**1. PAUL, ET AL. v. THE RIVA PARTNERS, SC20200155**

**Motion for Class Certification**

This is a putative class action lawsuit alleging wage and hour violations by defendant The Riva Partners, LP ("Riva"), who operate The Riva Grill. Pending is plaintiffs' motion for class certification. The motion is opposed by Riva.

Plaintiffs' First Amended Complaint ("FAC") asserts causes of action for (1) failure to pay all wages due, (2) failure to pay all gratuities, (3) failure to provide rest periods or compensation in lieu thereof, (4) failure to provide meal periods or compensation in lieu thereof, (5) failure to reimburse all business-related expenses, (6) failure to comply with itemized employee wage statement provisions, (7) failure to pay wages at separation of employment, (8) violations of Business and Professions Code § 17200, and (9) PAGA penalties.

Plaintiffs move to certify a Class that will prosecute the case against Riva on behalf of "[a]ll persons who were employed by Defendant in a non-exempt position in California ['Class'] at any time from April 28, 2016 to the present ['Class Period']," and who allegedly suffered certain Labor Code violations.[1] Plaintiffs also seek to certify a Subclass defined as: "All persons who are members of the Class and whose employment was separated between April 28, 2017 and the present" ("Subclass") as to plaintiffs' Seventh Cause of Action for waiting time penalties pursuant to Labor Code §§ 201–204.

**1. Legal Principles**

"Class actions are statutorily authorized '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....' [Citation.] The party seeking class certification must establish (1) 'the existence of an ascertainable and sufficiently

[1] Plaintiffs do not seek to certify a class as to the Ninth Cause of Action for penalties pursuant to Labor Code § 2698, et seq. ("PAGA").

numerous class'; (2) 'a well-defined community of interest'; and (3) 'substantial benefits from certification that render proceeding as a class superior to the alternatives.' [Citation.] The community of interest requirement in turn requires three additional inquiries: (1) whether common questions of law or fact predominate; (2) whether the class representatives have claims or defenses typical of the class; and (3) whether the class representatives can adequately represent the class. [Citations.]

" 'The certification question is "essentially a procedural one" ' [citation] that examines 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment' [citation]. A certification motion ' "does not ask whether an action is legally or factually meritorious" [citation],' but rather whether the common issues it presents ' "are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." ' [Citations and parenthetical.] The court must assume the class claims have merit and resolve disputes regarding the claims' merits only when necessary to determine whether an element for class certification is satisfied. [Citation.]" (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 372.)

**2. Preliminary Matters**

Plaintiffs' Evidentiary Objections to Declaration of Bryce Bjerke

Objections Nos. 1, 2, and 7 are overruled.

Objections Nos. 3, 4, 5, 6, 8, 9, 10, and 13 are sustained.

**3. Discussion**

**3.1 Class is Ascertainable**

The members of the proposed Class and Subclass are readily ascertainable by reference to Riva's business records.

### 3.2 Class is Sufficiently Numerous

To be certified a class must be sufficiently "numerous" in size so as to be "impracticable to bring them all before the court …." (Code of Civ. Proc. § 382.) There is no mandatory minimum number for a class action in California state courts. Class certification has been obtained with 42 retirees/members in *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, disapproved on other grounds in *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, and with as few as 28 beneficiaries/members in *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017.

Here, the proposed Class and Subclass are sufficiently numerous. Through Riva's records, plaintiffs have already identified about 396 employees that are within the Class Period, including about 396 members of the proposed Class and at least 242 members of the proposed Subclass. (Mot., Decl. of Daniel Gaines, ¶ 29.)

### 3.3 Community of Interest of Class Members

#### A. Whether Common Questions of Law or Fact Predominate

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. [Fn.] 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021–1022.) " 'The affirmative defenses of the defendant must

also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues. [Citations.]' [Citation.]" (*Knapp v. AT&T Wireless Servs.*, *Inc.* (2011) 195 Cal.App.4th 932, 941.)

" '[T]hat each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' [Citation.] Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Sav-On Drug Stores*, *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334.)

