SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	d by:
TITLE OF CASE: **Nisei Farmers League vs.California Labor and Workforce Development Agency**	
LAW AND MOTION MINUTE ORDER	Case Number: **16CECG02107**

Hearing Date:	**November 30, 2016**	Hearing Type:	**Demurrer**
Department:	**502**	Judge/Temp. Judge:	**Black, Donald**
Court Clerk:	**Loveless, Nancy**	Reporter/Tape:	**Sandra Vanderpol**

Appearing Parties:

Plaintiff:	Defendant:
Counsel: Jesse Cripps, Theodore Kider	Counsel: Matthew Wise

[x] ***The Court orders the demurrer to the amended complaint sustained without leave to amend as stated in the modified tentative ruling dated 11/30/16 which is adopted and attached. The request for stay is denied. The plaintiff's motion for declaratory relief which was taken under submission on 10/27/16 is now taken out from under submission and is denied as stated in the 10/27/16 tentative ruling which is adopted and attached.***

[ ] Continued to [ ] Set for __ at __ Dept. __ for __

[ ] Submitted on points and authorities with/without argument. [ ] Matter is argued and submitted.

[ ] Upon filing of points and authorities.

[ ] Motion is granted [ ] in part and denied in part. [ ] Motion is denied [ ] with/without prejudice.

[ ] Taken under advisement

[ ] Demurrer [ ] overruled [ ] sustained with __ days to [ ] answer [ ] amend

[ ] Tentative ruling becomes the order of the court. No further order is necessary.

[ ] Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

[ ] Service by the clerk will constitute notice of the order.

[ ] See attached copy of the Tentative Ruling.

[ ] Judgment debtor __ sworn and examined.

[ ] Judgment debtor __ failed to appear.
Bench warrant issued in the amount of $ __

JUDGMENT:
[ ] Money damages [ ] Default [ ] Other __ entered in the amount of:
Principal $__ Interest $__ Costs $__ Attorney fees $__ Total $__
[ ] Claim of exemption [ ] granted [ ] denied. Court orders withholdings modified to $__ per __

FURTHER, COURT ORDERS:
[ ] Monies held by levying officer to be [ ] released to judgment creditor. [ ] returned to judgment debtor.
[ ] $__ to be released to judgment creditor and balance returned to judgment debtor.
[ ] Levying Officer, County of __, notified. [ ] Writ to issue
[ ] Notice to be filed within 15 days. [ ] Restitution of Premises
[ ] Other: __

(28) **Modified Tentative Ruling**

Re: ***Niesi Farmers League v. California Labor and Workforce Development Agency.***

Case No. 16CECG02107

Hearing Date: November 30, 2016 (Dept. 502)

Motion: By Defendants demurring to the Amended Complaint in its entirety.

Tentative Ruling:

To sustain the demurrer. Whether leave to amend is granted will depend upon whether an as applied challenge to the statute can be alleged on these facts. The parties are ordered to file briefs addressing this issue on or before December 14, 2016 and the hearing is continued to December 21, 2016 at 3:30 p.m. in Dept. 502.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Demurrer to the Second, Third, and Fourth Causes of Action

Defendants demur to the causes of action for violation of Constitutional Due Process in the Second, Third, and Fourth causes of action, for vagueness, arbitrary deprivation of property and lack of fair notice, respectively.

As an initial matter, Plaintiffs contend that Defendants are applying the incorrect legal standard, insofar as they argue that the Defendants appear to be utilizing "summary judgment" procedures. Plaintiffs misconstrue the test.

"The interpretation of a statute and the determination of its constitutionality are questions of law." (*Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1120, 34 Cal.Rptr.3d 174.) As such, the only "facts" that are relevant is the language of the statute and any legal guidance provided by legislative history or other legal authority.

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, (*Tobe*).) "If feasible within bounds set by their words and purpose, statutes should be construed to preserve their constitutionality." (*Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1126–1127, fn. omitted (*Mason*).) "The analysis begins with the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [(*Tobe, supra,* 9 Cal.4th at p. 1107 (internal citations and quotations omitted).)

In *Tobe, supra,* 9 Cal.4th at page 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145, the Supreme Court articulated the following test for substantiating a facial constitutional challenge to a statute: "To support a determination of facial unconstitutionality, voiding the statute as a whole, [a party] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute .... Rather, [he or she] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. [Citations.]" (*See also Samples v. Brown* (2007) 146 Cal. App. 4th 787, 799- 804 (internal quotations omitted).)

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Civil as well as criminal statutes must be sufficiently clear to provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies. The vagueness doctrine serves two primary functions. First, it affords citizens reasonable notice of what is prohibited. Vague laws may trap the innocent by not providing fair warning. Second, this doctrine requires that a legislature establish minimal guidelines to govern law enforcement. [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.
>
> "Two principles identified by our Supreme Court and endorsed by the United States Supreme Court guide our analysis. First, the challenged statutory language must be evaluated 'in a specific context.' A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness. A court errs by characterizing statutory language as vague without considering that language in context which includes, in particular, the purpose of the statute at issue. Second, the Constitution requires only a reasonable degree of certainty or specificity. A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language."

