TENTATIVE RULINGS ON LAW & MOTION MATTERS

DEPT. CX-102
JUDGE PETER J. WILSON

DATE: MARCH 28, 2019
TIME: 2:00 PM

NOTE: IF YOU ARE ADMITTED *PRO HAC VICE* IN ANY CASE, YOUR ANNUAL FEE MAY BE DUE. Please provide the court with notice that the annual/anniversary fee has been paid.

Please consult California Rules of Court, rules 2.104 and 2.108, for type size (not smaller than 12 points) and format of papers.

If a tentative ruling is posted, you may submit on your papers without oral argument by calling the clerk at (657) 622-5302. If there is no submission or appearance by either party, the Court will decide whether the tentative ruling becomes the final ruling, or whether the motion will be taken OFF CALENDAR.

If a tentative ruling is posted, please do not telephone the clerk to ask questions about it or to attempt an ex parte communication with the clerk. Please do not submit late paperwork in response to a tentative ruling; the court will not receive it in time.

The court typically posts rulings on the Internet by 3:00 p.m. the day before the hearing, but there may not be a tentative ruling for every motion. If no tentative ruling appears below for your matter, that means one has not yet been posted. Please do not telephone the clerk.

#	Case Name	Tentative Ruling
1	**McCormick vs. Preferred Brokers, Inc.** **2015-00827781**	The hearing on the Motion for Preliminary Approval of Class Action Settlement is CONTINUED to May 2, 2019, at 2:00 p.m. in department CX102 to permit the parties to address the following issues. Any supplemental briefing shall be filed at least 10 days before the continued hearing. A red-lined version of any revised proposed Class Notice is to be provided. An amendment to the Settlement Agreement is directed, rather than 'amended settlement agreement', to avoid waste of limited Court time and resources. *As to the Settlement* 1. Is 4,170 the maximum number of class members, or might additional class members be identified? Since class members may have multiple claims, what is the reasonable estimate as to how many claims the 4,170 members have? It remains unclear that the proposed net settlement fund of $125,000 will be sufficient to cover all claims. 2. Please explain why the motion for final approval is due 14 days before the deadline for filing objections, exclusions, and the filing of any additional claims. The motion need only be filed 16 court days before the hearing. Further, the hearing date on the motion for final approval can be adjusted if the parties need more time. *As to the Class Notice*

		3. Further revise the notice consistent with the issues addressed above. 4. The 12-page notice, for a $29.95 settlement, remains calculated to discourage rather than invite review. The length of the notice must be reduced. By way of example only: there is no need for footnotes 1 and 2; the discussion about claims and defenses on p. 3 , and the contemplated amended complaint, are not relevant or necessary; a protracted discussion about the mediation is unnecessary, and the releases should be summarized. 5. On page 4, in the Proposed Plan of Allocation, include the individual amounts of attorneys' fees and Plaintiff's service award. 6. Note, for the notices and any proposed orders, that the Court will not endorse attorneys or mediators. While the parties may characterize them as they choose in the settlement, orders signed by the Court, and notices approved by the Court, should not identify attorneys or mediators as "highly experienced" "very skilled," "highly qualified" or any words to such effect. *As to the Summary Notice* 7. Further revise the summary notice consistent with the issues addressed above. *As to the Proposed Order* 8. Further revise the proposed order consistent with the issues addressed above, and revise all dates commensurate with the continuance of this motion. Plaintiff to give notice.
2	**Castro vs. Baymont Inn & Suites** **2016-00840094**	The hearing on the Motion for Preliminary Approval of Class Action Settlement is CONTINUED to May 2, 2019, at 2:00 p.m. in department CX102 to permit the parties to address the following issues. Any supplemental briefing shall be filed at least 10 days before the continued hearing. A red-lined version of any revised proposed Class Notice is to be provided. An amendment to the settlement agreement is directed, rather than 'amended settlement agreement', to avoid waste of limited Court time and resources. *As to the Settlement* 1. The PAGA Release is overbroad because it is not limited to the facts alleged in this action that form the basis for the PAGA claims. 2. As to the class members' release (settlement, ¶26), the Court will not approve class members "opting-in" to the FLSA portion of the settlement by cashing checks. This procedure is unnecessary, in an opt-out settlement under California class action procedural law. A recent 9th Circuit decision confirms the release

here is sufficient to extend to FLSA claims arising from the facts alleged in the pleading, using an opt-out procedure under California law. (*Rangel v. PLS Check Cashers of California, Inc.* (9th Cir. 2018) 899 F.3d 1106, 1110-11.)