Plaintiffs' theory of recovery is that Riva uniformly failed to authorize and permit meal periods on shifts of five hours or more; it required Class members to remain on premises during rest breaks; Riva owes meal period and rest break premiums as a result of its purported illegal policies and practices; Riva failed to reimburse Class members for business expenses incurred in the discharge of their duties; it failed to pay all wages due upon separation of employment; it issued inaccurate wage statements; and committed unfair or unlawful business practices in violation of Business and Professions Code § 17200.

In support of their contention that common questions predominate, plaintiffs cite the deposition testimony of Riva's PMK, Thomas Turner. He testified that all employees use the same timekeeping system, Positouch, for clocking in and out, and Riva has used the same timekeeping system for 23 years. (Mot., Decl. of Daniel Gaines, Ex. F.) Riva currently uses Netchex as its payroll company and previously used Payment Tech. (*Id.*, Ex. H.) Riva retains employee time records for at least seven years. (*Id.*, Ex. I.) Riva has retained employee payroll records from Netchex for the

past three to four years, and has retained payroll records from Payment Tech for about 15 years. (*Id.*, Exs. J, K.) Riva's wage statements are uniform in content and format for all Class members during the Class Period. (*Id.*, Ex. L.)

Turner also testified that Riva does not have any kind of employee handbook, and has not used an employee handbook at any time during the Class Period. (*Id.*, Ex. M.) He further testified that Riva's meal and rest break policy had not been amended since July 2015. (*Id.*, Ex. N.) That policy states that rest breaks must be taken on the premises. (*Id.*, Ex. P.) Riva does not schedule meal breaks or require employees to take them, but Riva tells employees that at any time they need a meal break to tell Riva and it will provide a meal break at any given time. (*Id.*, Ex. O.)

For scheduling, Riva posts the employees' schedules in the employee room of the restaurant or employees may pay to download HotSchedules. Riva can also communicate with employees at any time of the day with "broadcast messages" via HotSchedules. Riva does not reimburse employees for the cost of downloading the app because they are not required to download the app. (*Id.*, Ex. Q.)

Plaintiffs also submit multiple declarations from Class members, including from a dishwasher, cook, busser, servers, hostesses, and a bartender. (Mot., Pls. Compendium of Putative Class Member Declarations, Exs. 1–8.) These members uniformly report that they were told they "had to download" HotSchedules; some employees were listed in HotSchedules as on-call and they could not leave the area; some employees' schedules might be suddenly changed within HotSchedules; they uniformly report that they were not reimbursed for the downloading the app or for having to use their personal cell phones for communicating with work; they were not made aware that they were entitled to take a 30 minute meal break for five or more hour long shifts; all report having asked for meal or rest breaks and were told "no" or were laughed at or ignored; if they did take a rest break it was not a full,

uninterrupted break; and they were not given extra pay for any shifts they worked. (*Ibid.*)

In opposition to the motion, Riva denies all of plaintiffs' allegations about illegal, uniform policies and denies there is any common proof or evidence of such. It argues that the named plaintiffs' claims are individual claims that are not common to non-server employees; that Riva's business records alone cannot establish liability because the records do not explain why a meal break was not taken by an individual employee; and that Riva has evidence from other employees that rebut the declarations from putative Class members produced by plaintiffs. However, Riva does concede that "the only *common* evidence is a policy that is meal/rest break policy that is lawful on its face (with the sole exception of 'on premises' rest break language never enforced) …." (Opp'n, Mem. of P&As, 10:11–12 [emphasis in original].)

Riva's arguments and evidence in opposition to the motion raise disputed issues of fact that cannot be determined at this time. The court finds that common questions of law and fact predominate. The existence of these purported policies or practices are factual questions that are common to all Class members and are amenable to class treatment. Further, whether these policies exist and violate state labor law are questions of law that are common to all Class members and are also amenable to class treatment.

