

Tentative Rulings for April 27, 2022
Department 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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(03)

Tentative Ruling

Re: **Poore v. Milligan**
Superior Court Case No. 20CECG00142

Hearing Date: April 27, 2022 (Dept. 503)

Motion: Defendants' Demurrer and Motion to Strike Portions of
Second Amended Complaint

Tentative Ruling:

To overrule the demurrer as to the first, second, third and seventh causes of action. To sustain the demurrer to the eighth cause of action for failure to state facts sufficient to constitute a cause of action, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) To grant the motion to strike in its entirety, without leave to amend. (Code Civ. Proc., § 436.)

Explanation:

Demurrer to First Cause of Action: Defendants demur to the first cause of action for breach of written contract, contending that plaintiff has not alleged a valid claim because the written contract only provides that plaintiff has a right of first refusal if defendant Don Milligan either decides to transfer the business to a third party, dies, or becomes incapacitated. Defendants note that plaintiff has not alleged that any of these events occurred, and instead he alleges that defendant Milligan announced that he was going to retire and offered to sell the business to plaintiff, then changed his mind and refused to sell the business to him. Thus, defendants contend that plaintiff has not alleged that the right of first refusal was ever triggered. In addition, they argue that plaintiff has not sufficiently alleged that he performed his obligations under the agreement.

However, it appears that the agreement requires defendant Milligan to offer plaintiff the right of first refusal if he decides to sell the business to someone else, or withdraws from the business, or if he dies, becomes incapacitated, or retires. While defendants argue that the right of first refusal is not triggered by defendant Milligan's retirement, but only by a planned sale to a third party or defendant Milligan's death or incapacity, the agreement states that, "[t]his Agreement is made in order to restrict the rights of the Parties to sell or otherwise transfer all or any part of the business described below, and to provide the terms of purchasing said business *in the event Seller retires, dies, or otherwise withdraws from said business* whether voluntarily or involuntarily." (Exhibit A to SAC, p. 1, first paragraph, italics added.) The agreement goes on to state that, "Seller and Buyer wish to provide for Buyer to purchase said business of Seller at a future time including, without limitation, *upon Seller's retirement, death, or incapacity....*" (*Id.* at p. 1, fifth "Whereas" clause, italics added.)

In paragraph 3, entitled "Right of First Refusal," the agreement states that "Seller shall not transfer all or any portion of the Business or Seller's interest in the Business including without limitation capital, profits, and chattel, outside the terms of this

Agreement and without providing Buyer a right of first refusal to exercise the terms of this Agreement. Said right of first refusal does not and shall not obligate Buyer to purchase the Business or any portion of it.” (*Id.* at p. 2, ¶ 3.) Also, “[i]f the Business has not been purchased by Buyer prior to Seller’s death or incapacity, Seller’s estate or successor in interest shall sell the Business to Buyer via a right of first refusal in the same manner as described in paragraph 3, and under the same financial terms as described elsewhere in this Agreement.” (*Id.* at ¶ 5.) “If Buyer predeceases or retires before Seller, Seller shall have no further obligations under this Agreement to Buyer or to Buyer’s estate, except to pay Buyer’s estate any amounts that would have been due to Buyer for work performed by Buyer.” (*Id.* at ¶ 5.)

While the portion of the agreement related to the right of first refusal does not specifically mention that plaintiff has a right to purchase the business in the event of defendant Milligan’s retirement, other parts of the agreement mention that the agreement is intended to provide for purchase of the business if defendant Milligan retires, dies, withdraws from the business, or is incapacitated. (See Agreement, p. 1, first paragraph and fifth “Whereas” clause.) Therefore, it appears that the parties intended to allow plaintiff to purchase the business in the event defendant Milligan decided to retire. To the extent that the agreement is ambiguous with regard to exactly how plaintiff was to purchase the business in the event of defendant Milligan’s retirement, this is not an issue that the court can resolve on demurrer.

In the second amended complaint, plaintiff now alleges that defendant Milligan told him that he intended to retire, and that he was offering to sell the business to him. (SAC, ¶¶ 8, 14.) Plaintiff exercised his option to purchase the business when defendant Milligan notified him that he was retiring. (*Id.* at ¶ 15.) Plaintiff performed his obligations under the agreement by co-signing with defendants on the lease agreement for the office property, performing work, purchasing items and furnishing the business, sharing overhead expenses for the office operation, and servicing clients that defendant Milligan did not or could not service. (*Id.* at ¶¶ 9, 14.) Plaintiff also expended significant time and expense to prepare for the sale, including preparing office staff for the transition in ownership and making introductions to clients that were being transferred to him. (*Id.* at ¶ 14.) He also raised funds to purchase the business. (*Id.* at ¶ 17.)

The parties agreed that the sale would conclude by July 1, 2019. (*Id.* at ¶ 10.) However, approximately three days before the sale was to conclude, defendant Milligan unexpectedly repudiated the agreement and would not sell any part of the business to plaintiff under any circumstances. (*Id.* at ¶¶ 10, 15.) Defendant Milligan gave no reason for the repudiation, and then had the locks changed on the property even though plaintiff was a co-signer on the lease, thus excluding plaintiff from the office. (*Ibid.*) Plaintiff alleges that he was injured in the amount of at least \$2,000,000 based on the loss of the business, including improvements, preparations, furnishings, and value added by plaintiff, as well as the thousands of dollars plaintiff had already spent to conclude the sale. (*Id.* at ¶ 18.)