3. Explain why the definition of "Released Claims" includes PAGA Released Claims. The PAGA Members who are part of the general class are already providing a separate PAGA Release. (Settlement, ¶ 75.) Why is it necessary to have non-PAGA Members release PAGA claims, especially when they will not receive any share of the PAGA penalties?

4. What is the estimated number of PAGA Members?

5. Counsel should provide records in support of fees and costs at final approval.

6. The Court will determine the appropriate amount of Plaintiff's enhancement at final approval. At final approval, Plaintiff should re-submit her declaration or submit a new declaration that address the factors set forth in *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1272 and *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 804, including an estimate of the hours spent on this litigation.

7. Paragraph 32 Settlement provides that the costs of the Settlement Administrator are "estimated" to be $10,000 and that any excess amount will be paid from the settlement fund. However, paragraph 48 says these costs are "capped" at $10,000. (See also Settlement, ¶ 52.) These costs should consistently be described as "not to exceed" $10,000.

8. Paragraph 7 of the Settlement states the employer's employment taxes will be paid separately from the settlement amount. However, paragraph 18 of the Quintilone Declaration states "Defendants' … share of payroll taxes relates to Settlement Class Members' Individual Payment Amounts … will also be deducted from the" settlement amount. Further, Paragraph 51.b. of the Settlement states "all employer-owed tax liabilities" will be deducted from individual settlement payments. (See also Notice, § IV [Settlement Administrator shall pay employer side payroll taxes].) Please explain.

9. Paragraph 16 of the Settlement states the estimated Net Settlement Amount is $102,300 (see also § IV of Class Notice). However, paragraph 19 of the Quintilone Declaration states it is approximately $97,550. Please explain.

10. The settlement characterizes the consideration as one-third wages, one-third statutory and civil penalties, and one-third interest. See, for e.g., Settlement para. 68. How then can the PAGA Payment constitute only $5,000? Settlement, para. 49.

11. With the motion for final approval, Plaintiff must present a full report to the Court on all exclusions and objections received. The Court will consider any objections at the final approval hearing.

12. Paragraph 30 of the Settlement states class members have 45 days to file objections. However, paragraph 25 of the Quintilone Declaration states they only have 30 days to object. Please explain.

13. Along with the motion for final approval, the Settlement Administrator should provide an estimated high and low for individual settlement payments, along with Plaintiff' individual payouts.

14. The parties should file with the Court all disputes submitted by class members, the evidence submitted, and the resolution of those disputes and any unresolved claim disputes at the same time as the motion for final approval.

15. Paragraph 65 of the Settlement states that uncashed checks will be sent to the DIR's Unpaid Wages Fund. However, paragraph 22 of the Quintilone Declaration states uncashed checks will be sent to the State Controller's Unclaimed Property Fund. Please explain.

16. Counsel should state in supplemental briefing whether it has forwarded a copy of the Settlement to the LWDA and provide a proof of service. (See Lab. Code, § 2699(l)(3).) Any amendments made pursuant to this Order should also be filed with LWDA with a proof of service submitted to the Court.

Issues re Class Notice

17. The Class Notice is to be revised consistent with the issues addressed above.

18. Should the Class Notice need to be provided in any other languages?

19. Does "Baymont Inn & Suites" as used in the definition of the Class need to be constrained to any geographic location, e.g. Baymont Inn & Suites in Anaheim? (See also Paragraph 4 of Proposed Order.)