(*Samples, supra,* 146 Cal. App. 4th at 800-801 (internal citations and quotations omitted.), *see also People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.).)

Plaintiffs argue that the standard is simply whether "a lay person of common intelligence can understand the law, not a lawyer or judge." (*Kasler v. Lockyer* (2000) 23

Cal.4th 472, 498-99.) This is an oversimplification. As noted above, the standard is more nuanced than that.

Moreover, the standards of certainty for vagueness are lessened for a civil statute than a criminal statute. (*Ford Dealers Ass'n. v. DMV* (1982) 32 Cal.3d 347, 366.)

California Labor Code §226.2 states, in pertinent part:

> Notwithstanding any other statute or regulation, the employer and any other person shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226, based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, an employer complies with all of the following:
>
> > (1) The employer makes payments to each of its employees, except as specified in paragraph (2), for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of the formulas specified in subparagraph (A) or (B):
> >
> > > (A) The employer determines and pays the actual sums due together with accrued interest calculated in accordance with subdivision (c) of Section 98.1.
> > >
> > > (B) The employer pays each employee an amount equal to 4 percent of that employee's gross earnings in pay periods in which any work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time during the same time, provided that the amount by which the payment to each employee may be reduced for amounts already paid for other nonproductive time shall not exceed 1 percent of the employee's gross earnings during the same time.

Plaintiff specifically contends that the phrases "other nonproductive time," and "actual sums due" are unconstitutionally vague.

Plaintiff's argument is that its members do not know whether to take advantage of the affirmative defense provided by the statute because its members do not understand the phrases "other nonproductive time," and/or "actual sums due."

The parties' disputes center on the proper interpretation to give *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (*Gonzalez*) and *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 (*Bluford*).

In turn, *Gonzalez* and *Bluford* relied on *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, which held, over a decade ago, that "[w]hile the averaging method utilized by the federal courts to assess whether a minimum wage violation has occurred may be appropriate when considered in light of federal public policy, it does not advance the policies underlying California's minimum wage law and regulations. California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked. We conclude, therefore, that the FLSA model of averaging all hours worked "in any work week" to compute an employer's minimum wage obligation under California law is inappropriate. The minimum wage standard applies to each hour worked by respondents for which they were not paid."

Bluford and *Gonzalez* merely extended this explicitly to piece work compensation. *Gonzalez*, likewise, was based in part on "Wage Order No. 4" which provided that every employer shall pay to each employee "for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise" and was itself adopted in 2001. (*Gonzalez, supra,* 214 Cal.App.4th at 45; 8 CCR §11040, subd. (4)(B).) Arguably, Plaintiff's members should have been on notice that their method of averaging the compensation was legally suspect as of 2005 and that, therefore, at least rest periods were subject to minimum wage standards. As a result, the "actual sums due" would encompass compensation for these rest period as of 2005 and would, by terms of the statute, include the time discussed in *Bluford* and *Gonzalez*.

The precise phrase "non-productive time" does not appear in either *Bluford* or *Gonzalez*. However, it is defined in the statute as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." (Cal.Lab. §226.2 (first paragraph).)

Moreover, *Gonzalez* dealt with compensation both for rest breaks and for "time spent by a piece-rate employee waiting for vehicles to repair and performing non-piece-rate tasks directed by their employer." (*Gonzalez, supra,* 215 Cal.App.4th at 54.) Inferentially, therefore, *Gonzalez* would apply to the time "not directly related to the activity," which is to say "time spent...waiting" and "non-piece-rate tasks directed by their employer." Therefore, again, the language is discernable of meaning both in terms of "plain English" and in the context of the statutory scheme and applicable case law.

Thus, in this legal context, "actual sums due" and "non-productive time," are defined with "reasonable specificity" and are not vague and ambiguous as a matter of law.

Therefore, the demurrer to the second, third, and fourth causes of action is sustained.

Demurrer to the Fifth, Sixth and Seventh Causes of Action

The Fifth cause of action alleges a violation of due process insofar as section 226.2 can be interpreted as having retroactive application. The Sixth Cause of Action alleges a Takings Clause violation and the Seventh Cause of Action alleges a Contract Clause violation.

Defendants argue that each of these claims is essentially based on the premise that Section 226.2 impermissibly has retroactive effect. (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15 (burden to show due process violation is to establish retroactive legislation is arbitrary and irrational); *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 528-29 (there may be a cause of action for a Takings Clause violation when legislation imposes severe retroactive liability); *General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186 (violation of Contract Clause is to establish that legislation substantially impaired an existing contractual relationship). Plaintiffs do not appear to challenge this, merely that, as a complaint, Defendants must accept Plaintiffs' allegations. However, as noted above, the Complaint poses a question of law that can be resolved on a demurrer.

A fair reading of the statute indicates, as Defendants assert, that there is no retroactive enforcement anticipated in the law as written. Section 226.2 merely provides an affirmative defense for employers who follow the specified procedures and pay amounts already owed for piece-work prior to the start date. There is nothing in the Section that revises how the amounts owed for prior work is calculated. Plaintiffs point to various internal documents that purportedly direct staff with the Department of Labor Standards Enforcement to calculate sums retroactively. Even assuming Plaintiffs' view of these documents is correct, such evidence would likely be relevant in an as applied challenge, as opposed to the facial challenge brought here.