As a result, plaintiff has now alleged sufficient facts to state a claim for breach of the written contract that gave him the right of first refusal to purchase the business. Plaintiff alleges that defendant Milligan told him he was retiring, that defendant Milligan offered to sell the business to him under the written agreement, and that plaintiff

accepted the offer. He also alleges performance of certain obligations under the agreement, including obtaining funding for the purchase. However, defendant Milligan then refused to sell the business to him and locked him out of the office. Consequently, plaintiff has adequately alleged his claim for breach of the written contract, and the court overrules the demurrer to the first cause of action.

Demurrer to Second Cause of Action: Defendants have demurred to the second cause of action for breach of oral contract on the ground that the purported oral contract is barred because the written agreement superseded it. Defendants note that the written contract contains an integration clause, stating that “[t]his Agreement constitutes the whole and entire agreement of the Parties with respect to its subject matter. This Agreement replaces and supersedes all prior written and oral agreements by and between the Parties.” (Agreement, p. 4, ¶ 1.) Thus, defendants argue that any prior oral agreement between the parties has been superseded by the written agreement and cannot be enforced. They also contend that the parol evidence rule prevents introduction of any evidence of a prior or contemporaneous oral agreement that would modify or contradict the terms of the written agreement. (Code Civ. Proc., § 1856, subd. (a).) As a result, they conclude that plaintiff cannot state a valid claim for breach of the alleged oral agreement to sell the business to him.

However, defendants’ demurrer to the second cause of action is barred by Code of Civil Procedure section 430.41, subdivision (b), which states that, “[a] party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer.” (Code Civ. Proc., § 430.41, subd. (b).) Here, defendants could have raised their argument regarding the oral contract for sale of the business being barred by the integrated written agreement and the parol evidence rule in their earlier demurrers to the original and first amended complaints, but they did not do so. As a result, the court will not consider their new contention now.

Also, even if the court were to consider defendants’ argument, the alleged oral agreement is not necessarily entirely barred by the written agreement. The written agreement does contain an integration clause, and thus evidence of any prior or contemporaneous oral agreement regarding sale of the business would be inadmissible to vary the terms of the written agreement. (Code Civ. Proc. § 1856, subd. (a).) However, plaintiff has also alleged that there was an oral agreement between himself and defendant Milligan to spare office space and to share commissions prior to defendant Milligan’s retirement. (SAC, ¶ 20.) Plaintiff performed his obligations under the oral agreement by co-signing the lease, sharing office space and commissions, and serving clients for both himself and defendant Milligan. (*Id.* at ¶ 22.) Plaintiff also paid for office expenses including paying the lease, purchasing office equipment, and purchasing business software. (*Id.* at ¶ 21.) However, defendant Milligan breached the oral agreement by failing to perform his professional responsibilities to clients, thereby negating the value of the business. (*Id.* at ¶ 21.) Defendant Milligan also defamed plaintiff to his clients and potential clients, and locked him out of the office despite his name being on the lease. (*Id.* at ¶¶ 10, 12.)

Thus, plaintiff has alleged the existence and breach of an oral agreement between the parties to share office space, clients, and commissions. While the written agreement does appear to supersede the alleged oral agreement regarding sale of the business, it does not appear to be intended to supersede the oral agreement regarding sharing of office space, clients, or commissions. As a result, plaintiff has stated a valid claim for breach of an oral contract with regard to the shared business operation, even if he has not stated a valid claim for an oral agreement to sell the business. Therefore, the court overrules the demurrer to the second cause of action.

Demurrer to Third Cause of Action: Defendants argue that, since plaintiff has not alleged valid claims for breach of written or oral contract, he has also failed to allege a valid claim for breach of the implied covenant of good faith and fair dealing. However, as discussed above, plaintiff has now alleged sufficient facts to state claims for breach of oral and written contracts, so he can also plead a claim for breach of the implied covenant. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)

Defendants also contend that the acts that plaintiff has alleged constituted breach of the implied covenant have nothing to do with the express duties of the parties under the terms of the written agreement, and in fact they are contradictory to the written agreement's terms. Thus, they argue that plaintiff is improperly seeking to use the implied covenant to impose entirely new contractual duties that are not supported by the written contract.

It is true that "[t]he implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094, quoting 1 Witkin, Summary of Cal. Law (2003 supp.) Contracts, § 743, p. 449.)

Here, however, it does not appear that plaintiff's breach of implied covenant claim is based on duties that are not imposed by the underlying contracts. Instead, plaintiff has alleged that defendants intentionally and in bad faith interfered with his ability to benefit from the written and oral contracts. For example, plaintiff alleges that defendants breached the implied covenant of good faith and fair dealing by defaming him in an effort to damage his reputation and devalue the business that defendants had promised to sell him under the written agreement. (SAC, ¶ 25.) Defendant Milligan also allegedly breached the implied covenant with regard to the oral contract to share office space and split commissions with plaintiff by changing the locks on the office, thus preventing him from having the benefit of the expenses he incurred to furnish and supply equipment to the office. (*Id.* at ¶ 26.) Such allegations are sufficient to show that defendants interfered with the performance of the contracts and deprived plaintiff of the benefits of the contracts. As a result, the court overrules the demurrer to the third cause of action.

Demurrer to Seventh Cause of Action: Defendants argue that plaintiff has confusingly and improperly alleged two different torts as one cause of action, even though they have different elements. They claim that plaintiff has not alleged any interference with an existing contractual relationship to support his interference with present contractual relationship claim. Also, with regard to the prospective economic

relations claim, defendants contend that plaintiff has only alleged that defendant Milligan interfered with plaintiff's prospective economic relationship with defendant Milligan's own clients, and that defendant Milligan cannot be held liable for interfering with a contract to which he is a party. (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 517.) Finally, defendants contend that plaintiff is improperly attempting to bootstrap his breach of contract claim into a tort claim by alleging that defendant Milligan interfered with the performance of the right of first refusal contract.

