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FILED

JUL 25 2016

FRESNO COUNTY SUPERIOR COURT  
By \_\_\_\_\_ DEPT. 402

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

Nisei Farmers League,	)	No. 16CECG02107
	)	
Plaintiff,	)	ORDER AFTER HEARING
	)	
v.	)	Hearing Date: July 18, 2016
	)	Dept. 402
California Labor and Workforce	)	Judge: Honorable Jeff Hamilton
Development Agency, et al.,	)	
	)	
Defendants.	)	

The following matter came on calendar before this court on June 18, 2016 on an Order to Show Cause why a Preliminary Injunction should not issue. Having reviewed the papers and documents on file with the original Temporary Restraining Order and the supplemental briefing requested by the Court, and having considered the arguments of counsel, the Court rules as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff is an organization representing the interests of many farmers throughout the State of California. Many of its members pay their employees through "piece-work," which is to say, an employee works for a fixed rate per item of work. For example, a farmworker

1 could be paid per barrel, basket or bushel of fruit or nuts picked.

2       Recently, in response to cases interpreting the interplay of  
3 piece work and California minimum wage requirements, the Legislature  
4 enacted Labor Code section 226.2. This sets forward a scheme for  
5 ensuring that employees compensated on a piece work basis are also  
6 compensated for "other nonproductive time" which is defined in the  
7 first paragraph of the statute as "time under the employer's  
8 control, exclusive of rest and recovery periods, that is not  
9 directly related to the activity being compensated on a piece-rate  
10 basis." (Labor Code §226.2.) The statute mandates that such work,  
11 in addition to "rest and recovery periods" is intended to be  
12 compensated. (Labor Code §226.2, subd.(a)(1).) The statute sets  
13 forth guidelines for how the compensation is to be determined.  
14 (Labor Code §226.2, subd. (a)(3).)

15       At issue here in this Motion is a subsequent provision that  
16 creates an affirmative defense for employers "to any claim or cause  
17 of action for recovery of wages, damages, liquidated damages,  
18 statutory penalties, or civil penalties . . .based solely on the  
19 employer's failure to timely pay the employee the compensation due  
20 for rest and recovery periods and other nonproductive time for time  
21 periods prior to and including December 31, 2015." (Labor Code  
22 §226.2, subd.(b).)

23       In order to qualify for the affirmative defense, an employer  
24 must make payments to each of its employees for "previously  
25 uncompensated or undercompensated rest and recovery periods and  
26 other non-productive time from July 1, 2012 to December 31, 2015."  
27 (Labor Code §226.2, subd.(b)(1).) The payments must be either the  
28 "actual sums due" to each employee or a sum based on the "amount

1 equal to 4 percent of that employee's gross earnings in pay periods  
2 in which any work was performed on a piece-rate basis" with  
3 adjustments not relevant here. (Labor Code §226.2,  
4 subd.(b)(1)(A)&(B).) Such payments must be made on or before  
5 December 15, 2016. (Labor Code §226.2, subd.(b).)

6 Moreover, as especially pertinent here, in order to qualify  
7 for the affirmative defense, the statute requires, by no later than  
8 July 1, 2016, the employer to provide "written notice to the  
9 department of the employer's election to make payments to its  
10 current and former employees in accordance with the requirements of  
11 this subdivision." (Labor Code §226.2, subd. (b)(3).) The statute  
12 requires that the Department of Industrial Relations post on its  
13 website "either a list of the employers who have provided the  
14 required notice or copies of the actual notices. The list or notices  
15 shall remain posted until March 31, 2017." (Labor Code §226.2, subd.  
16 (b)(3)(B).)

17 Plaintiff filed a complaint on June 26, 2016. The Complaint  
18 seeks Preliminary and Permanent Injunctive and Declaratory Relief  
19 on a number of grounds: (1) Due Process-Vagueness; (2) Due Process-  
20 Arbitrary Deprivation of Property; (3) Due Process-Lack of Fair  
21 Notice; (4) Due Process-Retroactive Punishment; (5) Takings Clause;  
22 (6) Contract Clause; (7) Declaratory Relief; and (8) Injunctive  
23 Relief.

