corp.* (9th Cir. 1979) 605 F.2d 453, 454, fn.1; *Rose* v. *Wells Fargo, supra,* (the "significance" or "substantiality" of numerical

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[14] Defendants cite this case. Memorandum at p. 15.

disparities must be judged on an individual case basis.) 902 F.2d at p. 1424. The application of these principles is particularly apt in this case

In RIF cases plaintiffs need not show they were replaced by a younger worker; rather they may show through circumstantial, statistical or direct evident that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Id.* This is precisely what the SAC alleges. *See* ¶¶29-33; *see also Watson* v. *Ft. Worth Bank and Trust* (1988) 487 U.S. 977, 994 ("Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.") See SAC ¶¶29-33.

Moreover, "this inference can be established by showing the employer had a continuing need for their skills and services in that various duties were still being performed. *Coleman*, *supra*, 232 F.3d at 1281. The SAC allegations referencing Judge Nadler's letter to the Chief Justice makes this point, as does the Chief Justice's response: "I share your concerns." SAC ¶¶ 45-49, which makes clear the ongoing importance of the AJP program and the adverse consequences to judicial assignments made by defendants resulting from the lifetime cap.

Notably, "disparate impact plaintiffs are permitted to rely on a variety of statistical methods to support their claims. At the pleading stage some basic allegations of this sort will suffice." *Adams* v. *City of Indianapolis* (7th Cir. 2014) 742 F.3d 720, 733, and it is "premature to require detailed statistical evidence at the pleading stage." *Garay* v. *Lowes Home Centers, LLC*, *2017 WL 5473887*3.* The U.S. Supreme Court has also cautioned against trial courts requiring any rigid mathematical formula in disparate impact cases, where "an inference of causation" is to be raised. *Watson*, *supra*, 478 U.S. at p. 996.

Moreover, as noted below, see pp 17-19, *infra*., even without discovery, the SAC contains allegations regarding disparate impact considerably more robust than those in the cases *Mahler* cites as examples of shortcomings. *Mahler* at p. 115. *See*, *e.g., Adams* v. *City of Indianapolis*, *supra* at p. 733 (summary judgment granted where no evidence of discrimination

presented; lack of even basic allegations regarding statistical methods; claims stated as legal conclusions); *Garay* v. *Lowes Home Centers LLC*, supra (failure to allege age discrimination based on specific business practice); *Wu* v. *Special Counsel, Inc.* (D.D.C. 2014) 54 F.Supp.3d 48, 55 (mere speculation regarding alleged correlation between age and experience).

VII

PLAINTIFFS HAVE ALLEGED A ROBUST STATISTICAL ANALYSIS, SUFFICIENTLY ALLEGING CAUSATION, NOTWITHSTANDING THAT PLAINTIFFS'ACCESS PRESENTLY IS ONLY TO OUTDATED DATA

Notwithstanding the incomplete data available to plaintiffs, the SAC does allege the requisite causation through statistical analysis of all 349 retired judges enrolled in the AJP as of May 2019.[15]

Simply put, since the advent of the lifetime cap the only retired judges who are eligible for assignment under the AJP without having to undertake the "exception process," are those judges, who are statistically significantly younger and have not reached the 1,320-day limitation. If a judge has reached the 1,320-day cap, he/she is ineligible for assignment in that program absent going through an exception process.

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[15] Defendants claim that the SAC's statistical analysis affected only "promulgation" of the lifetime cap and not "the average age of judges affected by implementation . . . through judicial assignments." Memorandum at p. 15. Defendants fail to note that the only data available to plaintiffs for analysis is for the six-month period after "promulgation.". Plaintiffs have no data for the subsequent two- and one-half year period but have requested it from defendants. *See* p. 5, *supra*. Nevertheless, based upon data they have, plaintiffs have been able to sufficiently allege causation. Once defendants produce the requested data plaintiffs will be able to further address age disparities "for those who did and did not receive such assignments…". Memorandum p. 16.

Of course, without "promulgation" there can be no enforcement. Defendants' efforts to sharply distinguish between the two as relates to causation is in many respects nonsensical.

The SAC alleges, based upon a statistical analysis which includes a Logistic regression, and application of a coefficient on age, that "the odds being at the lifetime limit when 70 years old or older [*i.e.*, of not being eligible to receive an assignment without going through the onerous exception process] is **over four times** that of a AJP participant who is not yet 70," and "with every year older, the odds that a participant will be at the lifetime limit increased by 1.2." SAC ¶33 (emphasis in original).

Thus, alleges the SAC, "the statistics demonstrate that the disparity in impact is sufficiently large that it is highly unlikely to have occurred at random. The results support the reasonableness of the inference of discrimination based upon age." SAC ¶33.

Defendants contend that those judges who have reached the lifetime cap are "affected by the promulgation of the limit on service." Memorandum at p. 11 That may be true, but it misses the point. It is the failure of defendants to make AJP assignments of the same nature and substance as those judges had received in their prior service, and as continues to be received by judges outside the protected subclass, that has directly caused injury to them, and of which they complain.[16]

Moreover, it is no answer at the pleading stage to cavalierly argue "no harm no foul", as defendants do by asserting that "in fact" the 1320 judges "are sitting on assignment." Memorandum p. 15. This excuse assumes facts outside the record and ignores that the exception requirement does not eliminate the discriminatory aspect of the lifetime cap. Nor does defendants' claim regarding lack of age disparity of those "who did and who did not receive

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[16] It could be said that in the *Consumers' Union* case, Virginia lawyers were "affected by the promulgation" of the State Bar rules. But the Court recognized that it was the enforcement of those rules by the Virginia court that caused the direct injury.