The statute *as written* does not appear to apply retroactively. Since it does not apply retroactively, then Plaintiff has not stated a cause of action for the Fourth, Fifth and Sixth causes of action. Therefore, the demurrer as to these causes of action is sustained.

The First and Eighth Causes of Action

The First Cause of Action is for Declaratory Relief and the Eighth cause of Action seeks an injunction. Each of these is based on the other grounds for relief. Since the demurrer has been sustained as to each of the other grounds for relief, the demurrer to these is sustained.

Furthermore, the First Cause of Action seeks a declaration that "*Bluford* and *Gonzalez* were wrongly decided or at least limited to their specific facts" and, therefore, an injunction "prohibiting Defendants from applying their interpretations of

Gonzalez [and] *Bluford* [] to calculating 'actual sums due' before 2016." (Amended Complt. Paras. 167, 172.) This is plainly beyond the power of the trial court to decide; such arguments are better directed at the Court of Appeal.

Leave to Amend

To the extent that the Amended Complaint seeks legal determinations that Section 226.2 is facially unconstitutional, the demurrer is sustained without leave to amend. However, the parties have not addressed whether the Amended Complaint could be interpreted in whole or in part as an "as applied" challenge to implementation of the statute. (*Samples, supra,* 146 Cal. App. 4th at 803-804 (an as applied claim is often how "perceived ambiguity problems with [a particular] standard should be resolved, i.e., in the context of a specific application to an actual factual situation.") The court therefore orders briefing on the issue as set forth above.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB **on** 11/29/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Nisei Farmers League v. California Labor and Workforce Development Agency***

Case No. 16CECG02107

Hearing Date: October 27, 2016 (Dept. 502)

Motion: By Plaintiff for Partial Declaratory Relief

Tentative Ruling:

To deny.

Explanation:

Plaintiffs seek "partial declaratory relief .... regarding the meaning of the statutory term 'actual sums due' as that term is used in subdivision (b) of section 226.2 of the California Labor Code."

Defendants are correct that there is no such motion as a "Motion for Partial Declaratory Relief." Code of Civil Procedure §1060 does not provide for an independent pre-trial resolution of declaratory relief and no such motion appears to be anticipated by either the Code or case law.

The only case law that Plaintiffs have provided to support their claim for such relief in the moving papers is *In re Claudia E.* (2008) 163 Cal.App.4th 627, 633-34, where a court reasoned that a motion for declaratory relief would be an expedient means to dispose of a child's claims in a juvenile dependency proceeding. (*Id.* at 637.) Because this is not a juvenile dependency hearing, the case is inapposite.

In the reply brief, Plaintiffs cite to other case law they claim supports the "motion for declaratory relief." Each of these cases did not squarely address the propriety of such a motion over an objection. In *NetJets Aviation, Inc. v. Guillory* (2012) 207 Cal.App.4th 26, 37, each side filed cross-motions, and so neither side objected to the unusual procedure. In *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 479, the appellate court was presented with the question of whether the water management problem was better resolved by petition for writ of mandate and not through a civil complaint - the propriety of the "motion for declaratory judgment" was not squarely analyzed. In *Augustyn v. Superior Court* (1986) 186

Cal.App.3d 1221, 1223, 1225-26, the appellate court, again, did not address the propriety of an expedited procedure for obtaining a declaratory judgment.

Although there are no reported cases holding that a "motion for declaratory relief" is forbidden, there is also no statutory or common law basis which authorizes a "motion for declaratory relief" absent the consent of all the involved parties.

Defendants ask the Court to consider this as a motion for reconsideration of the motion for preliminary injunction. Though certainly a court may disregard a motion's title and construe it as a different type of motion depending on the relief sought. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193), a motion for reconsideration is based on different standards than one seeking final relief. (Code Civ.Proc. §1008.)

The motion could be considered a motion for judgment on the pleadings. However, Plaintiffs seek to rely on evidence outside the record, including e-mails from representatives of Defendants and declarations by members of Plaintiff's constituent organizations. Therefore, the motion would best be considered a motion for summary judgment, but, as Defendants have noted, Plaintiffs have not complied with the statutory requirements of Code of Civil Procedure §437c.

In the reply brief, Plaintiffs argue the Court has the inherent power to "adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*In re Reno* (2012) 55 Cal.4th 428, 522.) The court does not address whether its inherent discretionary power would extend to the requested relief because Plaintiffs have only sought application of that discretion in the reply brief.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **DSB** **on 10/26/16**
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	*FOR COURT USE ONLY*
TITLE OF CASE: Nisei Farmers League vs.California Labor and Workforce Development Agency	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 16CECG02107

I certify that I am not a party to this cause and that a true copy of the:

Minutes/Order/Tentative Rulings

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 12/02/2016 Clerk, by _____, Deputy

N. Loveless

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