24 Two days after filing the complaint, Plaintiff filed a request  
25 for a Temporary Restraining Order and for the Court to set an Order  
26 to Show Cause why a Preliminary Injunction should not be issued.  
27 Defendants filed an opposition. On June 30, 2016, the Court heard  
28 arguments from counsel. At oral argument, counsel for Plaintiff

1 argued that the requirement the publication requirement of Section  
2 226.2, subd.(b)(3)(B) represented an irreparable injury for the  
3 farmers represented by Plaintiff because it would potentially expose  
4 them to investigation by the state and lawsuits by potential  
5 plaintiffs. Relying in part on this argument and on the serious  
6 questions on the merits raised by Plaintiff, the Court granted the  
7 Temporary Restraining Order.

8 Because of scheduling issues, the parties stipulated to hold  
9 the hearing on July 18, 2016. After the hearing, the Court asked  
10 the parties to specifically brief the factual and legal support for  
11 or against the granting of the preliminary injunction as well as  
12 the evidentiary support for each position.

13 Plaintiff and Defendants each filed supplemental briefs and,  
14 despite no permission or request from the Court to do so, Plaintiff  
15 filed a reply brief.

16 Plaintiff's motion was based, in large part, on several  
17 declarations filed as "Doe Declarations." Defendants moved to strike  
18 those declarations on the grounds of non-compliance with Code of  
19 Civil Procedure section 2105.5, which requires proper  
20 "subscription" of declarations.

21  
22 II. LEGAL DISCUSSION

23 A trial court must evaluate two interrelated factors when  
24 deciding whether to issue a preliminary injunction: (1) the  
25 likelihood of success on the merits, and (2) the balance of harm  
26 presented. (*Common Cause v. Bd. of Supervisors of Los Angeles County*  
27 (1989) 49 Cal.3d 432, 441-42.) A motion for preliminary injunction  
28 *must be denied* if the plaintiff has failed to satisfy either of

1 these two factors. (*Carsten v. City of Del Mar* (1992) 8 Cal.App.4th  
2 1642, 1649.) A preliminary injunction may only issue upon an  
3 adequate evidentiary showing. (*Chico Feminist Women's Health Center*  
4 *v. Scully* (1989) 208 Cal.App.3d 230, 247.)

5  
6 A. Likelihood of Success

7 The challenge for Plaintiff is that it must show a likelihood  
8 of success on one of its causes of action in order to support its  
9 claim to a preliminary injunction. The arguments presented in its  
10 motion focused largely on its assertion that Section 226.2 was void  
11 for vagueness, but also that it unconstitutionally applied the law  
12 retroactively, and that, in addition to the void for vagueness  
13 argument, that the Court could issue a declaration clarifying the  
14 law in advance of its enforcement.

15 Even so, Plaintiff's briefing largely centered on its assertion  
16 that Section 226.2 is unconstitutionally void for vagueness. One of  
17 the difficulties the parties had was in settling on a standard for  
18 "void for vagueness." Recently, the United States Supreme Court, in  
19 *Johnson v. United States* (2015) 135 S.Ct. 2551, 2557, held that the  
20 standard found in some cases- that so long as any reasonable  
21 construction could be given to a statute it was immune from a  
22 vagueness challenge- was too high a bar. (*Id.*) However, the Supreme  
23 Court did not announce a new standard.

24 Until such time as the California Supreme Court can provide  
25 definitive guidance, the Court must rely on the state court cases  
26 that have provided standards.

27 Plaintiffs argue that the standard is simply whether "a lay  
28 person of common intelligence can understand the law, not a lawyer

1 or judge." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-99.) This  
2 is an oversimplification. As Defendants point out, the standard, as  
3 applied, is much higher.

4 A statute will be upheld unless its unconstitutionality  
5 "clearly, positively and unmistakably appears." (*Patel v. City of*  
6 *Gilroy* (2002) 97 Cal.App.2d 354, 489 (citing cases).)

7 Moreover, a party "cannot prevail by simply suggesting  
8 hypothetical situations in which constitutional problems may arise.  
9 [S]peculation about possible vagueness in hypothetical situations  
10 not before the Court will not support a facial attack on a statute  
11 when it is surely valid 'in the vast majority of its intended  
12 applications.' " (*Hill v. Colorado, supra*, 530 U.S. at p. 733, 120  
13 S.Ct. 2480; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th  
14 1069, 1109, 40 Cal.Rptr.2d 402, 892 P.2d 1145 [unless law sweeps in  
15 substantial amount of constitutionally protected conduct, facially  
16 vague law must be invalid in all respects and applications];  
17 *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201, 246  
18 Cal.Rptr. 629, 753 P.2d 585 [in facial vagueness challenge party  
19 must demonstrate vagueness in "all of its applications," not just  
20 some instances of uncertainty or ambiguity]; cf. *American Academy*  
21 *of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347-348, 66  
22 Cal.Rptr.2d 210, 940 P.2d 797.)" (*Id.* at 487-88 (internal quotations  
23 and citations omitted).)