**B. Whether the Class Representatives Can Adequately Represent the Class and Have Claims or Defenses Typical of the Class**

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. [Citation.] Where there is a conflict that goes to the ' "very subject matter of the litigation," ' it will defeat a party's claim of class representative status. [Citation.] Thus, a finding of adequate representation will not be appropriate if the proposed

class representative's interests are antagonistic to the remainder of the class. [Citation.] The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent. [Citation.] '[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' [Citations.] To assure 'adequate' representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.] [Citation.] … [¶] When a court decides a proposed class certification request, to consider issues of adequacy and fairness of representation, it will evaluate the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented. [Citation.] Although the trial court has discretion to make such a determination, its order certifying a class must not be based upon improper criteria or incorrect assumptions. [Citation.]" (*J. P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212–213.)

Riva argues that the named plaintiffs are not adequate or typical because both are subject to unique defenses based on their own, personal facts, and neither worked as anything other than a server.

The court finds Riva's arguments unpersuasive. Riva claims that the named plaintiffs cannot adequately represent the entire Class based upon its theory that servers such as the named plaintiffs have a motive to work through breaks, unlike other members of the Class. The declarations from putative Class members produced by plaintiffs does not support the argument that plaintiffs' allegations are limited to servers.

Riva also asserts that the named plaintiffs are subject to unique credibility defenses. Specifically, Riva makes unproven accusations about plaintiff Aaron Paul to

question his credibility, and Riva contends that both named plaintiffs are biased because they are in a long-term relationship with one another. These assertions do not demonstrate that the named plaintiffs' interests are antagonistic to the remainder of the Class, or that their personal claims are inconsistent with the claims of the other members. While credibility problems can be a basis for disqualification, there is no clear-cut basis for disqualification here. (See *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1307–1308.)

"As for typicality, the purpose of this requirement ' "is to assure that the interest of the named representative aligns with the interests of the class." ' [Citation.] ' "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " ' [Citations.]" (*Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases* (2018) 25 Cal.App.5th 369, 395; see also *Classen v. Weller*, (1983) 145 Cal.App.3d 27, 26 [class representatives need not have identical interests with class members; they must only be "similarly situated"].)

The court has reviewed the allegations of the FAC and the named plaintiffs possess the same or similar interest and suffer the same or similar injury as the Class members. As such, the court finds that the named plaintiffs can adequately represent the Class and their claims or defenses are typical of the Class.

**3.4 Superiority of a Class Action as Opposed to Individual Actions**

"Plaintiffs must show ' "by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." ' [Citation and footnote.]" (*Apple, Inc. v. Superior Court* (2018) 19 Cal.App.5th 1101, 1116, quoting *Sav-On Drug Stores*, *supra*, 34 Cal.4th at p. 332.)

" 'In general, a class action is proper where it " ' "provides small claimants with a method of obtaining redress" ' " and " 'when numerous parties suffer injury of

insufficient size to warrant individual action.' " [Citations.] ... [¶] In deciding whether a class action would be superior to individual lawsuits, "the court will usually consider [four factors]: [¶] [ (1) ] The interest of each member in controlling his or her own case personally; [¶] [ (2) ] The difficulties, if any, that are likely to be encountered in managing a class action; [¶] [ (3) ] The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] [¶] [ (4) ] The desirability of consolidating all claims in a single action before a single court." ' [Citation.]" (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1352–1353.)

The court finds that the factors weigh in favor of proceeding as a class action rather than individual actions. First, it provides the Class members, who are small claimants, with a method of obtaining redress. No other individual Class members have commenced litigation involving the same controversy. It is more desirable and efficient to consolidate all the claims into a single action. And, there is nothing to suggest any unique difficulties in managing a class action. Accordingly, plaintiffs' motion for class certification is granted as requested.

**TENTATIVE RULING # 1: PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IS GRANTED AS REQUESTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.**

**2. LI, ET AL. v. CHEN, SC20200010**

**OSC Re: Dismissal**

On May 6, 2022, the court issued an order granting defendant's motion for relief from entry of default and reinstated defendant's answer, and the court denied plaintiffs' request for entry of default judgment. Given the relief granted to defendant, it appears appropriate to vacate this hearing.