		20. Increase the font size of the text in the body of the notice so it is easier to read. 21. In Section IV, under "Monetary Amounts Under the Settlement," the Notice should state the award of attorneys' fees is "not to exceed" $62,700. 22. In Section IV, under "Release," break the second bullet point into multiple paragraphs so it is easier to read. 23. The "Released Parties" in Section IV, does not match the Released Parties in Paragraph 28 of the Settlement. Please explain. 24. Conform the language of the "Released Claims" in the Notice to match the definition of "Released Claims" in the Settlement. (Settlement, ¶ 26.) 25. In Section VII.D., explain how class members can submit a written objection. 26. In Section X, add information on how to access the files for this action on the Court's website, including the appropriate links to click so the member can enter into the case number. 27. Will PAGA Members receive a separate notice regarding the PAGA Payment? If so, please provide a copy of the notice. If not, please explain why you believe one is not necessary. *Issues re Proposed Order* 28. The Proposed Order is to be revised consistent with the issues addressed above. 29. The Settlement should be attached to the proposed order as an exhibit. 30. In Paragraph 5 on page 3, change "the best notice practical" to "reasonable notice." 31. In paragraph 7 on page 4, fill in a date for the final approval hearing. 32. In paragraph 7.b. strike "provided they submit a timely written objection to the Settlement." Section VIII of the Class Notice states a Class Member may offer oral objections without providing a written objection. 33. Provide a definition for "Effective Date." Plaintiff to give notice.
3	**Interest Smart Home Loans,**	The hearing on the Motion for Approval of PAGA Settlement

Inc. vs. Malone

2016-00878720

and Dismissal of Class Allegations is CONTINUED to May 2, 2019, at 2:00 p.m. in department CX102 to permit the parties to address the following issues. Any supplemental briefing shall be filed at least 10 days before the continued hearing. A red-lined version of any revised proposed notice is to be provided. An amendment to the settlement agreement is directed, rather than 'amended settlement agreement', to avoid waste of limited Court time and resources.

As to the Settlement

1. The release is overbroad as it still appears to release all claims by aggrieved employees for unpaid wages, as unpaid wages are sought in the complaint. The release must be limited to the PAGA penalties. The parties must either explain why this is not the case, or amend the release.

2. Also, please explain why the Representative PAGA Release does not specifically release claims on behalf of the PAGA Settlement Employees.

3. The valuation of claims in the paragraph 10 of the Gould Declaration appears to use the incorrect penalty amounts for Labor Code §§ 226, 1197, and 2802. (See Lab. Code, §§ 226.3, 1197.1, 2802(d).) Please explain and/or recalculate.

4. Will Malone receive a PAGA Payment in addition to her $5,000 payment? If so, in what amount?

5. Will any portion of the payment for settlement be subject to payroll taxes? If so, explain how the employee and employer's share of those taxes will be paid.

6. Provide an estimate of the low, high and average recovery of the PAGA Settlement Employees.

7. Malone should submit a declaration that addresses, among other things, the hours spent on this litigation, the assistance she provided to counsel, any hardships she faced as a result of this litigation, and any risks she faced in bringing this suit.

8. Does either party know of any other action pending in any other court that this settlement may impact?

9. Malone's 2/1/19 proof of service does not comply with CCP § 1013b. It is missing the electronic service address of the person making the service. (Code Civ. Proc., § 1013b(b)(1).) Further, Malone's counsel must give notice to the LWDA of any amendments to the Settlement made pursuant to this order and of the continued hearing date.

10. The Court has been informed in similar matters that the Unclaimed Wage Fund will no longer accept payment of unclaimed funds from settlements such