Indeed, most any person who is found to have violated a statute after being subject to its enforcement can be said to have been "affected" by the fact the statute had been "promulgated" in the first place. So, defendants' contention really proves nothing.

assignments" fare any better at this stage. Plaintiffs presently do not precisely know "who did and did not" receive assignments, although they would like to and have asked for that sort of statistical information up to the present time.

Defendants also dismiss the allegation that "only" 23% of judges over 70 have reached the lifetime cap, ignoring both the finding that only 7% of participants under 70 were affected, and the conclusion that "the hypothesis that the probability of being at the lifetime limit is independent of being in either age group can be rejected at a 1% level of statistical significance." SAC ¶ 32.[17] Also ignored is the fact that these numbers are as of June 2019; current statistics will surely find increasing numbers of post 70-years-old judges among the AJP participants subject to the 1,320-day lifetime cap.

The analysis presented in the SAC makes clear that, even using data from 2019, "to a statistically significant degree, the lifetime cap has a disproportionate adverse impact of members in the subgroup alleged." The statistics further demonstrate that this disparity is "unexplainable on grounds other than age." SAC ¶32. Stated another way "the statistics demonstrate that it is highly unlikely to have occurred at random." SAC 33. And the SAC concludes, based on the statistics available to plaintiffs (which are admittedly dated but all they

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[17] 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.

now have) "the results support the reasonableness of the inference of discrimination." SAC 33. And it is this inference which the Courts look for in disparate impact case.

It may be that defendants did not intent to create a system whereby judicial assignments under the AJP will necessarily be a function of discriminatory selections favoring younger judges over older ones. But as noted above that does not matter. Defendants' assertion that plaintiffs "fail to allege" that the AJP's implementation ("enforcement") of the lifetime cap had a material impact on plaintiffs is incorrect.

VIII

PLAINTIFF'S HAVE IDENTIFIED DEFENDANTS' CHALLENGED PRACTICE OR SELECTION CRITERIA CAUSING THE DISPARITY.

Disparate impact plaintiffs must "identify the specific employment practice or selection criteria being challenged." *Rose* v. *Wells Fargo and Co.*, *supra*, 902 F.2d at p. 1424; *Watson* v. *Ft. Worth Bank and Trust*, *supra,* 487 U.S. at pp. 988-990.[18]

The SAC clearly identified the enforcement and retroactive application of the 1,320-day lifetime cap as the employment practices or criteria which is alleged to have violated FEHA.[19] See SAC ¶¶ 34-36. The SAC, as noted above, clearly states that defendants'

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[18] Defendants erroneously omit from the first requirement "selection criteria" as an alternative to "employment practice." *See Rose* v. *Wells Fargo & Co.*, 902 F.2d, *supra* at pp. 1417, 1424; *Watson* v. *Ft. Worth Bank and Trust*, *supra*, 487 US at pp. 988-90.

[19] *Cf. e.g.*, *Life Technologies Corp* v. *Superior Court* (2011) 197 Cal.App.4th 640, 649 (Banke, J.) where identification of an employment practice as broad as a RIF, which plaintiff alleged "was discriminatorily applied" was deemed to "suffice" as the predicate for a disparate impact claim. *Meacham v. Knolls Atomic Power Laboratory* (2008) 554 U.S. 84, which defendants cite, stated that "any specific test, requirement or practice" should be identified. *Meacham* at p. 101. Of course, this is exactly what plaintiffs have done. *See also Pottenger* v. *Potlach Corp.* (9th Cir. 2003) 329 F.3d 740, 749.

enforcement of these criteria has proximately harmed plaintiffs. *e.g.,* SAC ¶¶ 11, 20, 28, 30-33, 35-36, 40, 43-44. Defendants assert that "the actionable employment practice cannot be defendants' adoption of a 1,320-day service limit." Memorandum at p. 13. This bogus assertion is based upon defendants' "head in the sand" insistence that no other "employment practice" viz, selection criteria, has been "isolate(d) or identify(ed)". *Id* at line 14

But, just as the Virginia court in *Consumers' Union* both promulgated and enforced the Virginia Bar rules, so too defendants are alleged to have both promulgated and enforced the retroactive application of the lifetime cap through the making of judicial assignments. And the latter is what plaintiffs have clearly identified as the "actionable employment practice" or "eligibility criteria."

Defendants attempt to support this flawed premise with their misleading placement of quotation marks, and the careful rearrangement of sentences to suit their own interpretation of the SAC's allegations. *See*, *e.g.*, Memorandum, p 13, lines 1-3. But ultimately, they are forced—albeit reluctantly—to acknowledge that plaintiffs indeed challenge defendants' "enforcing" of the lifetime cap. *Id*. As defendants concede, "Plaintiffs allege that Defendants 'have implemented, and are enforcing, this new eligibility policy. . ." Memorandum at p. 13. The court should reject Defendants' tortured approach.

IX

LEAVE TO AMEND.

If the court concludes that allegations in the SAC are in some way inadequate, plaintiffs submit that the Court should allow plaintiffs leave to file a further amended complaint.