**TENTATIVE RULING # 2: MATTER IS DROPPED FROM THE CALENDAR.**

**3. WEILAND v. EL DORADO COUNTY ASSESSMENT APPEALS BD., 22CV0341**

**CMC Re: Service, Response, Administrative Record, Briefing Schedule**

**TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, MAY 20, 2022, IN DEPARTMENT FOUR.**

**4. MAICO ASSET MGMT. v. WOODS, ET AL., PC20210228**

**Chase's Demurrer to Second Amended Complaint**

Plaintiff Maico Asset Management purchased a single-family residence in the South Lake Tahoe region as a "flipping opportunity." On November 23, 2021, plaintiff filed a Second Amended Complaint ("SAC") against defendants for (1) intentional misrepresentation, (2) constructive fraud, (3) negligent misrepresentation, (4) negligence, and (5) breach of fiduciary duty. Pending is defendant Chase International Equities Corporation's ("Chase") demurrer to the SAC.

The SAC alleges that in or about January 2018 defendants Jessica Woods ("Jessica") and Daryl Woods ("Daryl") called plaintiff to solicit him to purchase, remodel, and resell the subject property after the previous buyer (represented by Daryl) backed out. (SAC, ¶¶ 13, 14.) The Woodses asked plaintiff to drive to South Lake Tahoe so they could show him the property. (SAC, ¶ 15.) They described the property as a "homerun flip opportunity" and that plaintiff "could resell the property for $799,000 'all day long, no brainer' to either [an] owner occupier or secondary homeowner for VRBO purposes once the property was renovated." (SAC, ¶¶ 15, 18.) The SAC further alleges that Daryl was "heavily involved in the entire transaction" and that he "acted as Plaintiff's agent via an implied agreement." (SAC, ¶ 16.)

The property was first listed in November 2018. (SAC, ¶ 22.) The property "did not sell for almost two years after acquisition and ultimately sold for $575,000, much less than what had been reasonably expected by Plaintiff, on account of not having the attributes represented by Defendants and not being nearly as valuable as defendants represented when soliciting Plaintiff's purchase of the Subject Property." (SAC, ¶ 41.)

**1. Standard of Review**

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those

allegations." (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code of Civ. Proc. § 430.30(a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.App.3d at p. 318.)

**2. Discussion**

Chase first demurs on the basis that the SAC fails to state facts sufficient to establish an agency relationship between Daryl and plaintiff that satisfies the statute of frauds, and therefore plaintiff's claims against Chase fail.

Chase cites to Civil Code § 1624, the Statute of Frauds, which states in relevant part: "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: … [¶] … (4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, … or to procure, introduce, or find a purchaser or seller of real estate …." (*Id.*, subd. (a)(4); see also *Phillippe v. Shapell Indus.* (1987) 43 Cal.3d 1247, 1255–1258.)

"This writing requirement ' " 'serves only to prevent the contract from being unenforceable' " '; the statute of frauds ' "merely serve[s] an evidentiary purpose." ' [Citation.]" (*Reeder v. Specialized Loan Serv., LLC* (2020) 52 Cal.App.5th 795, 801; see also *Sterling v. Taylor* (2007) 40 Cal.4th 757, 766 [" 'The primary purpose of the Statute is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made.' "]; *Phillippe*, *supra*, 43 Cal.3d at p. 1257 [the "primary purpose" of section

1624(a)(4) "is to protect real estate sellers and purchasers from the assertion of false claims by brokers for commissions."].)

The primary purpose of section 1624(a)(4) is not met here by invoking the Statute of Frauds against plaintiff, who is not a licensed real estate agent/broker but was a buyer/seller. While real estate agent/broker agreements are subject to the statute of frauds, plaintiff is not seeking to enforce any provisions of an implied contract. Plaintiff's SAC asserts tort claims, not contract claims.

Even assuming plaintiff were seeking to enforce an alleged implied agreement, he could invoke the exception of equitable estoppel to a statute of frauds defense. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 27 ["The doctrine of estoppel to plead the statute of frauds may be applied where necessary to prevent either unconscionable injury or unjust enrichment."]; *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623.) Although, the SAC does not raise allege such a claim.