		as this. Accordingly, the parties are to further address the disposition of unclaimed funds. 11. Malone has not provided a declaration stating whether any direct or indirect consideration is being given for the dismissal of the class claims. *Issues re Notice* 12. The Notice is to be revised consistent with the issues addressed above. 13. The notice should state what claims have been released. *Issues re Proposed Order* 14. The proposed order is to be revised consistent with the issues addressed above. 15. The Settlement should be attached to the proposed order as an exhibit. 16. In Paragraph 2, either provide a definition for "PAGA Settlement Employees" or incorporate the definition from the Settlement. Do the same for other undefined terms. The Status Conference is continued to the same date and time. Moving party to give notice.
4	**Clinton vs. Amazon.com, Inc.** **2017-00938102**	Defendants Amazon.com, Inc. and Amazon Logistics, Inc.'s ("Defendants") Motion to Stay or Dismiss Plaintiff's Complaint is CONTINUED to July 26, 2019 at 9:00 a.m. in this department. <u>The stay imposed on June 6, 2018 remains in place until the continued hearing</u>. At the hearing, the parties should be prepared to discuss the status of the putative class actions and PAGA representative actions pending against Defendants in other courts, including *Rittman*, *Keller*, and *Knipe*. The status conference is continued to the same date and time. The parties are ordered to file a joint statement discussing the status of all then-known pending matters which have as a central issue the classification by Defendants of drivers like Plaintiff as independent contractors, rather than employees. The parties may also present in the joint statement any additional argument as to why the stay should or should not be lifted. The joint statement must be filed at least 10 days before the hearing and should be no longer than 10 pages. Defendants to give notice.
5	**Gizmo Beverages, Inc. vs. Park**	Cross-Defendant Walter Apodaca's ("Apodaca") Motion for Award of Attorneys' Fees and Costs is GRANTED in part and

2017-00941566

CONTINUED in part to April 25, 2019, at 2:00 PM as set forth below.

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16(c)(1).) A court may award attorneys' fees to a prevailing defendant whose anti-SLAPP motion was not heard because the complaint was dismissed on other grounds before the hearing on the motion. (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 220; *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal.App.4th 477, 480; *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323, disapproved on other grounds by *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329.)

To determine whether the defendant is the prevailing party and entitled to fees, courts evaluate the merits of the anti-SLAPP motion. (See *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220-21; *Tourgeman v. Nelson & Kennard* (2014) 222 Cal. App. 4th 1447, 1456-57.)

Apodaca would have prevailed on his special motion to strike the ninth and tenth causes of action in the initial cross-complaint ("XC") filed by Dong Park, Ramblewood Holdings, Ltd., DP Textiles, Inc., The Park 1997 Family Trust, David J. Park, and Tic Toc Trust (together, "X-Plaintiffs"). However, he would not have prevailed on his special motion to strike the thirteenth cause of action in the XC.

In analyzing an anti-SLAPP motion, the party moving to strike a claim has the initial burden to show that the claim arises from an act in furtherance of his right of petition or free speech. Once that burden is met, the burden shifts to the opposing party to demonstrate the probability that it will prevail on the claim. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

As to the ninth and tenth causes of action, Apodaca moved to strike allegations regarding the initiation, funding, and prosecution of ongoing litigation against certain X-Plaintiffs. (See Anti-SLAPP Memo P&A's, 3:11-5:2.) This is protected activity. (*Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1166.) While the ninth and tenth causes of action also arose from unprotected activity (see e.g. XC, ¶ 40-41, 62-62, 67, 179, 180-181, 183, 187), the court can strike "specific allegations of protected activity which constitute claims for relief but do not constitute an entire cause of action as pleaded." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) The burden then having shifted to X-Plaintiffs to demonstrate the probability of prevailing, X-Plaintiffs did not provide any evidence to support the merits of their claims based on protected activity. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289; *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351; *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121, 124.)

