WRITTEN	1st Read	2nd Read	Operant Grade
Essay 1:	60.0	60.0	60.0
Essay 2:	60.0	55.0	57.5
Essay 3:	70.0	60.0	65.0
Essay 4:	55.0	50.0	52.5
Essay 5:	65.0	65.0	65.0
Essay 6:	60.0	60.0	60.0
PT A:	60.0	60.0	60.0
PT B:	55.0	60.0	57.5

Fed. Rules of Civ. Proc.

1)

1. Paul's (P) service on Valerie and Meye Corp.

For the service to be valid, it must be done by a qualified person in accordance with the rules with the Federal Rules of Civil Procedure (Civ Pro) or with the rules of Civ Pro of the state where the service is taking place. A qualified person means a non-interested person over the age of 18 who is in sound mind and is not a party to the lawsuit. The service must contain the summons giving notice to the defendant (D) and the complaint giving rise to the litigation. It must be personally served on the person who is sued , it can be done at his place of her abode, or on someone at the place of abode who is also a resident there. The defendant can also consent to service if he is mailed the proper papers by mail and consents to being served, it gives D additional time to respond to the complaint and relieves D from the expense that Paul (P) incurred for service of process. In rare circumstances when a party is hard to find, service by publication is accepted, but for the court to accept such service, there must be a showing of the need to do it this way and the impossiblity of locating the party for proper service.

a. Valerie (V)

V is a defendant in the suit, she is a resident of San Francisco. Here, P drove to her San Francisco where he personally served her with the summons and complaint. As stated above, the summons and complaint here gave V proper notice of the suit against her. We can assume that she was served in a proper manner by being handed the papers, however, P was the party to the suit. It is no excuse that he filed the suit pro se without being represented, he must still find someone else to do the service or offer V to consent to service. Thus, it was improper.

b. Meyer Corp. (M).

A corporation can be served on a Registered Agent, a designated individual who

accepts service on behalf of the corporation when a corporation registers with the local Secretary of State, or it can be done on authorized agents or officers of the corporation. Moreover, Federal Rule of Civ Pro do not recognize service by ordinary mail as the proper means of service. California rules of Civ Pro don't recognize it either. It's likely that P did not fulfill the requirements stated above for proper service because he simply mailed a summons and complaint to M instead of having the corporation properly served. He must have had an independent individual personally serve a registered agent or an officer of the corp.

2. **Personal Jurisdiction (PJ)**

For the court to hear the case brought in front of it, the court must be able to exercise personal jurisdiction (PJ) over the parties.

CITIZENSHIP OF CORPORATION

Corp is a citizen of any state where it's incorporated, and a state where it has its headquaters. Corporations can have more than one state where they are considered citizens.

TRADITIONAL BASIS

PJ can arise under traditional basis such as consent of the parties, or presence when served, or when a defendant is basically at home in the forum state. P must state the basis of such personal jurisdiction in his complaint to show why the court must hear the case. Here, the facts actually suggest the opposite that a German Company with a sole of business in Germany. Obviously the company didn't consent or was served when present in the state, based on the issues of service described above. Also the corporation did not conduct business in the state of California to the extent it can be said that it was basically at home. Thus, we can look if the court has Constitutional basis for PJ.

CONSTITUTIONAL BASIS

Under Long Arm statutes which many states adopted, the courts can extend its jurisdiction over non citizens. To meet the constitutional requirement the case must not offend traditional notions of subtantial justice, in other words it must not unjustly burden the defendant to defend itself in that court. Such basis can be established by showing that it's fair for the court to hear the case and it doesn't create undue burden on the defendant to expent him to defend himself in that forum, also that the defendant specifically availed himself to the jurisdiction of the court and it was foreseeable to be hauled to the court in the forum state.

Fairness

The defendant must not be prejudiced in being expected to defend himself in the forum. The court can look whether the relevant witnesses, and other parties are not going to be greatly incovenienced by the forum. For such a determination, the court will look that M actually didn't do any business in CA. It's true that the only witness V is in CA, but it might not be enough to establish fairness.

Relatedness

The activity giving rise to the case must be related to the business that the corporation was conducting in the forum state. Here, M was doing business solely in Germany, thus there is no indication of their business in Germany would be so broad that it became related to their business in CA. It apprears that some, a mere insidental sale of chips in CA is unlikely to be related to M's business in CA.

Foreseeability

There must be some evidence showing that M should have foreseen to be

hauled to the courts of CA. Foreseeability can be shown that by placing products in the stream of commerce, M should have foreseen that they'll reach all states and might cause physical injury to state residence. Here, P will argue that M should have foreseen a consumer to be a potential Plaintiff.

Minimal Contact

P might argue that since M put chips in the stream of commerce, they have enough minimal contacts with the state, to the point that they benefited from the interstate commerce, from CA residence, and their activities amount to the minimal contacts with the state giving rise to the lawsuit. Again, it's a doubtful question since the contact was so incidental and there is no showing of continuous sale of these chips.

Moreover, it's worth to note that no privity is required between P and M, P got chips from V and V could have bought them from M's wholesaler.

NOT FEDERAL QUESTION.

Here the case obviously doesn't arise out of a federal question since it's an action for negligence or product liability. Thus the courts will not hear exercise its jurisdiction under this prong.

PJ FOR V

As discussed above, it must be shown that V is a subject to either a traditional or a constitutional basis of PJ. Here, her service was defective, thus, the presence inthe state does not qualify for PJ, she didn't consent. But she is actually a resident of CA since she resides in San Francisco. Moreover, she is conducting business in CA by selling chips or working as a vendor at a music festival. She intentionally availed herself to the jurisdiction of CA couts. Thus, there is basis for the court to exercise PJ over V.