With respect to plaintiff's causes of action for negligence and breach of fiduciary duty, the SAC alleges the existence of an agency relationship that gives rise to a duty. At this stage of the proceedings, plaintiff is not required to actually establish a duty with defendants. (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 758 [a demurrer tests adequacy of complaint's allegations, "not whether plaintiffs can produce evidence to support those allegations"].)

Liberally construing the SAC and accepting its factual allegations as true, the allegations of the SAC are adequate as to an agency relationship. Chase's demurrer on the basis of lack of agency is overruled.

Chase next demurs on the basis that the statements made by the Woodses amount to nothing more than opinions of value or sales puffery. "[I]t is well settled that an opinion may be actionable when it is made by a party who 'possess[es] superior knowledge.' [Citation.] … '[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the

representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false.' [Citations.]

"Equally well recognized is that there may be liability for an opinion where it is 'expressed in a manner implying a factual basis which does not exist.' [Citations.] Witkin explains how this rule is often applied to statements about future events, describing it this way: '(3) Future Events. As pointed out above ..., predictions or representations as to what will happen in the future are normally treated as opinion; but sometimes they may be interpreted as implying knowledge of facts that make the predictions probable. If the defendant does not know of these facts, the statement is an actionable misrepresentation.... The same is true where an agent states that his or her principal will advance money to harvest a crop, or where a corporation agent represents that the corporation will lease certain property or locate a plant in a certain city. [Citation.]' [Citations.]" (*Jolley v. Chase Home Fin., LLC* (2013) 213 Cal.App.4th 872, 892–893.)

Whether the Woodses' statements were merely opinion or could be viewed as statements of fact by parties with superior knowledge raises factual issues that are not amenable to resolution on demurrer. The demurrer on this basis is overruled.

Chase also demurs on the basis that plaintiff did not plead the fraud claims with particularity. The court disagrees. The SAC adequately sets forth the required "Who, What, When"-type allegations to put defendants on notice about what the plaintiff is complaining and what remedies are being sought. (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.) To the extent any of the claims are uncertain, "[a] demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery

procedures. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 927, p. 364;1 Weil & Brown, Civil Procedure Before Trial (1990) § 7:85, p. 7-23.)" (*Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Lastly, Chase demurs on the grounds that the SAC fails to adequately allege causation and damages. Liberally construing the SAC and accepting plaintiff's allegations as true, the SAC adequately alleges causation and damages.

In sum, Chase's demurrer to the SAC is overruled.

**TENTATIVE RULING # 4: DEFENDANT CHASE'S DEMURRER IS OVERRULED. CHASE MUST ANSWER THE SECOND AMENDED COMPLAINT NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.**

**5. WALLACE , ET AL. v. HENDERSON, ET AL., SC20210157**

**Motion to Compel Defendants' Joint Responses to Discovery Requests**

This is a partition and accounting action. Pending is plaintiffs' motion for an order compelling defendants to provide further joint responses to plaintiff Robert Wallace's Requests for Production of Documents (Set One) ("RPD"), Numbers 4–16, 20–36, 44–46, and 53–67. Plaintiffs also seek sanctions jointly and severally against defendants and their counsel in the amount of $6,525.

**Preliminary Matters**

Plaintiffs' request for judicial notice of the complaint (Ex. 1) and defendants' answer (Ex. 2) is granted. (Evid. Code § 452(d)(1).)

Defendants' Evidentiary Objections to the Declaration of Port Parker, Nos. 1–5 are overruled.

Plaintiffs' Evidentiary Objections to the Declaration of Alan Seher, Nos. 1–6 are overruled.

**Discussion**

The propounding party's motion to compel further responses must "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code of Civ. Proc. § 2031.310(b)(1).) "[A]bsent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing good cause simply by a fact-specific showing of relevance." (*Kirkland v. Super. Ct.* (2002) 95 Cal.App.4th, 92 98.) "In the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement." (*Glenfed Dev. Corp. v. Super. Ct.* (1997) 53 Cal.App.4th 1113, 1117.) Once good cause is shown, the burden shifts to the party opposing the motion to justify its objection(s). (*Kirkland*, *supra*, 95 Cal.App.4th at p. 98.)