As defendants note, interference with present contractual relations requires the existence of an actual contract between the plaintiff and a third party, with intentional and knowing interference in that contractual relationship by the defendant. (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1140-1141.) On the other hand, interference with prospective economic advantage does not require an existing contractual relationship, but only the probability of economic advantage in the future. (*Id.* at pp. 1141-1142.) The defendant's interference in the prospective relationship must be wrongful by some measure other than the fact of interference itself. (*Ibid.*, citing *Della Penna v. Toyota Motor Sales USA, Inc.* (1995) 11 Cal.4th 376, 393.)

In the present case, plaintiff has alleged claims for both interference with prospective economic advantage and interference with existing contractual relationship as one cause of action, which does create some confusion and ambiguity. The two causes of action are separate and distinct, with different elements and requirements of proof, as discussed above. Alleging them as if they were one-and-the-same creates some ambiguity. However, the claim is not so confusing and ambiguous as to make it impossible for defendants to respond to it. In essence, plaintiff has alleged that defendant Milligan interfered with both his relationships with plaintiff's existing clients and also his anticipated relationships with the clients he expected to inherit from defendant Milligan when Milligan sold the business to him. While it is not ideal that plaintiff chose to allege the two claims together, the resulting ambiguity and confusion is not so great as to warrant sustaining the demurrer for uncertainty. Any confusion can be resolved through discovery. Therefore, the court overrules the demurrer for uncertainty.

Defendants also contend that plaintiff's intentional interference with existing contractual relations is insufficiently pled because he does not allege anything more than that his clients were "affected" by defendant Milligan's actions. (SAC, ¶ 45.) However, defendants ignore the fact that plaintiff has now alleged that he actually lost some of his clients due to defendant Milligan's conduct. (*Ibid.*) "[Plaintiff] lost clients, both current and prospective, due to Defendant's actions and statements." (*Ibid.*) Therefore, it appears that plaintiff has sufficiently alleged his claim for intentional interference with existing contractual relations, and the court overrules the demurrer to the interference with existing contract claim.

Defendants have also argued that plaintiff's intentional interference with prospective economic advantage claim is defective because plaintiff is essentially alleging that defendant Milligan interfered with his contractual relationships with his own clients, which is not a valid basis for an interference claim. (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, *supra*, 7 Cal.4th at p. 517.) However, even if plaintiff has not alleged a valid claim for intentional interference with prospective economic relations, he has stated a claim for intentional interference with existing contractual relationships. A

general demurrer for failure to state facts sufficient to constitute a cause of action must be overruled if the plaintiff has stated any valid claim, even one that he did not intend to state. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.) Therefore, since plaintiff has alleged a valid claim for intentional interference with existing contractual relations, the court overrules the demurrer to the seventh cause of action.

Demurrer to Eighth Cause of Action: In order to state a claim for intentional infliction of emotional distress, the plaintiff must allege (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; (3) and actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394.)

“‘Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.’ The defendant must have engaged in ‘conduct intended to inflict injury or engaged in with the realization that injury will result.’” (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, quoting *Christensen v. Superior Court* (1991) 54 Cal.3d 868.)

“In order to avoid a demurrer, the plaintiff must allege with ‘great specificity’ the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community.” (*Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 160-61, citing *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.) “[T]he defendant’s conduct must be ‘intended to inflict injury or engaged in with the realization that injury will result. [Citation.]’” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051, quoting *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) “Liability for intentional infliction of emotional distress ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’” (*Hughes v. Pair, supra*, at p. 1051, internal citation omitted.)

Also, “[w]ith respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar. ‘Severe emotional distress means “‘emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’”” (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1051, quoting *Potter v. Firestone Tire & Rubber Co., supra*, 6 Cal.4th at p. 1004.)

In the present case, plaintiff alleges that defendants acted intentionally, with malice, and with the intent of causing plaintiff to suffer humiliation, mental anguish, and emotional and physical distress. (SAC, ¶ 49.) He also alleges that “Defendant intentionally contacted prospective clients of [plaintiff] and defamed [plaintiff’s] reputation, changed the locks on the jointly leased office space denying [plaintiff] entry, and refused to discuss the contractual business sale to [plaintiff].” (*Ibid.*) Also, “Defendant Milligan published via mass email defamatory statements about Plaintiff Poore, including both current and prospective clients of Plaintiff Poore. Further, Plaintiff Poore is informed and believes and thereon alleges that Defendant Milligan verbally defamed him by stating to numerous individuals that Plaintiff Poore was incompetent, incapable of performing in his professional life, was not trustworthy, should be avoided, would try to unethically steal clients, acted otherwise unethically, had not treated

Defendant Milligan fairly, had refused to purchase the business, and/or that Plaintiff Poore was not able to operate the business." (*Ibid.*) These statements were false and were intended to cause plaintiff severe emotional harm and to destroy plaintiff's ability to compete with defendant Milligan. (*Ibid.*)

However, none of these alleged actions and statements by defendant Milligan constitute the type of extreme and outrageous conduct that would support a claim for intentional infliction of emotional distress. At most, plaintiff has alleged that defendant Milligan breached the alleged contract to sell the business, made false and defamatory statements about him to existing and potential clients, and impugned his professional abilities and ethics. Such conduct, while rude, unprofessional, and defamatory, is not so extreme as to go beyond the bounds of what is tolerated in a civilized society. (See e.g. *Hughes v. Pair, supra*, 46 Cal.4th at p. 1051 [finding that defendant's sexually suggestive comments to plaintiff were not sufficient to support a claim for intentional infliction of emotional distress].)