		As to the thirteenth cause of action, it is unclear from the face of the XC that Dong Park's defamation claim arose from protected activity. The allegations in the XC are too vague to determine this. (See e.g. XC, ¶¶ 64-65.) As such, Apodaca would not have prevailed on the special motion to strike the thirteenth cause of action. (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 628.) Since Apodaca would have been partially successful on his anti-SLAPP motion, he is entitled to fees and costs. But only those "incurred in moving to strike the claims on which [he] prevailed, [and] not fees and costs incurred in moving to strike the remaining claims." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 82.) It is unclear from the Schena Declaration how much of the incurred fees are attributable to the ninth and tenth causes of action, rather than the thirteenth cause of action. Thus, as to the amount of fees, the hearing is continued so that Apodaca's counsel can submit a supplemental brief of no more than 5 pages setting forth the fees and costs incurred for the ninth and tenth causes of action. The supplemental brief shall be filed no later than 14 days prior to the hearing. X-Plaintiffs may file a response brief of no more than 5 pages no later than 7 days prior to the hearing. This additional briefing is restricted to the issue of the proper allocation of the requested fees, for the ninth and tenth causes of action only. The status conference remains on calendar. Moving party to give notice.
6	**Alemzay vs. Farmers Insurance** **2018-00962736**	Continued to May 30, 2019.
7	**McCraney vs. Acosta, Inc.** **2018-00974997**	Motions off calendar. Status Conference continued to April 18, 2019. The parties are Ordered to file a joint status conference report not later than 5 court days before the hearing. Moving party to give notice.
8	**Pruitt vs. Nihon Kohden America, Inc.** **2018-00983954**	The motion of Defendant Nihon Kohden America, Inc. ("Defendant") to Compel Arbitration is GRANTED and its Motion to Dismiss Class Claims is DENIED. The arbitration agreement is enforceable. "Both procedural and substantive unconscionability must be present before a contract or term will be deemed unconscionable." (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 178.) Here, substantive unconscionability is missing. An "agreement is capable of construction consistent with the dictates of *Armendariz*" even where it lacks "express provisions which provide for the payment of fees and costs." (*Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 719; see also *24 Hour Fitness, Inc. v.*

		Superior Court (1998) 66 Cal.App.4th 1199, 1214–1215.) The agreement is mutual since it binds both parties to arbitrate covered claims. (Estrada Decl., Ex. A, ¶ A.) Further, nothing in the agreement limits Plaintiff's right to seek attorney's fees under the Labor Code or judicial review. (Estrada Decl., Ex. A, ¶ A.) Finally, there is no right of unilateral modification in the arbitration agreement. Rather, the employee handbook states that that Defendant may modify the terms and conditions of Plaintiff's employment. (Estrada Decl., Ex. B.) The arbitration agreement is governed by the FAA. (See Estrada Decl., ¶ 3; *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 277; *American Postal Workers Union, AFL-CIO v. U.S. Postal Service* (11th Cir. 1987) 823 F.2d 466, 473.) A court's role in considering a petition to compel arbitration under the FAA is limited to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (*Chiron Corp. v. Ortho Diagnostic Sys. Inc.* (9th Cir.2000) 207 F.3d 1126, 1130.) If these requirements are met, "the court must compel arbitration." (*Boardman v. Pacific Seafood Group* (9th Cir. 2016) 822 F.3d 1011, 1017.) Here, Defendant has submitted a valid arbitration agreement that covers the claims asserted by Plaintiff in this action. (Estrada Decl., ¶ 4, Ex. A.) Plaintiff does not contest that he signed the arbitration agreement. Nor does he contest that his claims are covered by the agreement. Thus, Plaintiff's individual claims must be arbitrated. The issue of whether Plaintiff's class claims should be dismissed is for the arbitrator to determine. The language of the arbitration agreement is comprehensive enough to cover arbitrability of class claims. Further, any ambiguities regarding the arbitration agreement are construed against Defendant and doubts regarding arbitrability are resolved in favor of arbitration. (See e.g. *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243-48.) Moreover, Defendant does not object to the arbitrator determining this issue. (Reply, 10:19-20.) Thus, the Court orders Plaintiff's individual and class claims to arbitration and orders this action stayed pending arbitration. The Court sets an Arbitration Review Hearing for September 27, 2019 at 9:00 AM. Moving party to give notice.
9	**Sierra Fireproofing Inc. vs. Davis/Reed Construction Inc.** **2017-00957271**	Demurrer and Motion to Strike Davis/Reed Construction, Inc.'s ("Davis/Reed") demurrer to the Second Amended Cross-Complaint ("SACC") of The Waterfront Hotel, LLC ("Waterfront") is SUSTAINED with leave to amend. "[F]raud must be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996)

12 Cal.4th 631, 645.) "This particularity requirement necessitates pleading facts which "show how, when, where, to whom, and by what means the representations were tendered." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.)

