

MAY 27 2021

RULINGS/ORDERS

Sherri R. Carter, Executive Officer/Clerk
By: Pedro Martinez, Deputy

Avilez v. Gorlitz Sewer & Drain, Inc., Case No.: 20STCV21169

The Parties' Motion for Preliminary Approval of class action settlement is GRANTED as fair, adequate, and reasonable.

The essential terms are, among other things:

- A. The Gross Settlement Amount ("GSA") is \$220,000.
- B. The Net Settlement Amount ("Net") \$113,416.28 is the GSA minus the following:

- Up to \$73,333 (33%) for attorney fees;
- Up to \$7,500 for litigation costs;
- Up to \$10,000 for a service award to the proposed class representative;
- Up to \$6,000 for settlement administration costs;
- Estimated \$4,125.72 in employer's payroll taxes;
- \$5,625 (75% of \$7,500 PAGA penalty) to the LWDA; and

- C. Plaintiffs release of Defendants from claims described herein.

The Parties' Motion for Final Approval of Class Action Settlement must be filed by August 27, 2021. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed] Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

Nonappearance case management review is set for September 3, 2021, 8:30 a.m., Dept. 9.

I.
BACKGROUND

Plaintiff James Avilez sues his employer, Gorlitz Sewer & Drain, Inc., for alleged wage and hour violations. Defendant is

a manufacturer of sewer and drain cleaning equipment. Plaintiff seeks to represent a class of Defendant's current and former non-exempt employees.

On May 29, 2020, Plaintiff filed the class action complaint in Los Angeles County Superior Court against Defendant alleging causes of action for: (a) failure to pay wages (including overtime wages where appropriate) for hours worked off-the-clock in violation of Labor Code §§204(a), 218.6, 510(a), 1194(a) and 1197; (b) failure to provide accurate itemized wage statements in violation of Labor Code §226(a); (c) failure to provide meal breaks in violation of Labor Code §512(a) and IWC Wage Order No. 1-2001, §11(A) – (C) and to pay meal period premiums in violation of Labor Code §226.7(c) and IWC Wage Order No. 1-2001, §11(D); (d) failure to authorize and permit rest breaks in violation of IWC Wage Order No. 1-2001, §12(A) and to pay rest period premiums in violation of Labor Code §226.7(c) and IWC Wage Order No. 1-2001, §12(B); (e) failure to timely pay all wages due upon termination of employment in violation of Labor Code §§201-203; (f) unfair business practices in violation of California Business & Professions Code §17200 et seq.; and (g) civil penalties under the Private Attorneys General Act of 2004 ("PAGA"), Labor Code §2698 et seq. and violation of California Business & Professions Code § 17200.

On April 29, 2020, the Parties attended a full-day mediation with the Honorable Judge Margaret A. Nagle. At the conclusion of the mediation, the Parties reached a proposed settlement that they memorialized in a Memorandum of Understanding. Shortly after, the Parties agreed to the Settlement reflected in the Stipulation of Class Action Settlement and Release ("Settlement Agreement"), a copy of which was filed with the Court.

In response to the Court's "checklist" of issues regarding the motion for preliminary approval, the parties filed supplemental briefing and a revised Settlement Agreement.

Now before the Court is Plaintiff's motion for preliminary approval of the settlement agreement.

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II.
SETTLEMENT AGREEMENT

A. Definitions

Class: all persons who were employed by Defendant and paid hourly rates at any time within the Class Period. (§4)

Class Period: Four (4) years preceding the filing of the Complaint up to and through the date of filing of the Complaint. (§3) [i.e., 5/29/2016 to 5/29/2020].

PAGA Aggrieved Employees: All Class Members who were employed by Defendant at any time within the PAGA Period.