Nor has plaintiff alleged any facts showing that he actually suffered extreme emotional distress due to defendants' actions. At most, plaintiff's allegations of emotional distress are vague and conclusory, and do not show the type of severe or extreme emotional distress needed to support a claim for intentional infliction of emotional distress. As a result, the court sustains the demurrer to the eighth cause of action.

Furthermore, it does not appear that plaintiff can allege any more facts that would cure the defects in his claim, as he has already had several chances to allege a valid cause of action and has not been able to do so. Nor has he identified any other facts that he could truthfully allege if he were given leave to amend. Consequently, the court sustains the demurrer to the eighth cause of action without leave to amend.

Motion to Strike: First, defendants move to strike some of the allegations in paragraph 16 of the second amended complaint, which is part of the first cause of action for breach of the written sale contract. Plaintiff alleges that "Defendants further breached said written contract by defaming Plaintiff Poore's professional reputation and by failing to perform Defendants' own professional responsibilities to clients, thereby negating the value of the business and the benefit to Plaintiff Poore which he and Defendants reasonably expected Plaintiff Poore to receive from complete performance of the written agreement." (SAC, ¶ 16.)

However, as defendants point out, this allegation does not actually tend to show any breach of the terms of the written right of first refusal agreement. The written agreement does not impose any duties on defendants not to make defamatory statements about plaintiff, nor does it require defendants to perform their professional duties in any particular manner. (See Exhibit A to SAC.) The agreement simply requires defendant Milligan to offer to sell the business to plaintiff if certain events occurred. While the allegations may support some other claim, such as defamation or breach of the implied covenant of good faith and fair dealing, they have nothing to do with whether defendants breached their obligations in the written agreement. Therefore, the court strikes the first sentence of paragraph 16 of the second amended complaint as improper and irrelevant surplusage.

Second, the court grants the motion to strike the punitive damages allegations from the breach of implied covenant and negligent infliction of emotional distress claims. (SAC, ¶¶ 27, 55.) Plaintiff has conceded that he cannot seek punitive damages with regard to these claims, so the allegations related to punitive damages are irrelevant and improper. Furthermore, the court denies leave to amend, as plaintiff has failed to show how he could amend the complaint to seek punitive damages with regard to these causes of action.

Finally, the court grants the motion to strike the prayer for attorney's fees from the second amended complaint. (Prayer for Relief, ¶ 5.) Under the American Rule, attorney's fees are not recoverable unless there is a statute or contract that provides for them. (Code Civ. Proc., § 1033.5; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.)

Here, plaintiff has not alleged that there is a statute or contract clause that provides for an award of attorney's fees to him. The attached written contract also does not include a clause regarding attorney's fees. (Exhibit A to SAC.) Plaintiff concedes that he has not alleged any statutory or contractual basis for an award of fees. Thus, the request for attorney's fees is unsupported and is subject to being stricken as improper.

Nevertheless, plaintiff argues that striking the prayer for fees would be premature, as he might later discover a basis for such fees. Motions to strike prayers for attorney's fees are common, and should be granted if the plaintiff fails to cite to a statute or contract language supporting the request. The entire purpose of a motion to strike is to delete irrelevant, false or improper language from pleadings, including improper requests for attorney's fees. (Code Civ. Proc., § 436; *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal. App. 4th 385, 404 [affirming trial court's grant of motion to strike attorney's fees].) Therefore, plaintiff's contention that the motion to strike the request for attorney's fees is somehow premature is without merit.

Also, the case has now been pending for over two years, so it is hardly unreasonable to expect plaintiff's counsel to be able to cite to some contractual or statutory basis for his fees request. As discussed above, the only possible basis for attorney's fees would be either the contract between the parties or a statute. The contract has been in plaintiff's possession for some time, so, if the contract provided any basis for a fees request, plaintiff could have identified the relevant language in his amended complaint or his opposition to the motion to strike. He has not done so, apparently because no such language exists in the contract.

Nor has plaintiff been able to cite to any statute that provides for fees here. Again, if any statutory support for fees existed, plaintiff's counsel could have cited to it in his amended complaint or opposition to the motion to strike. Since he has not done so, he has failed to show that there is any basis for the fees request. There is no reason to believe that plaintiff's counsel will find statutory support for attorney's fees in the course of the discovery process. Of course, if plaintiff's counsel does later discover some basis for a request for fees, he could move to amend the complaint again. However, at this time, the court grants the motion to strike the fees request without leave to amend, as there does not appear to be any way for plaintiff to seek fees in this case.

(20)

Tentative Ruling

Re: ***Cantu v. State of California Department of Transportation et al.***
Superior Court Case No. 20CECG00632

Hearing Date: April 27, 2022 (Dept. 503)

Motion: Defendants' Motion for Summary Judgment or Adjudication

Tentative Ruling:

To continue the hearing to June 2, 2022, at 3:30 p.m. in Department 503, to allow supplemental briefing (limited to the issue of waiver of Government Code section 910.8 discussed below). Defendants and plaintiff shall file supplemental briefs on the issue on or before May 19, 2022.

Explanation:

This is a personal injury action arising out of an automobile accident allegedly caused by James Hinson, a Department of Transportation employee. The complaint alleges a single cause of action for motor vehicle negligence. The Judicial Council form complaint checks boxes indicating that plaintiff is required to comply with a claims statute and has complied. (Complaint ¶ 9(a).)