24 Finally, as Defendants point out, two underling principles  
25 (endorsed by the US Supreme Court in *Communications Ass'n v. Douds*  
26 (1950) 339 U.S. 382, 412) also inform the analysis: first, "the  
27 concrete necessity that abstract legal commands must be applied in  
28 a specific context," and, second "the notion of 'reasonable

1 specificity' or '[r]easonable certainty.'" (*People ex rel. Gallo v.*  
2 *Acuna* (1997) 14 Cal.4th 1090, 1117 (emphases in original).)

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

7 The parties' disputes center on the proper interpretation to  
8 give *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36  
9 (*Gonzalez*) and *Bluford v. Safeway Stores, Inc.* (2013) 216  
10 Cal.App.4th 864 (*Bluford*). The cases, in turn, involved  
11 interpretations of *Amenta v. Osmose, Inc.* (2005) 135 Cal.App.4th  
12 314 (*Amenta*). These cases stand for the proposition that, at least  
13 in certain circumstances, when an employee is performing rest or  
14 recovery periods or "performing non-piece-rate tasks directed by  
15 their employer" (*Gonzalez, supra*, 215 Cal.App.4th at 54), the  
16 employee must be compensated at least at minimum wage by the hour,  
17 and not on an average on a weekly basis, as under the federal minimum  
18 wage system. (*E.g., Armenta, supra*, 135 Cal.App.4th at 45.)

19 Defendants argue that, in the context of these cases, which  
20 the legislative history suggests Section 226.2 was meant to codify,  
21 the challenged language is understandable, even to a person of  
22 "common intelligence." Plaintiff contends that the cases do not  
23 offer sufficient guidance and that the cases are incorrectly  
24 decided.<sup>1</sup>

25 Whatever standard is to be adopted, the Court does not believe  
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27 <sup>1</sup> The Court will note that it is without power to decide whether  
28 those cases were rightly or wrongly decided; the duty of the trial  
court is simply to follow their rulings until or unless they are  
overturned.

1 that Plaintiff has borne its burden of showing a likelihood of  
2 success on the merits that the statute is unconstitutionally vague.  
3 A fair reading of the statute is that, insofar as activities prior  
4 to its enactment are concerned, no new obligations were created;  
5 either employers had fully compensated their employees for their  
6 work or they had not been fully compensated. If an employer wishes  
7 to take advantage of the offered affirmative defense it must either  
8 make a good faith attempt to pay the amounts due or pay 4% of the  
9 gross earnings of the employee between July 1, 2012 and December  
10 31, 2015. (Labor Code §226.2, subd. (b) (1) & (b) (1) (A)-(B).)

11 If the employer does not take advantage of the safe harbor  
12 provisions, then it may still argue that it does not owe any back  
13 pay to its employees.

14 In oral argument, Plaintiff stressed that its members found  
15 that "other non-productive time" and "directly related" were void  
16 as applied to the farming industry. While the Court is sympathetic  
17 to these issues, the Court is also mindful that the statute is  
18 intended to apply to all industries utilizing piece-rate  
19 compensation, and so all that is required is that there must be  
20 "reasonable certainty" and "reasonable specification." ((*People ex*  
21 *rel. Gallo, supra*, 14 Cal.4th at 1117.))

22 Here, Plaintiff has not shown that the definitions in dispute  
23 are "clearly" and "unreasonably" indefinite.

24 Further, there is nothing in the statute that suggests that it  
25 makes any substantive changes to the law. To the extent that  
26 *Gonzalez, Bluford*, and/or *Armenta* did or did not apply beyond their  
27 facts prior to the enactment of this law, it does not appear that  
28 this code section changes that calculation.



1 Finally, to the extent that Plaintiff has alleged that the  
2 Court could issue a declaration "clarifying" the law for its  
3 members, the Court is inclined to agree with Defendants that such  
4 a ruling would be advisory.