PAGA Period: May 29, 2019 (one year preceding the filing of the Complaint) up to and through May 29, 2020 (the date of filing of the Complaint). (§4)

The Parties stipulate to class certification for settlement purposes only. (§5)

B. Terms of Settlement Agreement

The essential terms are as follows:

- The Gross Settlement Amount ("GSA") is \$220,000, non-reversionary. (§10)
- The Net Settlement Amount ("NSA") (\$113,416.28) is the GSA minus the following:
 - o Up to \$73,333 (1/3) for attorney fees (§11.a);
 - o Up to \$7,500 for litigation costs (Ibid.);
 - o Up to \$10,000 as an enhancement award to the class representative (§11.b);
 - o Up to \$6,000 for settlement administration costs (§11.c);
 - o Estimated \$4,125.72 in employer's payroll taxes (Supp. Santiago Decl. ¶7; Notice pg. 2); and
 - o Payment of \$5,625 (75% of \$7,500 PAGA penalty) to the LWDA (§11.d).
- The payment of the employer's share of taxes shall be paid from the Net Settlement Amount. (§11.e)
- No Claim Form. Class Members are not required to submit a claim form to receive their individual settlement payments. (Notice pg. 3)
- Response Deadline. Requests for Exclusion, written objections, and workweek disputes must be postmarked and sent to

the Settlement Administrator no later than 60 days after the date of the Notice. (§§ 11.g.5, 17)

o The Settlement, if approved, precludes further PAGA claims irrespective of whether a request for exclusion is submitted. As a result, all Class Members—regardless of whether they submit a request for exclusion—shall receive a check for their share of the PAGA settlement when settlement payments are delivered, and they will be bound by a release of the PAGA claims. (§11.f)

o To the extent any Class Member requests exclusion from the Settlement, his or her unclaimed portion shall remain in the Net Settlement Amount, and shall be made available for distribution to the remainder of the Participating Class Members. (§20)

• Individual Settlement Share Calculation. Each Participating Class Member will receive a pro rata share of the Net Settlement Amount reflecting the ratio of the total weeks worked by each Participating Class Member for Defendant during the Class Period to the total weeks worked by all Participating Class Members for Defendant during the Class Period. (§11.g.1)

o Tax Allocation. Each individual settlement payment will be allocated as 20% to wages, 40% to interest and 40% to penalties. (§11.g.2)

o Twenty-five percent of the PAGA Settlement Amount (\$1,875) will be distributed among all PAGA Class Members in equal shares ("Class Member PAGA Payments"). The Parties estimate that each PAGA Class Member will receive a Class Member PAGA Payment of approximately \$60.48 (i.e., \$1,875 / 31 PAGA Class Members = \$60.48 per PAGA Class Member), representing an equal share of the PAGA payments available to PAGA Class Members (for tax purposes, the Class Member PAGA Payments will be treated as non-wages and will be reported on IRS Form 1099). (§11.d)

• Funding of Settlement. Within seven (7) calendar days after the Effective Date, Defendant will remit to the Settlement Administrator the Gross Settlement Amount, which the Settlement Administrator shall deposit in an interest-bearing account. (§13.a)

• Uncashed Checks. Any checks issued by the Settlement Administrator to Class Members shall be negotiable for one hundred eighty (180) calendar days. Those funds represented by Settlement checks returned as undeliverable and those Settlement checks remaining uncashed for more than one hundred eighty (180) calendar days after issuance (collectively, "Voided Settlement Checks") shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code Section 1500 et seq., for the benefits of those Class Members who did not cash their checks until such time they claim their property. (§13.c)

- CAC Services Group, LLC will perform notice and settlement administration. (§11.c)
- The Settlement Agreement was submitted to the LWDA on April 6, 2021. (Second Supp. Santiago Decl., Exh. 1)
- Notice of Entry of Judgment will be issued by the Settlement Administrator via postcard or other written notification with the mailing of the Individual Settlement Payments to the Participating Class Members and the Class Member PAGA Payments to the PAGA Class Members, and posted and available for review on the Settlement Administrator's website. (§31)
- Participating class members and the named Plaintiff will release certain claims against Defendants. (See further discussion below)

III. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. On April 29, 2020, the Parties attended a full-day mediation with the Honorable Judge Margaret A. Nagle (a retired Magistrate Judge of the U.S. District Court for the Central District of California with experience mediating wage-and-hour class actions) via Zoom videoconferencing conducted by JAMS. At the conclusion of the mediation, the Parties reached a proposed settlement that they memorialized in a Memorandum of Understanding in the week following the mediation. Shortly after the Parties executed their Memorandum of Understanding, the Parties agreed to the Settlement reflecting in the Settlement Agreement. (Declaration of Daniel V. Santiago §§ 21-23.)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Class Counsel represents that he investigated Defendant's policies and practices at issue in the action, with interviews of Plaintiff regarding Defendant's policies and practices at issue. He analyzed Plaintiff's employment records throughout the Class Period, Defendant's Responses to Plaintiff's Special Interrogatories reflecting its purported practices regarding off-the-clock work, meal periods, rest periods, and related issues, Defendant's Responses to Plaintiff's Requests for Production of Documents and its corresponding production of records reflecting its policies regarding off-the-clock work, meal periods, rest periods, and related issues the employment records of a sample of Class Members throughout the Class Period

(i.e., 8 of 38 or 21% of the Class Members), and class data relevant to evaluating the Class Members' potentially recoverable damages. (Id. at ¶¶ 8-14.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in class action litigation, including wage and hour class actions. (Id. at ¶¶ 66-67.)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 14:139.18, ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Class Counsel has provided information, summarized below, regarding the estimated exposure for each of the claims alleged:

Violation	Maximum Exposure
Off-the-Clock Wages	\$52,516
Wage Statement Violations	\$0
Meal Period Violations	\$212,268
Rest Period Violations	\$174,690
Waiting Time Penalties	\$22,800
PAGA Penalties	\$161,750
Total	\$624,024

(Santiago Decl. ¶17.)

2. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

3. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.")).)

4. Amount offered in settlement. Plaintiff's counsel obtained a \$220,000 non-reversionary settlement. The \$220,000 settlement amount represents approximately 35.3% of Defendant's maximum potential damages, which, given the uncertain outcomes, and Defendant's financial condition, is within the "ballpark of reasonableness."

The \$220,000 settlement amount, after reduced by the requested deductions, leaves approximately \$116,667 to be divided among approximately 38 putative class members. Assuming full participation, the resulting payments will average approximately \$3,070.18 per class member. [$\$116,667 / 38 = \$3,070.18$]

In addition, each Eligible Aggrieved Employee will receive a portion of the PAGA penalty, estimated to be \$60.48 per class member. ($\$1,875$ or 25% of $\$7,500$ PAGA penalty $\div$ 31 aggrieved employees = $\$60.48$)

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Class Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including wage and hour class actions.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object, opt-out and/or submit claim forms. This factor becomes relevant during the fairness hearing.

The Court concludes that the settlement can be preliminarily deemed "fair, adequate, and reasonable."

C. Scope of the Release

1. Release of Class Claims.

Upon the date on which Defendant fully funds the Settlement, each Participating Class Member will release Defendant and the Released Parties from the "Released Class Claims," which are defined as any and all claims asserted in the Complaint, or which could have been asserted in the Complaint, based on the cited statutes and/or underlying facts alleged in the Complaint. This includes, all claims, rights, demands, liabilities, and causes of action, arising from, or related to, the same set of operative facts as those set forth in the operative pleadings in the Action, including, inter alia: (a) Defendant's alleged failure to pay all wages (including overtime wages where appropriate) due and owing in violation of Labor Code §§204(a), 218.6, 510(a), 1194(a) and 1197 (First Cause of Action in the Complaint); (b) Defendant's alleged failure to provide accurate itemized wage statements in violation of Labor Code §226(a) (Second Cause of Action in the Complaint); (c) Defendant's alleged failure to provide meal breaks in violation of Labor Code §512(a) and IWC Wage Order No. 1-2001, §11(A)-(C) and to pay meal period premiums in violation of Labor Code §226.7(c) and IWC Wage Order No. 1-2001, §11(D) (Third Cause of Action in the Complaint); (d) Defendant's alleged failure to authorize and permit rest breaks in violation of IWC Wage Order No. 1-2001, §12(A) and to pay rest period premiums in violation of Labor Code §226.7(c) and IWC Wage Order No. 1-2001, §12(B) (Fourth Cause of Action in the Complaint); (e) Defendant's alleged failure to timely pay all wages due upon termination of employment in violation of Labor Code §§201-203 (Fifth Cause of Action in the Complaint); (f) Defendant's allegedly unfair business practices in violation of California Business & Professions Code §17200 et seq. (Sixth Cause of Action in the Complaint); and (g) Defendant's alleged liability for civil penalties under the PAGA, Labor Code §2698 et seq. (Seventh Cause of Action in the Complaint). For the avoidance of doubt, such claims are released through the date of filing of the Complaint in this Action. (¶25)