Waterfront argues the SACC alleges a promissory fraud claim based on fraud in the inducement. (See e.g., Opp., 9:5-17, 10:6-10.) However, the SACC simply states in conclusory terms that purported misrepresentations were made "at the time Waterfront executed the Contract." (SACC, ¶ 65; see also SACC ¶ 68.) Waterfront must allege when the specific misrepresentations were made, as well as who made them, where they were made, to whom they were made, and by what means. (*Robinson Helicopter Co., supra,* 34 Cal.4th at p. 993.) The contract itself does not supply these allegations. (See Opp., 8:9-20.) Here, specificity is particularly required since Waterfront is arguable seeking to impose tort liability for an alleged breach of a written contract.

As to Waterfront's argument regarding parol evidence, parol evidence is admissible to establish illegality or fraud. (Code Civ. Proc., § 1856(g); *Richard v. Baker* (1956) 141 Cal.App.2d 857, 863.)

As the demurrer has been sustained with leave to amend, the motion to strike is moot.

Moving party to give notice.

Motion to Consolidate and Joinder

Waterfront's motion for an order consolidating related actions is CONTINUED to May 2, 2019 at 2:00 PM.

Waterfront has not complied with California Rules of Court, Rule 3.350(a)(1)(A) and (C) and (2)(B). The notice of the motion does not list all named parties in each case, the names of those who have appeared, and the names of their respective attorneys of record. Nor has the notice been filed in each case sought to be consolidated. Further, it is unclear whether all parties in all actions sought to be consolidated have been served. (California Rules of Court, rule 3.350(a)(2)(B).)

Within 7 days of this Order, Waterfront must file, in each case sought to be consolidated, a notice of the motion pursuant to Rule 3.350(a)(1). The revised notice must be served on all parties in all actions and the moving papers must be served on any parties that were not previously served with them. Waterfront must also file an updated proof of service.

Any party that has not yet filed an opposition to the motion may do so no later than 9 court days before the hearing, and Waterfront may file a reply to any new opposition no later than 5 court days before the hearing.

Davis/Reed's joinder to the motion to consolidate is also continued to May 2, 2019.

		Moving party to give notice.
10	**Best Interiors, Inc. vs. The Waterfront Hotel, LLC** **2018-00987122**	Plaintiff Best Interiors, Inc.'s ("Plaintiff") Motion for Leave to File a Second Amended Complaint ("SAC") is GRANTED. Plaintiff must file the amended SAC within 5 days of this order. The Court notes that Plaintiff has not complied with California Rule of Court, Rule 3.1324(b)(4). The Jenkins Declaration does not state why the request could not have been made earlier. Further, the Jenkins Declaration establishes that Plaintiff discovered the information forming the basis of the amendments on March 2, 2018 (see e.g. Jenkins Decl., ¶ 13), more than a month before Plaintiff filed its initial complaint. However, "'the trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown.'" (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 [alterations in original].) "This discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1047.) Even if there is unreasonable delay, "it is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment." (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) There will be no prejudice to defendant Davis/Reed Construction, Inc. ("Davis") if leave to amend is granted. The motion for leave was filed on September 11, 2018, less than five months after the initial complaint was filed. Further, there is no trial date in this action. (Jenkins Decl., ¶ 7.) Nor has Davis identified any prejudice in its opposition. While Davis argues the amendment is without basis, rather than deny the motion, "the preferable practice [is] to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings." (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) Plaintiff to give notice.
11	**Trujillo vs. ABC Phones of North Carolina, Inc.** **2018-01022678**	The hearing on the Motion for Approval of PAGA Settlement is CONTINUED to May 2, 2019, at 2:00 p.m. in department CX102 to permit the parties to address the following issues. Any supplemental briefing shall be filed at least 10 days before the continued hearing. A red-lined version of any revised proposed notice is to be provided. An amendment to the settlement agreement is directed, rather than 'amended settlement agreement', to avoid waste of limited Court time and resources.

As to the settlement:

1. Clarify whether aggrieved employees will be waiving underlying wage and hour claims they may have against Defendant. While the language of the release states that it is limited to claims "pursued in the Action under the PAGA … or could have been pled under the PAGA," the Schmidt Declaration appears to include wages in its liability calculations. (Schmidt Decl., ¶¶ 25-33.) If the aggrieved employees are not waiving their underlying wage and hour claims, please specify this in the notice. If they are, please explain how this comports with due process since over 3,300 employees will be releasing wage and hour claims without any form of notice or ability to opt out.