Moreover, situations where "subjective criteria are at issue may make this more difficult"; here, of course, the selection criteria (not having served 1,320 days in the AJP) are quite objective and akin to a reduction in force. *Watson* v. *Ft. Worth Bank*, *supra*, 487 US 97 at 994. *Cf. Garay* v. *Lowes Home Centers, LLC*, 2017 WL 5473887*3 allegation that defendants "acted upon a policy which encourages discrimination against older workers . . ." was insufficient.

The Law is very supportive of plaintiffs' request.

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. Paul Fire & Marine Ins. Co.* (2015) 237 Cal.App.4th 23.

Defendants have made no showing that there is no reasonable possibility that Plaintiffs can state a cause of action. Plaintiffs are confident they can do so in good faith, should it become necessary.

X

DISMISSAL OF CONSITIUTIONAL CLAIMS

Plaintiffs do not oppose dismissal of their California Constitutional claim.

XI

CONCLUSION

The demurrer should be overruled as to the FEHA. Leave to amend should be granted if the court concludes that any allegations in the SAC are presently insufficient.

Dated this 15th day of December 2021.

Furth Salem Mason & Li LLP

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

Exhibit A

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Judicial Council of California and
Chief Justice Tani G. Cantil-Sakauye

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,

v.

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

Defendants.

CASE NO. CGC-19-575842

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS (SET ONE)

First Amended Complaint Filed:
May 28, 2019

Second Amended Complaint Filed:
October 19, 2021

PROPOUNDING PARTY:	PLAINTIFFS GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, and JOHN SAPUNOR
RESPONDING PARTY:	DEFENDANTS JUDICIAL COUNCIL OF CALIFORNIA and CHIEF JUSTICE TANI G. CANTIL-SAKAUYE
SET NO.:	ONE

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

Pursuant to section 2030.010, *et. seq.*, of the Code of Civil Procedure, Defendants Judicial Council of California and Chief Justice Tani G. Cantil-Sakauye provide the following responses and objections to Defendants' Requests for Production of Documents, Set One ("Requests"), propounded by Plaintiffs Glenn Mahler, James H. Poole, Julie Conger, Edward M. Lacy Jr., William S. Lebov, John C. Minney, and John Sapunor.

PRELIMINARY STATEMENT

Each of the responses below is made solely for the purpose of this action. Each response is subject to all objections as to competence, relevance, materiality, propriety, and admissibility, all of which objections and grounds are expressly reserved and may be interposed at any further time. Defendants reserve the right to make changes to these responses if it appears that omissions or errors have been made, and/or additional or more accurate information becomes available. No incidental or implied omission is intended herein. The fact that Defendants have responded to a Request is not, and should not be taken as, an admission that Defendants accept or admit the existence of any facts or documents set forth or assumed by such Request or that such response constitutes admissible evidence. The fact that Defendants have responded to the Requests, and any specific Request, is not intended to, and shall not be construed to, be a waiver by Defendants of any or all objections thereto.

Defendants have not completed their investigation, discovery, analysis, and research of the facts, documents, and evidence relating to this action. All of the responses below are based on information presently available to, and specifically known by, Defendants. It is anticipated that further discovery, investigation, analysis, and research may supply additional information that may lead to changes or additions to the responses set forth. The following responses are given without prejudice to Defendants' right to produce additional evidence. Accordingly, Defendants reserve the right to revise any and all responses below as additional facts and documents are ascertained and recalled.

GENERAL OBJECTIONS

1. In addition to any specific objections which may be made on an individual basis in the separate responses below, Defendants object generally to each Request to the extent it seeks documents subject to and protected by the attorney-client privilege, the attorney work-product doctrine, the common interest doctrine, the deliberative process privilege, legislative immunity, judicial immunity, or any other applicable privilege, immunity, or protection. Nothing contained herein is intended, or should be construed, as a waiver of the attorney-client privilege, the attorney work-product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, or any other applicable privilege, immunity, or protection.

2. In addition to any specific objections which may be made on an individual basis in the separate responses set forth below, Defendants object generally to each Request to the extent it seeks to elicit documents subject to and protected by constitutional, statutory, or common-law rights of privacy.

3. Defendants generally object to each Request as vague and ambiguous, and as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence in this action. Many of the individual Requests refer to an "Assigned Judges Program" that does not exist by that name. Defendants presume that Plaintiffs intend all references to an "Assigned Judges Program" instead to refer to California's "Temporary Assigned Judges Program" ("TAJP").

4. Defendants further object to each Request as overbroad, unduly burdensome, oppressive, and as seeking irrelevant information to the extent it seeks documents relating to *promulgation* of changes to the TAJP, for which Defendants are absolutely immune. The Court of Appeal limited Plaintiffs to seeking declaratory relief only as to *enforcement* of these changes through individual judicial assignments; Defendants limit their responses accordingly.

5. These responses are made solely for the purpose of this action. Each response is made subject to and without waiving all objections to competence, authenticity, relevance, materiality, propriety, admissibility, and any and all other objections and grounds that would or could require or permit the exclusion of any document or statement therein from evidence, all of

which objections and grounds are expressly reserved and may be interposed in further proceedings and at the time of trial.

6. Any statement made herein of an intent to produce documents is not, and shall not be deemed, an acceptance or admission of the existence of any such documents or any factual or legal contention contained in any Request. Defendants object to each request to the extent it contains any statements that are factually or legally incorrect or inaccurate.