"Released Parties" means Defendant, and its predecessors, successors, affiliates, subsidiaries, parent companies, partners, current and past employees, insurers, agents, consultants, legal representatives, and any other related

entities and all of their past, present, and future officers, shareholders, owners, members, directors, partners, agents, lawyers, employees, assigns, insurers, predecessors-in-interest, successors-in-interest, and underwriters. (§9)

2. Release of PAGA Claims

Upon the date on which Defendant fully funds the Settlement, all Class Members will release Defendant and the Released Parties from the "Released PAGA Claims," which are defined as any and all claims asserted in the Complaint under PAGA, or which could have been asserted in the Complaint under PAGA, based on underlying facts alleged or related to facts alleged in the Complaint. This includes all claims, rights, demands, liabilities, and claims for civil penalties, arising from, or related to, the same set of operative facts as those set forth in the operative pleadings in the Action, including, but not limited to: (i) all claims for civil penalties based on failure to pay meal and rest period premiums; (ii) all claims for civil penalties based on failure to pay any wages for all hours worked "off-the-clock"; (iii) all claims for civil penalties based on failure to furnish accurate itemized wage statements; and (iv) all claims for civil penalties based on failure to pay all wages due upon termination of employment. (§26)

All Class Members—regardless of whether they submit a request for exclusion—shall receive a check for their share of the PAGA settlement when settlement payments are delivered, and they will be bound by a release of the PAGA claims. (§11.f)

3. Named Plaintiff

Named Plaintiff will additionally provide a general release and §1542 waiver. (§27)

D. May Conditional Class Certification Be Granted?

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified (Amchem Products, Inc. v. Winsor (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (Dunk at 1807, fn 19.) Finally, the Court is under no "ironclad requirement" to

conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240, disapproved on another ground in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.)

1. Numerosity. There are approximately 38 Class Members, 31 falling within the PAGA Period. (Santiago Decl. ¶15; Supp. Memo ISO Prelim at 2:12-14.) This element is met.

2. Ascertainability. The proposed class is defined above. The class definition is "precise, objective and presently ascertainable." (Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919.) Class Members are identifiable through Defendant's records. (Santiago Decl. ¶10).

3. Community of interest. "The community of interest requirement involves 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.'" (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.)

Regarding commonality, Plaintiff contends his theories of liability are well suited for class treatment as indicated by the common questions of fact and the common questions of law outlined in the Complaint. (Memo ISO Prelim at 13:11-25.)

Regarding typicality, Plaintiff asserts that he worked for Defendant during the vast majority of the Class Period and allegedly suffered from the same unlawful practices as the entire Class. Plaintiff contends his claims arise from the same facts and are based on the same legal theories as those applicable to the entire Class. Accordingly, Plaintiff contends that his claims are not only typical of the Class Members' claims, but they are also substantively identical. (Memo ISO Prelim at 14:2-6.)

Finally, as to adequacy, Plaintiff represents that he has no antagonism or conflict of interest with any Class Member, has been active in his duties as class representative, and understands the risks and burden of serving as class representative. (See Declaration of James Avilez.)

4. Adequacy of class counsel. As indicated above, Class Counsel has shown experience in class action litigation, including wage and hour class actions.

5. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

The Court finds that the class may be conditionally certified because the prerequisites of class certification have been satisfied.