2. The billing records that Plaintiff's counsel have submitted are inadequate. The billing records contain initials for each billing attorney and/or paralegal and their rate. (See Schmidt Decl., Ex. C.) However, there is no explanation of the identity of the initials or their billing rates.

3. Plaintiff's counsel must submit documentation for their expert costs.

4. Provide an estimate of the low, high and average recovery of the aggrieved employees.

5. Does either party know of any other action pending in any other court that this settlement may impact? If yes, please identify the case, the court in which it is pending, and provide a brief summary of the procedural posture of that case.

6. The Settlement provides that any uncashed check will be sent to the State Controller and held in the name of the aggrieved employee per Unclaimed Property Law. (Settlement, Section IV, ¶ 3.) However, the notice states that they will be sent to the Department of Industrial Relations - Unclaimed Wage Fund. Please clarify whom will receive the funds. However, the Court is informed that the DIR Unclaimed Wage Fund no longer accepts such deposits.

7. Plaintiff's counsel must give notice to the LWDA of any amendments to the Settlement made pursuant to this order and of the continued hearing date.

As to the notice:

8. The notice to the aggrieved employees is to be revised consistent with the issues addressed above.

As to the proposed order:

		9. The proposed order is to be revised consistent with the issues addressed above. 10. The Settlement and Notice should be attached to the proposed order as an exhibit. The Status Conference is continued to the same date and time. Plaintiff to give notice.
12	**California Business & Industrial Alliance vs. Becerra** **2018-01035180**	The demurrer of Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California ("Defendant") is SUSTAINED as to the first cause of action, OVERRULED as to the eighth, and ninth causes of action, and CONTINUED as to the remaining causes of action. Plaintiff California Business & Industrial Alliance ("Plaintiff") has standing and its claims are ripe as to the first, eighth, and ninth causes of action. "'[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673 [quoting *Hunt v. Washington State Apple Advertising Com'n* (1977) 432 U.S. 333, 343].) As to the first prong, Plaintiff's opposition clarifies that it is seeking prospective equitable relief. (Opp., 6:2-5, 17-20.) "A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Cuenca v. Cohen* (2017) 8 Cal.App.5th 200, 216 [internal quotations and citations omitted].) "[T]he [ripeness] requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) The controversy is sufficiently concrete and there is widespread public interest in these particular legal questions. Plaintiff alleges that PAGA as currently applied is unconstitutional. Its argument is not reliant on a specific application of the PAGA statute to particular set of facts that have not yet occurred. Moreover, it provides specific allegations regarding the manner in which PAGA is enforced that render it unconstitutional. (See e.g. Complaint, ¶¶ 68-76, 89-109.) The dispute is sufficiently definite to enable the Court to make a ruling that will dispose of the controversy. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) As to the third prong, it is met so long as "[n]either the[] claims nor the relief sought require[] the [Court] to consider the individual circumstances of any aggrieved [] member."

(*Brotherhood of Teamsters*

		• Under Labor Code § 2699(e)(2), courts have discretion to "award a lesser amount than the maximum civil penalty … if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." How does this impact the excessive fine and substantive due process analysis? • Is there any case stating that the *threat* of an excessive fine, litigation costs, or settlements can or cannot be part of the excessive fine or substantive due process analysis? • Is there any authority for or against the proposition that civil penalties can be treated as criminal or quasi-criminal liability for the purposes of Plaintiff's procedural due process claims? Each party's supplemental briefs shall be limited to 10 pages and shall be due at least 14 days before the hearing. The parties may also file reply briefs limited to 5 pages and due at least 7 days before the hearing. Further, within 7 days of this order, Plaintiff must clarify to Defendant whether its excessive fine claims (i.e. the claims under the excessive fine clauses and under substantive due process) are as applied or facial challenges. This should be incorporated into the parties' supplemental briefs. All the requests for judicial notice of Plaintiff and Defendant are granted. (Evid. Code, § 452(c), (h); see also *Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665 fn. 4.) Moving party to give notice.
13	**Giammarco vs. Gizmo Beverages Inc.** **2017- 00954944**	The Status Conference remains on calendar.