7. Defendants object to each Request and instruction to the extent it purports to impose obligations in excess of or different from those imposed by the Code of Civil Procedure, Rules of Court, Local Rules for the San Francisco Superior Court, and other applicable laws or rules.

8. Defendants object to each Request and instruction to the extent it seeks documents that are (a) publicly available to Plaintiffs and their counsel; (b) already in Plaintiffs' possession, custody, or control; (c) in Defendants' possession only because they were produced by another party in this litigation; or (d) not within Defendants' possession, custody, or control.

9. Defendants object to each Request and instruction to the extent it contains terms that are undefined, vague, and ambiguous.

10. Defendants object to each Request to the extent it is duplicative or otherwise purports to require production of more than one copy of any document that may be responsive to more than one Request.

11. Defendants object to each Request and instruction to the extent it calls for Defendants to create compilations of material or calls for matters to be produced in a form or manner other than that kept by Defendants in the ordinary course of business.

12. Where Defendants agree to produce documents below, Defendants agree to produce such documents solely and exclusively for use in this action, and do not authorize or permit such documents to be used for any other purpose whatsoever.

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS (SET ONE)

REQUEST FOR PRODUCTION NO. 1:

All DOCUMENTS, referring or related to the Assigned Judges Program, including, but not limited to:

a. all participants currently enrolled in the AJP, including the participant's date of birth, date of retirement, date of enrollment in the AJP, and cumulative lifetime service days in the AJP;

b. all participants formerly enrolled in the AJP from Jan. 1, 2016, including the participant's date of birth, date of retirement, date of enrollment in the AJP, and cumulative lifetime service days in the AJP;

c. for participants currently or formerly enrolled in the AJP with more than 1,320 cumulative lifetime service days in the AJP, any exceptions from the 1,320-day cumulative lifetime service cap that were requested, and granted or denied;

d. the letter from Judge Gary Nadler to Defendant Chief Justice Cantil-Sakauye dated February 20, 2019;

e. defendant Chief Justice Cantil-Sakauye's letter response, dated March 28, 2019, to Judge Gary Nadler's February 20, 2019 letter;

f. authority of defendant Chief Justice Cantil-Sakauye to implement changes or amendments to the AJP;

g. eligibility requirements, or proposed eligibility requirements, for participation by retired judges in the AJP;

h. handbook on Judicial Eligibility for Assignment and Restrictions, including all drafts;

i. e-mail message from Bob Lowney to Justices and Judges of the Assigned Judges Program dated May 23, 2018, including all drafts thereof;

j. responses to the e-mail message of Bob Lowney to Justices and Judges of the Assigned Judges Program dated May 23, 2018;

k. reasons for or against implementation of the 1,320-day cumulative lifetime service cap;

l. the retroactive application of the 1,320-day cumulative lifetime service cap including but not limited to reasons for or against implementation of such application;

m. the impact of implementation of the 1,320-day cumulative lifetime service cap on retired judges, including the impact of the retroactive application of said cap;

n. data regarding the AJP kept in the Themsis database;

o. For the period 2018-2021, minutes, agendas, presentations, and attendance records regarding changes to the AJP, including, but not limited to reviews by the Judicial Council's Trial Court Presiding Judges Committee, the Court Executives Advisory Committee, the Administrative Presiding Justices Advisory Committee, and all transition meetings;

p. communications between and among Defendant Judicial Council of California and individual presiding judges and court executive officers regarding the AJP;

q. the AJP Handbook effective from 2018 to the present, including all drafts of the version of the Handbook dated June 2019;

r. The Memorandum dated May 21, 2018 from Martin Hoshino, regarding "Revisions to Assigned Judges Program" including all drafts;

s. communications between Defendant Chief Justice Cantil-Sakauye and Defendant; Judicial Council of California regarding of AJP policies and procedures;

t. complaints or other communications regarding favoritism in AJP assignments.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Defendants hereby incorporate the General Objections stated above. Defendants further object to this Request on the grounds that it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections. Defendants further object on the grounds that this Request

is compound and duplicative. Defendants further object to this Request on the grounds that it is overbroad and unreasonably burdensome, not proportionate to the needs of the case, and seeks documents that are neither relevant to any claims or defenses at issue in this case nor reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this Request on the grounds that it is overbroad, vague, and ambiguous in multiple respects. Defendants further object to this Request to the extent it seeks production of documents already in Plaintiffs' possession, custody, or control. Defendants further object to this Request on the grounds that it seeks information relating to third parties that is protected from disclosure by constitutional, statutory, or common-law rights of privacy.

Subject to and without waiving the foregoing objections, and upon entry of an appropriate protective order in this action, Defendants respond as follows:

(a). Defendants further object to Request 1(a) as vague, ambiguous, and overbroad, and as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence because the personal information of all retired judges participating in the TAJP has nothing to do with whether and how the 1,320-day lifetime service cap was enforced against *Plaintiffs* in particular cases, and is unnecessary for purposes of disparate impact statistical analysis. Defendants further object to this Request to the extent it seeks to invade the constitutional, statutory, or common-law privacy rights of individual retired judges participating in the TAJP. Subject to and without waiving these objections, Defendants respond as follows:

Pursuant to the terms of a protective order to be negotiated between the parties, Defendants will produce responsive, non-privileged documents reflecting current participants in the TAJP, their age, length of service in the TAJP, cumulative days on assignment, number of assignments requested, and number of assignments approved. Such documents will be redacted to remove personal identifying information of TAJP participants.