E. Is the Notice Proper?

1. Content of class notice. Copies of the revised proposed notice to class members are attached to the Settlement Agreement as Exhibits 2 (English) and 3 (Spanish) to the Second Supp. Santiago Decl. The content appears to be acceptable. They include information such as: a summary of the litigation; the nature of the settlement; the terms of the settlement agreement; the proposed deductions from the gross settlement amount (attorney fees and costs, enhancement awards, and claims administration costs); the procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the consequences of participating in, opting out of, or objecting to, the settlement; and the date, time, and place of the final approval hearing. The Notices will be issued in English and Spanish. (§15)

2. Method of class notice. Within seven (7) calendar days after entry of an Order granting preliminary approval of this Stipulation ("Preliminary Approval Order"), Defendant will provide to the Settlement Administrator the Class Data List. The Settlement Administrator will conduct a search through the National Change of Address database for each of the individuals identified on the Class Data List. (§14) Within seven (7) calendar days after receipt of the "Class Data List," the Settlement Administrator will send all Class Members, by first-class mail to their last known address and email to their last-known email address(es), the Court-approved Notice. (§15) The Settlement Administrator will perform one skip trace on returned mail and re-mail the Notice to an updated address (if any) as soon as possible upon return of the undeliverable Notice, but no later than fifteen (15) calendar days of receiving notice that a Notice was undeliverable. It is the intent of the Parties that reasonable means be used to locate Class Members. Those Class Members who receive a re-mailed Notice will have an additional 15 calendar days from the end of the original 60-day notice period to request exclusion from the Settlement to object to the Settlement, or to dispute the accuracy of the number of weeks worked by him or her during the

Class Period and/or the estimated settlement payment amount as stated in the Notice. (§16)

3. Cost of class notice. As indicated above, settlement administration costs are estimated to be \$5,000 (§11.c). Prior to the time of the final fairness hearing, the settlement administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

F. Attorney Fees and Costs

CRC rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-1096; Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615, 625-626; Ketchum III v. Moses (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by the parties to the contrary, "the court ha[s] an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th 123, 128.)

The question of whether Class Counsel is entitled to \$73,333 (1/3) in attorney fees will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees. Class counsel must provide the court with billing information so that it can properly apply the lodestar method, and must indicate what multiplier (if applicable) is being sought as to each counsel.

Class Counsel should also be prepared to justify the costs sought (capped at \$7,500) by detailing how they were incurred.

G. Incentive Award to Class Representative

The Settlement Agreement provides for an enhancement award of up to \$10,000 for the class representative, James Avilez (§11.b). In connection with the final fairness hearing, the

named Plaintiff must submit a declaration attesting to why he should be entitled to an enhancement award in the proposed amount. The named Plaintiff must explain why he "should be compensated for the expense or risk she has incurred in conferring a benefit on other members of the class." (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than pro forma claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit'" (Id. at 806-807, italics and ellipsis in original.)

The Court will decide the issue of the enhancement award at the time of final approval.

IV. CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Preliminary Approval of class action settlement is GRANTED as fair, adequate, and reasonable.

2) The essential terms are, among other things:

A. The Gross Settlement Amount ("GSA") is \$220,000.

B. The Net Settlement Amount ("Net") \$113,416.28 is the GSA minus the following:

Up to \$73,333 (33%) for attorney fees;

Up to \$7,500 for litigation costs;

Up to \$10,000 for a service award to the proposed class representative;

Up to \$6,000 for settlement administration costs;

Estimated \$4,125.72 in employer's payroll taxes;

\$5,625 (75% of \$7,500 PAGA penalty) to the LWDA; and

C. Plaintiffs release of Defendants from claims described herein.

3) The Parties' Motion for Final Approval of Class Action Settlement must be filed by August 27, 2021. The parties are

ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

4) The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed] Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

5) Nonappearance case management review is set for September 3, 2021, 8:30 a.m., Dept. 9.

CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.

DATED: May 27, 2021

YVETTE M. PALAZUELOS

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JUDGE OF THE SUPERIOR COURT