Defendants move for summary judgment on the ground that plaintiff did not comply with the Government Code claim presentation requirements. The main issue presented in this motion is whether plaintiff's counsel's August 17, 2018 letter of representation to the Department of Transportation substantially complies with the claim presentation requirements.

The parties disagree on the question of whether the moving papers establish that Hinson was acting in the course and scope of his employment at the time of the accident. The complaint clearly alleges that he was. In the opposition, plaintiff misconstrues his own complaint in arguing that the pleading is inconsistent. Paragraph MV-2(a) identifies Hinson as the driver of the vehicle. Paragraphs MV-2(b), (c) and (d) identify State of California/Department of Transportation as the employer of the driver, owner of the vehicle, and the defendant who entrusted the vehicle. Paragraph MV-2(e) alleges that State of California/Department of Transportation and Hinson were the agents and employees of the other defendants acting in the course and scope of their employment. Read as a whole, the complaint clearly alleges that Hinson was employed by State of California/Department of Transportation and was acting in the scope of his employment/agency at the time of the accident.

An action for "money or damages" may not be maintained against the "state" or a "public entity" unless a written claim has first been timely presented to the defendant and rejected in whole or in part. (Gov. Code, §§ 905, 905.2, 945.4.) Presentation of a claim, when required by law, is a mandatory prerequisite to maintaining a cause of action against a public entity, and failure to file a claim is fatal to the claimant's cause of

action. (*State v. Superior Court* (2004) 32 Cal.4th 1234, 1239.) It is an element of the cause of action. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239-1244.)

The claim is required to be presented "not later than six months after the accrual of the cause of action." (Gov. Code, § 911.2, subd. (a).) A claim must include: "(a) The name and post office address of the claimant. [¶] (b) The post office address to which ... notices [are] to be sent. [¶] (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted. [¶] (d) A general description of the ... injury, damage or loss incurred.... [¶] (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known. [¶] (f) The amount claimed if it totals less than ten thousand dollars (\$10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars (\$10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case." (Gov. Code, § 910.)

To gauge the sufficiency of a particular claim against a public entity, two tests must be applied: Is there some compliance with all of the statutory requirements; and, if so, is this compliance sufficient to constitute substantial compliance. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447.)

Plaintiff's counsel sent the Department of Transportation a representation letter on August 17, 2018. Although it includes plaintiff's counsel's mailing address, it does not include "[t]he post office address of the claimant," any "[monetary] amount claimed," or "whether the claim would be a limited civil case," and fails to even indicate that plaintiff is seeking money damages at all. (Gov. Code, §§ 910, subds. (a), (d) and (f); see *Olson v. Manhattan Beach Unified Sch. Dist.* (2017) 17 Cal.App.5th 1052, 1061 [finding claim defective because, among other things, it did not contain "the dollar amount claimed or whether the claim would be a limited civil case"]; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1083 ["Nowhere in the letter is there a claim for money damages, nor, for that matter is there even an estimate of the amount of any prospective injury, damage or loss."]; *Pac. Tel. & Tel. Co. v. County of Riverside*, (1980) 106 Cal.App.3d 183, 191 [holding that claim did not satisfy substantial compliance where it did not give "notice of ... the extent of the damages claimed."].) It is undisputed that plaintiff's August 17, 2018 letter does not contain this information.

Contending that the representation letter substantially complies with the presentation requirements, plaintiff relies on *Santos v. El Guapos Tacos, LLC* (2021) 72 Cal.App.5th 363, as "address[ing] the issue of the adequacy of notice to a defendant finding that the notice was adequate so long as it alerted the employer and the Labor and Workforce Development Agency of the existence of a potential claim." (Oppo. 3:17-20.) However, *Santos* did not involve compliance with the Government Code claim presentation requirements. It involved the prefiling notice requirements for a lawsuit brought against a private employer pursuant to the Private Attorneys General Act. (*Santos, supra*, 72 Cal.App.5th at p. 366.) It does not address public entity liability or what constitutes "substantial compliance" with respect to the claim filing requirements set forth in section 910 of the Government Tort Claims Act. *Santos* is simply not relevant.

Since plaintiff's counsel's letter does not set forth many of the required elements of a claim as specified in Government Code section 910, there is no substantial compliance.

However, the moving papers include no discussion of Government Code section 910.8, which provides that if, in the opinion of the board of the relevant government agency, a claim as presented fails to comply substantially with the requirements of Government Code sections 910, 910.2 or 910.4, the board or person designated may, within 20 days after the claim is presented, give written notice of the claim's insufficiency, stating with particularity defects or omissions therein.

"Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to the defect or omission as provided in Section 910.8." (Gov. Code, § 911.)

"A 'claim as presented' is a claim that is defective in that it fails to comply substantially with Government Code sections 910 and 910.2, but nonetheless puts the public entity on notice that the claimant is attempting to file a valid claim and that litigation will result if it is not paid or otherwise resolved. A 'claim as presented' triggers a duty on the part of the governmental entity to notify the claimant of the defects or omissions in the claim. A failure to notify the claimant of the deficiencies in a 'claim as presented' waives any defense as to its sufficiency." (*Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 643) "[A] document constitutes a 'claim as presented' ... if it discloses the existence of a 'claim' which, if not satisfactorily resolved, will result in a lawsuit against the entity." (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 709)

(*Olson v. Manhattan Beach Unified School Dist.* (2017) 17 Cal.App.5th 1052, 1061-1062.)

When a public entity receives written notice that a claim for money damages exists and that litigation may ensue, it has the responsibility under Government Code sections 910.8 and 911 to notify the claimants of any defect that renders the document insufficient under Government Code sections 910 and 910.2. (*Phillips, supra*, 49 Cal.3d at p. 709.)