(b). Defendants further object to Request 1(b) as vague, ambiguous, and overbroad, and as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence because the Court of Appeal remanded this case only

so Plaintiffs could attempt to show that *enforcement* of the 1,320-day lifetime service cap somehow constitutes age discrimination in violation of the Fair Employment and Housing Act. Documents relating to judges working on assignment prior to institution of the service cap are plainly irrelevant to the limited scope of the Court of Appeal's remand. Defendants further object to this Request to the extent it seeks to invade the constitutional, statutory, or common-law privacy rights of individual retired judges participating in the TAJP.

(c). Defendants further object to Request 1(c) as vague, ambiguous, duplicative, and overbroad because it seeks production of documents previously identified in Requests 1(a) & (b). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Requests 1(a) & (b).

(d). Defendants further object to Request 1(d) as overbroad, unduly burdensome, and oppressive, and as seeking documents that are equally available to Plaintiffs, that are in Plaintiffs' possession, custody, or control, and that Plaintiffs have already published in filings with the Superior Court and the Court of Appeal in this case. Defendants further object to the extent this Request seeks to use responses to requests for production of documents to somehow authenticate such documents.

(e). Defendants further object to Request 1(e) as overbroad, unduly burdensome, and oppressive, and as seeking documents that are equally available to Plaintiffs, that are in Plaintiffs' possession, custody, or control, and that Plaintiffs have already published in filings with the Superior Court and the Court of Appeal in this case. Defendants further object to the extent this Request seeks to use responses to requests for production of documents to somehow authenticate such documents.

(f). Defendants further object to Request 1(f) in its entirety as overbroad, unduly burdensome, and oppressive, and as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. The Court of Appeal held that the Chief Justice has the constitutional and statutory authority to promulgate revisions to the TAJP, and that Defendants are absolutely immune from claims questioning the wisdom of those revisions. *Mahler, et al. v. Judicial Council of California, et al.*,

67 Cal. App. 5th 82, 104 (2021) ("We further conclude the Chief Justice's promulgation of the revised TAJP was both within her sphere of authority and legislative in character.").

(g). Defendants further object to Request 1(g) as vague and ambiguous as to the term "eligibility requirements." Defendants presume this refers to the TAJP's eligibility minimum participation requirements mandated by the California Constitution, the California Government Code, the California Rules of Court, and other applicable laws. Defendants further object to this Request as vague and ambiguous to the extent the term "eligibility requirements" includes program limitations placed on otherwise eligible TAJP judges. Subject to and without waiving these objections, Defendants presume this Request seeks production of TAJP Handbooks, as well as memoranda that may have been issued from time to time by the Judicial Council describing interpretation of, or updates to, the Handbook, which documents Defendants agree to produce. Defendants object to production of any drafts of these materials, to the extent they exist, as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, and that are protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections.

(h). Defendants object to Request 1(h) in its entirety as vague, ambiguous, and unintelligible to the extent it confuses the TAJP Handbook with "Judicial Eligibility for Assignment and Restrictions," which is a subsection of the TAJP Handbook itself, and which does not exist as a separate document.

(i). Defendants object to Request 1(i) in its entirety as vague, ambiguous, duplicative, and overbroad to the extent it seeks documents previously described in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see objections and responses to Request 1(g).

(j). Defendants further object to Request 1(j) in its entirety as overbroad, unduly burdensome, and oppressive, and as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence.

Defendants further object on the grounds that this Request seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, protections, and immunities, including constitutional, statutory, and common-law rights of privacy. Defendants further object to this Request in its entirety as vague, ambiguous, duplicative, and overbroad to the extent it seeks documents previously described in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see objections and responses to Request 1(g).

(k). Defendants further object to Request 1(k) in its entirety as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. As explained in Defendants' General Objections, Plaintiffs can no longer challenge the reasons for *promulgation* of the 1,320-day lifetime service cap and its exceptions. The Court of Appeal limited Plaintiffs to attempting to establish that *enforcement* of existing TAJP standards as written violate the FEHA. Defendants further object on the grounds that this Request seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, protections, and immunities, including constitutional, statutory, and common-law rights of privacy.

(l). Defendants further object to Request 1(l) as vague, ambiguous, overbroad, and unintelligible to the extent it assumes changes to a discretionary program can or cannot be made "retroactive." Defendants further object to this Request in its entirety as seeking documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. As explained in Defendants' General Objections, Plaintiffs can no longer challenge the reasons for *promulgation* of the 1,320-day lifetime service cap and its exceptions, including whatever decision may have been made with respect to its "retroactivity." Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable

privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy. Defendants further object to this Request as vague, ambiguous, duplicative, and overbroad to the extent it seeks documents previously identified in Requests 1(a) & (b) insofar as they seek data regarding judges enrolled, or previously enrolled, in the TAJP.

Subject to and without waiving these objections, Defendants respond as follows: Please see objections and responses to Requests 1(a) & (b).

(m). Defendants further object to Request 1(m) as vague, ambiguous, overbroad, and unintelligible with respect to the term "impact," the meaning of which cannot be discerned from the context of the Request itself. Defendants further object to this Request in its entirety as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence to the extent it seeks documents relating to *promulgation* of the 1,320-day lifetime service cap and its exceptions, as opposed to *enforcement* of the cap and its exceptions in particular cases. Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy. Defendants further object to this Request as vague, ambiguous, duplicative, and overbroad to the extent that it seeks documents previously identified in Requests 1(a) & (b) insofar as they seek data regarding judges enrolled, or previously enrolled, in the TAJP.