5 The Court has therefore concluded that Plaintiff has not shown  
6 a likelihood of success on the merits in the papers presented as  
7 part of this motion.

8  
9 B. Balance of Harms

10 Where a Court has ruled that there is no likelihood of success  
11 on the merits, the preliminary injunction will be denied. (*Law*  
12 *School Admission Council, Inc. v. State of Calif.* (2014) 222  
13 Cal.App.4th 1265, 128 ("trial court may not grant a preliminary  
14 injunction, regardless of the balance of interim harm, unless there  
15 is some possibility that the plaintiff would ultimately prevail on  
16 the merits of the claim".)) Nevertheless, the Court will observe  
17 that Plaintiff has not shown that the balance of harms will tilt in  
18 its direction. (*Id.* (balance of harm demonstrated by the comparative  
19 consequences of the issuance and non-issuance of the injunction).)

20 As stated above, Plaintiff has shown no harm to Plaintiff's  
21 membership from any requirement to pay back wages: the statute  
22 appears to make no difference in the obligations of employers to  
23 pay for rest and recovery periods and other non-productive time for  
24 any period before its enactment. Simply put, Plaintiff's members'  
25 obligations with respect to moneys owed do not appear to be changed  
26 by this statute.

27 The only applicable harm, as identified by the Plaintiff,  
28 appears to be the publication requirement of Labor Code section

1 226.2, subdivision (b) (3) (B). In support of the alleged harm caused  
2 by this requirement, Plaintiff has provided declarations of several  
3 farms who have remained anonymous (they have filed "Doe  
4 Declarations").<sup>2</sup> Collectively, they state that they are fearful  
5 that, by declaring their intentions to rely on the affirmative  
6 defense and make payments to their employees, they are likely to  
7 suffer investigation from the state and law suits from the  
8 plaintiff's bar.

9 While the Court is mindful that state investigations and  
10 private lawsuits are not trivial, there is nothing in the  
11 declarations that explains the costs of such lawsuits or why such  
12 lawsuits would be more likely if their names are posted. In fact,  
13 there is an argument that by broadcasting to potential plaintiffs  
14 that they are relying on an affirmative defense, it makes private  
15 lawsuits less likely.

16 Furthermore, the Defendants have presented declarations and  
17 information that delaying implementation of the affirmative action  
18 scheme would be a hardship for the employers who had already  
19 indicated to the State their intention to pay employees under the  
20 auspices of Section 226.2. As Defendants noted in oral argument,  
21 such non-parties will also be subject to uncertainty as to whether  
22 they can have the advantage of an affirmative defense if the  
23 injunction were to be granted.

24  
25 <sup>2</sup> At oral argument, the Court denied the motion to strike and  
26 allowed admission into evidence of the "Doe Declarations." The  
27 Court noted that much of the evidence provided by Defendant was  
28 hearsay (to which Plaintiff did not object), but admitted the  
evidence from both parties. The Court has treated the evidentiary  
deficiencies as going to the weight, not the admissibility, of the  
evidence.

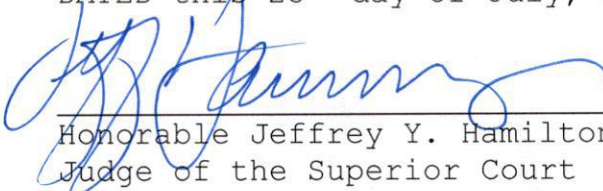
1 To be fair, neither party has provided definitive evidence as  
2 to the scope of the problem for purposes of balancing these  
3 hardships. In such a case, the burden remains on the party seeking  
4 the injunction to demonstrate that the balance of harms tilts in  
5 its favor. (*Id.*) For this reason, too, the motion will be denied.

6 The Court notes that the Court is not making any observations  
7 or rulings on the other causes of action contained in Plaintiff's  
8 complaint, merely those for which Plaintiff provided briefing.

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10 III. CONCLUSION

11 For the reasons stated above, the Court denies Plaintiff's  
12 motion for preliminary injunction. The Temporary Restraining Order,  
13 expired as of the hearing on July 18, 2016. Per the terms of the  
14 Court's order to show cause, the deadline for electing whether to  
15 comply with Labor Code §226.2, subd.(b)(3) is July 28, 2016.

16  
17 DATED this 25<sup>th</sup> day of July, 2016

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Honorable Jeffrey Y. Hamilton, Jr.  
Judge of the Superior Court

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