Having reviewed plaintiff Wallace's RPDs at issue, the court finds that each disputed RPD is relevant to the issues of the litigation; that is, plaintiffs' partition and accounting claims. (*Ibid.*)

The burden now shifts to defendants to justify their objections. "The party to whom a demand for inspection, copying, testing, or sampling has been directed shall respond separately to each item or category of item by any of the following: [¶] (1) A statement that the party will comply with the particular demand ….[¶] (2) A representation that the party lacks the ability to comply with the demand ….[¶] (3) An objection to the particular demand for inspection, copying, testing, or sampling." (Code of Civ. Proc. § 2031.210(a).)

For the sake of clarity and convenience, plaintiffs state that the disputed RPDs fall into seven general categories, including documents relating to: (1) usage of the properties at issue (Nos. 4–7); (2) maintenance, management of, and income derived from the properties (Nos. 8–13); (3) defendants' contentions that the properties are not suitable for partition by sale (Nos. 14–16, 20–36); (4) defendants' denials of plaintiffs' allegations in the complaint (Nos. 44–46, 53, 54); (5) communications concerning this case (No. 55); (6) defendants' affirmative defenses (Nos. 56–66); and (7) defendants' responses to plaintiffs' initial Form Interrogatories (No. 67).

Having reviewed the parties' documents, the court rules as follows:

RPD Nos. 4–7 (Usage of the Properties at Issue)

The motion is denied as to Nos. 4–7. Defendants' objections on the grounds that the requests are overbroad and not reasonably particularized are sustained.

RPD Nos. 8–13 (Maintenance/Management/Income Derived from Properties)

The motion as to Nos. 8–13 is granted. Defendants' objections are overruled.

RPD Nos. 14–16, 20–36 (Suitability for Partition by Sale)

The motion as to Nos. 14–16 and 20–36 is granted. Defendants' objections are overruled.

RPD Nos. 44–46, 53, 54 (Defendants' Denials of Plaintiffs' Allegations)

The motion as to Nos. 44–46, 53, and 54 is granted. Defendants' objections are overruled.

RPD No. 55 (Communications Re: Case)

The motion is denied as to No. 55. Defendants' objections on the grounds that the request is overbroad and not reasonably particularized are sustained.

RPD Nos. 56–66 (Defendants' Affirmative Defenses)

The motion as to Nos. 56–66 is granted. Defendants' objections are overruled.

RPD No. 67 (Documents Re: Defendants' Responses to Form Interrogatories)

The motion as to No. 67 is granted. Defendants' objections are overruled.

**Sanctions**

Having reviewed and considered the declaration of plaintiffs' counsel regarding fees and costs incurred in bringing the motion—and bearing in mind that plaintiffs were not entirely successful with the motion—the court finds that $4,060 (16 hours x $250/hour + $60 filing fee) is a reasonable sanction under the Discovery Act. The sanction is imposed against all defendants and their counsel of record jointly and severally.

**TENTATIVE RULING # 5: PLAINTIFFS' MOTION TO COMPEL FURTHER JOINT RESPONSES FROM DEFENDANTS TO PLAINTIFF ROBERT WALLACE'S REQUESTS FOR PRODUCTION OF DOCUMENTS (SET ONE) IS GRANTED IN PART AND DENIED IN PART. DEFENDANTS MUST PROVIDE COMPLETE VERIFIED JOINT RESPONSES TO THE DISCOVERY REQUESTS DETAILED IN THE TEXT OF THE TENTATIVE**

**RULING, AND PAY PLAINTIFFS' COUNSEL $4,060, NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER REGARDING THIS RULING. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.**

**6. GALIC v. GORDON, 21CV0279**

**Hearing Re: Petition for Alternative Writ of Mandate**

On December 7, 2021, Alexis Galic filed a petition for alternative writ of mandate (Code of Civ. Proc. § 1094.5) to set aside the suspension or revocation of her driver's license. The administrative record has been lodged with the court.[2] The parties' briefing is complete: On April 28, 2022, petitioner filed a supplemental brief in support of her petition; respondent DMV's opposition/objection to the petition was filed May 9, 2022; and petitioner's reply was filed May 13, 2022. Now is the time set for hearing on the petition.