The question is whether the August 17, 2018 representation letter constitutes a "claim as presented." In *Foster v. McFadden* (1973) 30 Cal.App.3d 943, the plaintiff was injured when he was struck by a bulldozer operated by an employee of a sanitation district. The plaintiff's attorney sent the driver of the bulldozer a letter which stated the plaintiff's name and the date and place of the accident. The letter asked the driver to forward the letter to his insurer, or, if not insured, to contact the plaintiff's counsel. The plaintiff's attorney also sent a copy of the letter to the sanitation district. The Court of Appeal found that the letter was sufficient to trigger the notice and defense-waiver provisions of Government Code sections 910.8 and 911 and reversed a judgment entered in favor of the district. The Court of Appeal reasoned that the plaintiff's letter "accomplished the two principal purposes of a sufficient claim. It afforded the district the opportunity to make a prompt investigation of the accident occasioning the letter

(36)

Tentative Ruling

Re: **Frank v. Carter, et al.**
Superior Court Case No. 21CECG03129

Hearing Date: April 27, 2022 (Dept. 503)

Motion: Defendants' Motion to Stay Civil Action

Tentative Ruling:

To grant.

Explanation:

An application for a stay is addressed to the sound discretion of the trial court. (*Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746.) An order staying discovery until expiration of the criminal statute of limitations allows the plaintiff to prepare his or her action "while alleviating [the defendant's] difficult choice between defending either the civil or criminal case." (*Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 690.)

Pursuant to both the United States and California Constitutions, a person has the right to refuse to answer potentially incriminating questions put to him or her in any proceeding. (U.S. Const., 5th Amend.; Cal. Const., art. 1, § 15; see Evid. Code, § 940.) The privilege against self-incrimination protects an individual from being forced to answer official questions in any proceeding, civil or criminal, formal or informal, in which the individual reasonably believes that the answers might incriminate him or her in a criminal case. (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 714; *Kassey S. v. City of Turlock* (2013) 212 Cal.App.4th 1276, 1280.) "One cannot be forced to choose between forfeiting the privilege, on the one hand, or asserting it and suffering a penalty for doing so on the other." (*Spielbauer, supra*, 45 Cal.4th at p. 714.) The privilege may be invoked where it is shown that the plaintiff's fear of self-incrimination is "substantial and real, as opposed to merely trifling or imaginary[.]" (*Kassey S., supra*, 212 Cal.App.4th at p. 1281; *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1044.)

"The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made in light of the particular circumstances and competing interests involved in the case. This means the decision maker should consider the extent to which the defendant's Fifth Amendment rights are implicated. In addition, the decision maker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation." (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 885, citing *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324–25, internal citations and quotation marks omitted.)

Since the motion as to defendant Carter is unopposed, the analysis is limited to defendant Graham.

- Extent to Which Defendant Graham's Fifth Amendment Rights Are Implicated

Defendant Graham contends summarily that although there are currently no criminal charges against her, the risk of criminal prosecution is elevated through her involvement and testimony in the civil proceedings. Defendant Graham's argument relies primarily on the fact that the civil and criminal proceedings are interrelated and involve the same facts.

On the other hand, plaintiff argues that the civil matter does not place defendant Graham at any risk of facing potential criminal prosecution, because the facts applicable to her in the instant case will not require her to produce information that will give rise to a criminal prosecution against her. Plaintiff contends that the only way defendant Graham could potentially face criminal prosecution is if there was some evidence indicating that she was the driver of the subject vehicle, and the evidence confirms that she was not in the vehicle when the subject incident occurred.

Although there is merit to plaintiff's argument, it cannot be proven with certainty that defendant Graham's risk of criminal prosecution in relation to the subject incident is nonexistent. Since the material facts of both actions are one in the same, defendant Graham's fear of prosecution and self-incrimination is substantial and real. (*Kassey S.*, *supra*, 212 Cal.App.4th at p. 1280.)

- Interest of Plaintiff to Proceed Expeditiously and Potential Prejudice of Delay

Plaintiff argues that proceeding in the instant matter would allow him to obtain information from defendant Graham while the information is "fresh in her mind." (Opp., 5:21.) Indeed, a stay of the proceedings could potentially "increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." (*Avant! Corp.*, *supra*, 79 Cal.App.4th at p. 887.)

However, defendant Graham argues that allowing the criminal case to proceed first may narrow the issues and streamline discovery in the civil proceeding. Additionally, since the civil and criminal actions involve the same material facts, the risk of the witnesses' inability recall facts required in the civil proceeding is decreased as these same witnesses may be required to recall these same facts during the criminal proceeding.

Plaintiff also argues that he would be prejudiced by the delay as "it is unconscionable to force a parent, whose child is deceased as a result of the subject incident, to halt or pause [his] claims against a defendant on the grounds that the defendant may face criminal prosecution." (Opp., 5:21-24, emphasis in original.)

Here, since the civil and criminal proceedings are based on the same or similar material facts, the danger of prejudice resulting from the loss of evidence is low. However, plaintiff's interest in proceeding expeditiously with the civil matter is unquestionable. No criminal charges have yet been filed against defendant Graham. If

criminal charges are filed against Graham in the future, this would likely mean that a stay would extend until that future criminal proceeding concluded, or at least until the applicable statute of limitations is expired. Thus, the prejudice resulting from delay is great, due to the uncertainty of the timeframe that the stay would remain.