Subject to and without waiving these objections, Defendants respond as follows: Please see objections and responses to Requests 1(a) & (b).

(n). Defendants further object to Request 1(n) as vague and ambiguous with respect to the terms "data regarding the AJP" and "Themsis database." Defendants further object to this Request in its entirety to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy.

Defendants further object to this Request as vague, ambiguous, duplicative, and overbroad to the extent it seeks documents previously identified in Requests 1(a) & (b) insofar as they seek data regarding judges enrolled, or previously enrolled, in the TAJP.

Subject to and without waiving these objections, Defendants respond as follows: Please see objections and responses to Requests 1(a) & (b).

(o). Defendants further object to Request 1(o) in its entirety as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence because documents relating to meetings regarding *changes to the TAJP*, by definition, relate to *promulgation* of those changes, as opposed to their *enforcement* in particular cases. Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy.

(p). Defendants further object to Request 1(p) in its entirety as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence. This Request seeks production of potentially thousands of individual communication between approximately 33 members of the Judicial Council, an unknown number of Judicial Council staff members, and presiding judges and administrative presiding judges of all 58 counties in California, as well as individual TAJP judges, virtually all of which have *nothing* to do with this action, which, pursuant to the Court of Appeal's remand, can only address *enforcement* of the 1,320-day lifetime service cap and its exceptions with respect to the named Plaintiffs. Defendants further object to this Request as overbroad, unduly, burdensome, oppressive, and not proportionate to the needs of the case to the extent Plaintiffs expect Defendants to attempt to identify all such communications and then sift through them in order to find arguably relevant documents. The burden and cost of such an endeavor dwarfs any possible benefit Plaintiffs may hope to gain, given the limited nature of Plaintiffs' remaining claim. Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client

privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy.

Subject to and without waiving these objections, Defendants will produce responsive, non-privileged communications sent on behalf of the Judicial Council regarding Plaintiffs' TAJP eligibility, as well as assignments plaintiffs may have received since 2019.

(q). Defendants further object to Request 1(q) in its entirety as duplicative and overbroad because it seeks documents that have already been identified in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Request 1(g).

(r). Defendants further object to Request 1(r) in its entirety as duplicative and overbroad because it seeks documents that have already been identified in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Request 1(g).

(s). Defendants further object to Request 1(s) in its entirety as vague, ambiguous, and overbroad to the extent it seeks production of any communication between approximately 33 members of the Judicial Council, an unknown number of Judicial Council staff members, and the Chief Justice of California regarding any aspect of the TAJP, without regard to whether such "communications" have anything to do with enforcement of the 1,320-day lifetime service cap and its exceptions with respect to the named Plaintiffs in this action. Defendants further object to this Request as overbroad, unduly, burdensome, oppressive, and not proportionate to the needs of the case to the extent Plaintiffs expect Defendants to attempt to identify all such communications and then sift through them in order to find arguably relevant documents. The burden and cost of such an endeavor dwarfs any possible benefit Plaintiffs may hope to gain, given the limited nature of Plaintiffs' remaining claim. Defendants further object on the grounds that the Request seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity,

judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy.

(t). Defendants further object to Request 1(t) in its entirety as vague, ambiguous, and unintelligible with respect to the term "favoritism". Defendants further object to this Request as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence because documents relating to alleged "favoritism" in any TAJP assignment has nothing to do with *enforcement* of the 1,320-day cumulative lifetime service cap and its exceptions with respect to the named Plaintiffs. Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy. Defendants further object to this Request as duplicative and overbroad because it seeks documents that have already been identified in Request 1(p).

Subject to and without waiving these objections, Defendants respond as follows: Please see the objections and response to Request 1(p).

REQUEST FOR PRODUCTION NO. 2:

DOCUMENTS sufficient to show:

a. the effective date of the 1,320-day cumulative lifetime service cap;

b. the effective date of the requirement of an exception from the 1,320-day cumulative lifetime service cap for assignment of a participant in the AJP who had exceeded that cap;

c. which counties were exempt from the requirement for exceptions from the 1,320-day cumulative lifetime service cap;

d. reasons for granting or denying requests for exceptions from the 1,320-day cumulative lifetime service cap;

e. Expense reimbursements for AJP participants from 2015 through the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Defendants hereby incorporate the General Objections stated above. Defendants further object to this Request on the grounds that it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities and protections. Defendants further object to the Request on the grounds that it is compound and duplicative. Defendants further object to this Request on the grounds that it is overbroad and unreasonably burdensome, not proportionate to the needs of the case, and seeks documents that are neither relevant to the claims and defenses at issue nor reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this Request on the grounds that it is vague and ambiguous in multiple respects. Defendants further object to this Request on the grounds that it seeks information relating to third parties that is protected from disclosure by constitutional, statutory, and common-law rights of privacy.

Subject to and without waiving the foregoing objections, and upon entry of an appropriate protective order in this action, Defendants respond as follows:

(a). Defendants further object to Request 2(a) in its entirety as duplicative and overbroad because it seeks documents that have already been identified in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Request 1(g).