**1. Standard of Review**

When a person petitions for a writ of mandate following an order suspending her driver's license (Veh. Code § 13559(a); Code of Civ. Proc. § 1094.5), the trial court is required to determine, based on the exercise of its independent judgment, whether the "weight of the evidence" supports the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456; Code of Civ. Proc. § 1094.5(c).) Review is strictly limited to the record of the administrative hearing, and the trial court may not consider any other evidence. (Veh. Code § 13559(a).) "In reviewing the administrative record, the court acts as a trier of fact; it has the power and responsibility to weigh the evidence and make its own determination about the credibility of the witnesses. [Citation.] While the court must afford a strong presumption of correctness concerning the administrative findings, ultimately it is free to reweigh the evidence and substitute its own findings. [Citations.]" (*Roze v. Dep't of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1183–1184.)

[2] On May 2, 2022, petitioner filed her notice of lodging of administrative record of the DMV's September 24, 2021, administrative hearing. On May 9, 2022, the DMV filed its notice of lodging of Bate-numbered copy of the administrative record.

**2. Discussion**

The DMV first asserts that the petition is untimely.

"Notwithstanding Section 14400 or 14401, within 30 days of the issuance of the notice of determination of the department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle after the hearing pursuant to Section 13558, the person may file a petition for review of the order in the court of competent jurisdiction in the person's county of residence." (Veh. Code § 13559(a).) Under Vehicle Code § 23, "[t]he giving of notice by mail is complete upon the expiration of four days after deposit of the notice in the mail …." (*Ibid.*)

The Notification of Findings and Decision was issued on October 5, 2021, and was served on petitioner by mail that same day at her address of record as shown in her DMV records. (AR 2–5, 7.) As such, the petition was due by November 8, 2021. Because the petition was not filed until 29 days later, on December 7, 2021, the DMV asserts the petition is untimely and this court lacks jurisdiction.

In her reply, petitioner contends that various statutes provide extensions for filing a writ where a petitioner makes a timely request for an administrative transcript. (See Code of Civ. Proc. § 1094.6(b), (d); Gov. Code § 11523.) Petitioner further contends that where other statutory deadlines are inapplicable, the catch-all in Vehicle Code § 14401(a) applies. Lastly, she argues that the DMV has waived this objection.

For the following reasons, the court disagrees with petitioner's arguments and agrees with the DMV that the petition was not timely filed. Here, there is no need to resort to the catch-all deadline in Vehicle Code § 14401(a) because Vehicle Code § 13559 provides the applicable deadline here. Additionally, Code of Civil Procedure § 1094.6 applies to judicial review of any decision of *a local agency*, which does not apply to the state DMV.

Petitioner also cites the case *Johanson v. Department of Motor Vehicles* (1995) 36 Cal.App.4th 1209, in support of her argument that a longer deadline applies. *Johanson* is not on point. *Johanson* involved a petitioner who sought further departmental review following the DMV's decision at a departmental hearing. Petitioner here did not seek further departmental review.

Lastly, petitioner argues that the DMV waived the timeliness argument. This argument is not well-taken. In the DMV's answer to the petition, it "alleges as an affirmative defense that the Petition is untimely" under Vehicle Code § 13359(a), and thus "this Court lacks jurisdiction." (Resp. Ans. at 3:16–18.) As such, the DMV did not waive the objection by not demurring or raising the issue in its answer.

Moreover, even if petitioner is correct that the DMV's answer was filed late, "[t]he writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not." (Code of Civ. Proc. § 1088.) Even if the DMV had not answered the petition, objections on the basis that the court lacks jurisdiction or the petition fails to state facts sufficient to constitute a cause of action are not waived. (Code of Civ. Proc. § 430.80(a).)

In sum, the petition was not timely filed and is therefore dismissed. As such, it is not necessary for the court to consider the merits of the petition.

**TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 2:00 P.M., FRIDAY, MAY 20, 2022, IN DEPARTMENT FOUR.**