- Burden on Defendant

Defendant Graham argues that the burden placed upon her is a significant one, as the immediate civil action forces her to choose between defending herself and possibly compromising her criminal defense (should there be a criminal prosecution against her) or simply abandoning her defense in the instant case. Plaintiff contends that no burden is imposed on defendant Graham, as the criminal proceeding against defendant Carter has been ongoing for over a year and no criminal charges have yet been brought against her.

Defendant Graham's burden is likely to be significant. Although there is currently no criminal proceeding against her, since the facts of both actions are intertwined, it is not unreasonable for defendant Graham to believe that she is in danger of having to invoke her Fifth Amendment rights. It is without question that this is likely to influence her ability to defend against the instant case.

In *Pacers v. Superior Court*, *supra*, 162 Cal.App.3d 686, after weighing the parties' competing interests, the court imposed a stay in a civil action involving individual defendants who were facing *possible* criminal prosecution based on the same facts, just as in the case at bar. (*Id.* at p. 690.) There, the court reasoned that the defendants' Fifth Amendment rights against self-incrimination outweighed the plaintiffs' objections based on inconvenience and delay. (*Ibid.*) Moreover, should the instant matter be submitted to jury, a jury would likely be influenced by defendant Graham invoking her Fifth Amendment rights, even when instructed otherwise.

- Convenience of the Court and Use of Judicial Resources

Plaintiff maintains that it is somehow most efficient to allow him to proceed in the civil matter as to defendant Graham only. Plaintiff reasons that his claims against defendant Graham could potentially be resolved before adjudication of the criminal case and, once the stay as to defendant Carter is lifted, the parties can then proceed with a narrow focus as to the claims against defendant Carter only.

The court finds plaintiff's contention as to the efficient use of judicial resources wholly unpersuasive, as plaintiff fails to identify how resolving his claims against defendant Graham first and then against defendant Carter later is more efficient. Additionally, as defendant Graham notes, allowing the civil litigation to proceed will likely result in protracted discovery disputes and further law and motion proceedings, all of which will consume further judicial time and resources.

- Interest of Third-Parties to Civil Action

Neither party identifies any interests of third-parties, nor is the court aware of any third party that may be impacted if the instant case is stayed.

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Tentative Ruling

Re: ***Rebekah Ayers v. Cherry Hill Programs, Inc.***
Superior Court Case No. 20CECG00821

Hearing Date: April 27, 2022 (Dept. 503)

Motion: Preliminary Approval of Class Action Settlement

Tentative Ruling:

To deny plaintiff's motion for preliminary approval of class action settlement and to certify class, without prejudice.

Explanation:

Although plaintiff's motion is entitled a motion for preliminary approval of the class action settlement, plaintiff also seeks class certification for the purposes of approving the settlement. Therefore, the court must first determine whether the class should be certified before deciding whether the settlement should be preliminarily approved.

1. Class Certification

Where certification of a class is sought in conjunction with settlement, the motion is treated the same as if it were a motion solely for certification but for one factor – the proponent need not prove the case is manageable for trial. Everything else has to be proven, with admissible evidence, in order for due process concerns to be met. The Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812.) The certification process ensures that is the case. This is a basic constitutional requirement which applies to all class actions, federal and state.

"Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." (*Amchem Products v. Windsor* (1997) 521 U.S. 591, 620.)

"Code of Civil Procedure section 382 authorizes class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class

representatives who can adequately represent the class.” (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 96-97, internal quotations omitted.)

“Trial courts are accorded great discretion in granting or denying certification. . . . As the focus in a certification dispute is on what type of questions - common or individual - arise in the action, rather than on the merits of the case, in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.” (*Ibid.*, internal quotations omitted.)

a. Numerosity and Ascertainability

Here, the class is limited to local managers, however titled, who were employed by defendant in California between December 30, 2015 and December 30, 2020. The putative class consists of 346 local managers, based upon information shared during informal discovery. No supporting declaration or authenticated records are provided to confirm the estimated class size. Plaintiff counsel's declaration is the sole evidence of the class size. (Hawkins Decl., ¶¶ 73, 75.) At most, his knowledge of the issues of the case is based on documents and evidence obtained from defendant. Declarations of counsel, who have no personal knowledge of the facts, are not sufficient to establish the facts supporting the petition. (*Rodriguez v. County of Los Angeles* (1985) 171 Cal.App.3d 171, 175.) Thus, plaintiff has not offered adequate evidence that the numerosity and ascertainability factors are satisfied.

Additionally, there appears to be some disagreement between the “class period” being between December 15, 2015 and December 20, 2020 and the “class” being persons employed by defendant as salaried, local managers from December 30, 2015 to present. (Settlement Agreement, ¶¶ II.C, II.I.)

b. Community of Interest

The community of interest factor requires consideration of three separate factors: (1) predominant common questions of law or fact; (2) class representatives whose claims are typical of the class; and (3) class representatives and counsel who can adequately represent the class. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The community of interest requirement for certification does not mandate uniform or identical claims, but focuses on internal policies, pattern and practice in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate. (*Capitol People First v. Dept. Developmental Servs.* (2007) 155 Cal.App.4th 676, 692.)

Here, there appear to be sufficient common issues between the putative class members for purposes of the commonality requirement, as plaintiffs allege that they were misclassified as exempt leading to unpaid wages, unpaid overtime, a failure to provide meal and rest breaks, and inaccurate wage statements.

There is also a typicality requirement, i.e. that plaintiff's claims are significantly similar to those of other class members. (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d

462, 470.) This requires them to arise from the same event, practice, course of conduct, or legal theories (even if they are not identical to the class). (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 874; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347.)