(b). Defendants further object to Request 2(b) in its entirety as duplicative and overbroad because it seeks documents that have already been identified in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Request 1(g).

(c). Defendants further object to Request 2(c) in its entirety as duplicative and overbroad because it seeks documents that have already been identified in Request 1(g). Subject to and without waiving this objection, Defendants respond as follows: Please see the objections and responses to Request 1(g).

(d). Defendants further object to Request 2(d) as vague, ambiguous, and overbroad, and as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence to the extent it seeks documents relating to enforcement of the 1,320-day lifetime service cap and its exceptions with respect to any TAJP participants other than the named Plaintiffs. Defendants further object to this Request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest privilege, the deliberative process privilege, legislative immunity, judicial immunity, and other applicable privileges, immunities, and protections, including constitutional, statutory, and common-law rights of privacy. Defendants further object to this Request as vague, ambiguous, duplicative, and overbroad to the extent that it seeks documents previously identified in Requests 1(p).

Subject to and without waiving these objections, Defendants respond as follows: Please see objections and responses to Requests 1(p).

(e). Defendants further object to Request 2(e) in its entirety as vague, ambiguous, and overbroad, and as seeking documents that are neither relevant to any claim or defense in this case nor calculated to lead to the discovery of admissible evidence because the Court of Appeal remanded this case only so Plaintiffs could attempt to show that enforcement of the 1,320-day lifetime service cap somehow constitutes age discrimination in violation of the FEHA. Documents relating to expense reimbursements for TAJP participants are plainly irrelevant to the limited scope of the Court of Appeal's remand. Defendants further object to this Request to the extent it seeks to invade the constitutional, statutory, or common-law privacy rights of individual retired judges participating in the TAJP.

Dated: November 23, 2021.

JONES DAY

By: _____
Robert A. Naeve

Attorneys for Defendants
JUDICIAL COUNCIL OF CALIFORNIA and CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

PROOF OF SERVICE

I, Frances Pham, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3161 Michelson Drive, Suite 800, Irvine, California 92612. On November 23, 2021, I served a copy of the within document(s):

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENT (SET ONE)

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Quentin L. Kopp, Esq.
qkopp@fsmllaw.com
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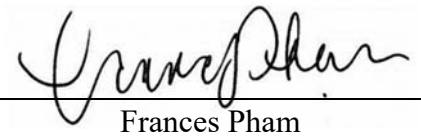
Attorneys for Plaintiffs
GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, and JOHN SAPUNOR

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 23, 2021, at Irvine, California.



Frances Pham

Exhibit B

Robert A. Naeve (State Bar No. 106095)
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Attorneys for Defendants
Judicial Council of California and
Chief Justice Tani G. Cantil-Sakauye

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,

v.

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

Defendants.

CASE NO. CGC-19-575842

DEFENDANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS (SET ONE) TO PLAINTIFF MAHLER

First Amended Complaint Filed: May 28, 2019

Second Amended Complaint Filed: October 19, 2021

PROPOUNDING PARTY: DEFENDANT JUDICIAL COUNCIL OF CALIFORNIA

RESPONDING PARTY: PLAINTIFF GLENN MAHLER

SET NO.: ONE

TO PLAINTIFF GLENN MAHLER AND HIS ATTORNEYS OF RECORD:

Pursuant to section 2030.010, *et. seq.*, of the Code of Civil Procedure, Defendant Judicial Council of California requests that Plaintiff Glenn Mahler serve written responses to these Requests for Production of Documents, Set One ("Requests"), under oath and produce for inspection and copying the document set forth that are in his possession, custody, or control, or in the possession, custody, or control of his attorneys and/or any other "PERSONS" (as that term is defined below) acting on his behalf or at his direction, at the offices of Jones Day, located at 3161 Michelson Drive, Suite 800, Irvine, California 92612, within thirty (30) days of the date of service of these Requests.

DEFINITIONS AND INSTRUCTIONS

As used herein, the following words or terms shall have the meanings indicated:

1. "YOU" and "YOUR" shall refer to Plaintiff Glenn Mahler and any of his past and present agents, representatives, and other PERSONS acting on his behalf or at his direction.

2. "ACTION" shall refer to this lawsuit, *Mahler, et al. v. Judicial Council of California, et al*., Case No. CGC-19-575842, Superior Court of California, County of San Francisco.

3. "COMMUNICATION" and "COMMUNICATIONS" shall refer to and include any contact between two or more PERSONS, including, without limitation, written contacts by such means as letters, memoranda, facsimile transmissions, e-mail, and telegrams, and oral contact by such means as face-to-face meetings, telephone conversations, and voicemail.

4. "DOCUMENT" and "DOCUMENTS" shall have the same meaning as the definition of "writing" under Evidence Code section 250, and includes the original or a copy of any handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing, and any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof whether in electronic form or not. "DOCUMENTS" include, but are not limited to, memoranda, recordings, tapes, disks, diskettes, summaries and transcriptions of conversations, records, statements, calendars, diary entries, calendar entries, personal notes, contracts, agreements, files, drafts, and revisions of drafts.

It further includes each and every copy or reproduction of all such DOCUMENTS where such copy or reproduction is not identical to the original, and each and every copy or reproduction where such copy or reproduction contains any commentary or notation that does not appear in or on the original.

5. "PERSON" and "PERSONS" shall mean any natural person and any other cognizable entity, including but not limited to, corporations, proprietorships, partnerships, joint ventures, consortiums, clubs, associations, foundations, governmental agencies or instrumentalities, societies, and orders.

6. "TAJP" shall mean the Temporary Assigned Judges Program, referred to as the "Assigned Judges Program ("AJP")" in paragraph 2 of Plaintiffs' Second Amended Complaint in this ACTION.

7. As used herein, the singular forms shall include the plural and vice versa wherever such dual construction will serve to bring within the scope of these Requests any information that otherwise would not be brought within their scope.

8. The use of the connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to make a Request inclusive rather than exclusive.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

DOCUMENTS sufficient to show the total amount of compensation YOU received each year in connection with YOUR TAJP assignments.

REQUEST FOR PRODUCTION NO. 2:

DOCUMENTS sufficient to show the total amount of retirement-related compensation YOU received each year since YOUR retirement as a judge of the Superior Court of California.

REQUEST FOR PRODUCTION NO. 3:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR participation in the TAJP, including by way of example only and without limitation YOUR application(s) and qualifications for participation in the TAJP, assignments YOU received through

the TAJP, and COMMUNICATIONS with any PERSONS regarding YOUR participation in the TAJP.

REQUEST FOR PRODUCTION NO. 4:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding the "disabling eligibility criteria changes" to the TAJP referenced in paragraph 3 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 5:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that YOU "are unable to participate in the [T]AJP under the same terms, conditions, and privileges of employment as existed prior to the change," as stated in paragraph 20 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 6:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that YOU "are unable to participate in the [T]AJP under the same terms, conditions, and privileges of employment … as are applicable to judges who are not part of the subgroup of retired judges over the age of 70 years," as stated in paragraph 20 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 7:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that YOU "failed to receive assignments of the name nature and substance [YOU] had received in [YOUR] prior service in the [T]AJP," as stated in paragraph 20 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 8:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "the lifetime cap on service days [in the TAJP], while facially neutral, disproportionately and significantly adversely impacted [YOU] because of [YOUR] membership in a protected subgroup participating in the [T]AJP," as stated in paragraph 28 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 9:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that Defendants "fail[ed] to undertake a reasoned decision-making process reflecting deliberate and considered policy decisions" regarding the TAJP, as stated in paragraph 36 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 10:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that Defendants "fail[ed] to engage in conscious balancing of risks and advantages of implementation and enforcement of the new eligibility policy" for the TAJP, as stated in paragraph 36 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 11:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "the retroactive application of the new eligibility policy [for the TAJP] was arbitrarily implemented only as an afterthought," as stated in paragraph 37 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 12:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "Defendants … have enforced and continue to enforce, the new eligibility requirements [for the TAJP] against [YOU]," as stated in paragraph 40 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 13:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "[m]ost [TAJP] assignments under the exceptions are either to Family Law Departments or to courts located in communities far from the home counties of Plaintiffs," as stated in paragraph 43 of YOUR Second Amended Complaint in the ACTION.

REQUEST FOR PRODUCTION NO. 14:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "the 'exception' procedure [for the TAJP] otherwise imposes excessive additional

work on local courts," as stated in paragraph 44 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 15:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding YOUR allegation that "the changes in the eligibility requirements [for the TAJP], including the imposition of the lifetime cap, can hardly be considered a necessity," as stated in paragraph 45 of YOUR Second Amended Complaint in this ACTION.

REQUEST FOR PRODUCTION NO. 16:

All DOCUMENTS, including but not limited to COMMUNICATIONS and exception request forms, regarding any requests, made for YOU or on YOUR behalf, for an exception or other relief from eligibility criteria for participation in the TAJP.

REQUEST FOR PRODUCTION NO. 17:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding any exceptions or other relief YOU received from eligibility criteria for participation in the TAJP.

REQUEST FOR PRODUCTION NO. 18:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding any harm or damages YOU allege to have suffered or sustained in this ACTION.

REQUEST FOR PRODUCTION NO. 19:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding each TAJP assignment YOU received prior to May 21, 2018, including whether YOU accepted or declined each such assignment.

REQUEST FOR PRODUCTION NO. 20:

All DOCUMENTS, including but not limited to COMMUNICATIONS, regarding each TAJP assignment YOU received since May 21, 2018, including whether YOU accepted or declined each such assignment.

REQUEST FOR PRODUCTION NO. 21:

All of YOUR COMMUNICATIONS with Dr. Bruce Hoadley regarding this ACTION, including but not limited to COMMUNICATIONS regarding Dr. Hoadley's Report in Support of Plaintiffs' Motion for Preliminary Injunction, filed in this ACTION on July 1, 2019.

Dated: November 12, 2021.

JONES DAY

By: _____
Robert A. Naeve

Attorneys for Defendants
JUDICIAL COUNCIL OF CALIFORNIA and CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

PROOF OF SERVICE

I, Frances Pham, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3161 Michelson Drive, Suite 800, Irvine, California 92612. On November 12, 2021, I served a copy of the within document(s):

DEFENDANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS (SET ONE) TO PLAINTIFF MAHLER

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Quentin L. Kopp, Esq.
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Attorneys for Plaintiffs
GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, and JOHN SAPUNOR

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 12, 2021, at Irvine, California.

Frances Pham

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 December 15, 2021, I served true and correct copies of the document(s) listed here:

- PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO SECOND 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 15th day of December, 2021, at Santa Rosa, California.

Thomas W. Jackson