Plaintiff's declaration states that, during her employment, she was misclassified as exempt and not paid for all hours worked, paid minimum wages or overtime in a timely manner, provided meal and rest periods, reimbursed for necessary expenses, or provided with accurate itemized wage statements. (Ayers Decl., ¶ 3.) Additionally, plaintiff has presented the declaration of attorney James Hawkins to describe the violations alleged to have been experienced by other class members. (Hawkins Decl., ¶¶ 53, 54.) However, plaintiff's attorney has no personal knowledge as to any facts related to whether plaintiff and the other class members were actually denied rest periods, overtime pay, minimum wages, etc. At most, his knowledge of the issues of the case is based on documents and evidence obtained from defendant and any witness interviews. Declarations of counsel, who have no personal knowledge of the facts, are not sufficient to establish the facts supporting the petition. (*Rodriguez v. County of Los Angeles* (1985) 171 Cal. App. 3d 171, 175.)

Therefore, plaintiff has not presented sufficient evidence to establish that her claims are similar to the type of claims being raised on behalf of the other class members.

c. Adequacy

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 669.) Counsel have shown that they are experienced and that they have successfully litigated other class actions. (Hawkins Decl., ¶ 78; Lucio Decl., ¶¶ 4-10.) Therefore, it does appear that class counsel have shown that they are adequate to represent the interests of the class.

The evidence is insufficient to support plaintiff as the class representative, as there is no evidence that she shares the same claims and interests as the other class members. Plaintiff's declaration does not affirmatively indicate that she has no conflicts that would disqualify her from representing the class members. Therefore, in addition to the typicality concerns described above, there is insufficient evidence for the court to conclude that the named class member is qualified to represent the class.

2. Preliminary Approval of Class Settlement

In light of the lack of evidence supporting the motion for class certification, the court does not have to reach the issue of whether the settlement is fair and reasonable. However, the court nevertheless finds that plaintiff has not met her burden of presenting evidence to establish that the settlement is fair and reasonable here.

"The trial court has broad discretion to determine whether the settlement is fair. It should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed

and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, internal citation omitted.)

“[I]n the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129, internal quotations omitted.)

Plaintiff’s counsel contends that the settlement is fair and reasonable, as it represents approximately 18.3 percent of defendant’s maximum liability, and is well within the ballpark of reasonableness.

Plaintiff initially estimated the claims to be worth approximately \$4.845 million. The estimates are based upon 346 class members, 2,831 workweeks, 1,455 pay periods, 16,986 shifts, 259 former employees, \$20.25 average wage rate, approximately 200 Private Attorneys General Act (“PAGA”) group members, and 638 pay periods in the PAGA period. There is no explanation of how plaintiff arrived at these estimates or supporting evidence provided with the motion.

After taking into consideration the defenses presented by defendant and likely difficulties in certification and establishing common questions of fact, and the burden of litigation costs and defendant’s financial difficulties, plaintiff revised the estimated worth of the claims. The “realistic exposure” for plaintiff’s strongest claims is estimated to be \$1.77 million. The settlement of \$325,000 represents just over 18 percent of the realistic exposure to defendant at trial.

The settlement was reached as a result of mediation with a highly experienced wage and hour mediator. The parties engaged in mediation after informal discovery including the production of wage information for each member of the putative class, the Employee Handbook, pay card policies, and other relevant company policies. Counsel also reviewed the employment file and all wage statements for plaintiff. Counsel conducted interviews regarding the functions and experiences of salaried local managers in California. Importantly, defendant disclosed financial information including tax returns and financial statements in connection with the mediation as evidence of defendant’s financial difficulties. Class counsel reviewed the documents with their certified public accountant prior to the mediation.

Before the court can fairly evaluate the settlement, more support for how plaintiff arrived at the estimated exposure figures is required. Most of the evidence in support of the motion is contained in Mr. Hawkins’ declaration. However, Mr. Hawkins does not have personal knowledge of many of the underlying facts, such as the nature and extent of the actual violations that form the basis of the complaint. He appears to be relying primarily on the evidence obtained from defendant, as well as deposition testimony, written discovery responses, etc. Since much of the evidence presented with the motion

is inadmissible hearsay and not based on personal knowledge, plaintiff has not established that the settlement amount is reasonable in relation to the total value of plaintiff's claims.

The declarations of plaintiff's counsel do establish that the attorneys are highly experienced and qualified to act as class counsel. Plaintiff's attorney is qualified to opine as to the strength of the case, the risks involved, its complexity, and the chances of prevailing at trial. He does provide fairly detailed information on these issues that tend to support the amount of the settlement accepted in relationship to the amounts potentially recoverable, should the matter proceed to trial. It also appears that there was some preliminary informal discovery in the case. The fact that the settlement was reached with the assistance of a mediator after arm's length negotiations also supports the assertion that the settlement was fair and reasonable.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks a fee award based on one-third of the gross settlement. There has been considerable debate in the appellate courts as to whether a percentage fee should be permitted in class action settlements, or whether the courts should employ the lodestar fee calculation method. However, the California Supreme Court determined that a percentage fee method is allowable where there is a common fund settlement.

"Whatever doubts may have been created by *Serrano III* [*Serrano v. Priest* (1977) 20 Cal.3d 25], or the Court of Appeal cases that followed, we clarify today that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund, does not in itself constitute an abuse of discretion. We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 503.)

However, the California Supreme Court also observed that the trial court has discretion to double-check a proposed fee percentage award by using the lodestar method. "Nor do we perceive an abuse of discretion in the court's decision to double check the reasonableness of the percentage fee through a lodestar calculation. As noted earlier, '[t]he lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved.' [Citation.] A lodestar cross-check thus provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee. If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage. [Citation.]" (*Id.* at p. 504.)