3. Venue

Venue is proper in a jurisdiction where 1. the defendant resides, or 2. in where the accident or substantial part of the events giving rise to the litigation took place, or if there is no jurisdiction where 1 or 2 are applicable then in any jurisdiction where the court would have had jurisdiction under subject matter jurisdiction (SMJ) and personal jurisdiction (PJ).

PJ as discussed above. It appears that M is not a subject to PJ of CA.

SMJ can be based on a federal question, such as the case arises out of a federal law instead of state law. Or it must be based on diversity jurisdiction and must meet the criteria: over $75,000 in controversy and the parties are residents of different states.

As discussed above, M is not a resident of CA, since it didn't incorporate here and its headquaters is not in CA but in Germany. Thus, P is diverse to M and would meet the first diversity element.

Moreover, the amount in controversy is not satisfied since P is only suing for $50,000.

V is also a resident of CA, thus the basis for Venue under SMJ is broken by V's residency in CA.

The court might also look at Paul (P) whether he has standing to bring a cause of action in the local court since he is a citizen of Mexico who is on a student visa attending college in San Diego. A person is a citizen of a particular state when he is domiciled in that state, such as that he intends to make it his permanent home. Here, P is only on a student visa in CA, thus he is unliky the citizen of CA.

But non-citizens can still bring a suit when the substantial part of the events under the suit happened in the forum state.

4. Removable to Federal Court (F C)

D may petition to remove the case to Fed. Court in a timely fashion, it' s a right of a denendant not plaintiff. The case must have been eligible to have been filed in F.C originally in order to be removable to Fed. Court. However, it must not offend PJ and SMJ if it's removed to Fed. Court.

Here, as discussed above, the SMJ over V will be severed since both V and P are likely to be viewed as citizens of CA. Moreover, the amount in controversy of $50000 is less than the requirement for SMJ. Thus the case would not have been removable to Fed. Court.

Question #1 Final Word Count = 1633

Real Property

2)

1. Ben's action

Ben (P) is suiting Polly (P) here for declaratory relief that the farm is burdened by his easement.

CREATION OF AN EASEMENT

An express easement can be created by a valid written instrument which meets Statute of Frauds requirements and which burdens on plot of land and benefits another.
An implied easement can be obtained by necessity when one plot of land is landlocked and there is not way for the other property owner to gain access to the community roads or utilities. An easement by prescription can also be obtained similarly to adverse possession, except it does not need to be exclusive to the owner's right to possess. It can be shared with the other property owner. The servient land owner would need to show that he was using the land openly, contuniously, for statutory period (most jurisdictions around 20 years), hostile, i.e. without owner's permission, apparently, such it was obvious that the land was being used.

The facts presented support the fact that the easement was likely express since B was able to record it in 2011, there must have been some actual writing since "Al deeded an easement" in order for him to present it in the land title recordation office.

However, even if C claims that there was no express easement, B would be able to claim easement by prescription. He would be able to show that he was using it openly such driving on it, he graded and paved road, it's been over 25 years since he started doing it, and it's likey the statute of limitation is satisfied by this time frame. There might be an issue that he was using it without the

permission of the true owener, since Al actually permitted B to use it, thus the hostility element would likely fail.

SEVERANCE OF AN EASEMENT

Abandoning easement, non use, severance by acquisition of the land by joint owner, destruction of the easement would be a proper means to destroy an easement by necessity or a prescriptive easement. However, An express easement would need to have a valid written instrument invalidating it, simply abandoning use of the easement would not make it invalid.There is no such instrument which severed B's easement on Al's land, thus it contunues to be valid.

STATUTES OF FRAUDS (S of F)

Certain contract must be in writing to be valid, such as any contract that conveys land, a contract which cannot be fulfilled within one year, suretiship, sale of goods over $500, in consideration of marriage, and executory agreements.

Here, it's likely that the easement was in writing since it was express and it was later recorded by B in 2011. Thus, it had met the requirments under S of F.

B would also argue that P took the land subject to the easement when she took the land. She should have inspected the land then she would have discovered the easement by observing an obvious landmark - graded and paived road. The record notice is further discussed below.

However, it's probably unnecessary for B to argue record notice, since he received an actual express easement from Al.

2. P's action for **breach of contract against Carol (C)**

P would argue that the clause "Seller shall covenant against encumbrances with no exceptions" is an absolute condition for the contract. However, a condition precedent to the contract can provide relief to C.

C would argue that the land was already burdened by B's covenant when she promised to sell it to P. Moreover, C would argue that P already had inquiry notice.

Types of notice: actual, record, or inquiry.

An actual notice can exist when the grantee has actual notice about an encumbrance on the land. Record notice can exist when the grantee conducts title search and discoveres a recorded instument on the property such as a mortgage, lien, or an easement. Inquiry notice can be imputed on the grantee since the grantee has an obligation to inspect the property prior to purchase. Thus, had she inspected the property, she would have easily observed the paved road on the farm which led to B's property.

Here, because the paved road was an obvious landmark, P should have had the inquiry notice of the easement. Moreover, she would have had the record notice because B recorded his easement in 2011 before C executed a written contract for sale of the farm. The basic principle "buyer beware" is applicable here. Thus, it would be unfair for P to claim that C entered into the sale contract and should thus relief P of the burden on the land which was preexisting to the time the contract was formed. This argument would lead to P being unjustly enriched by receiving the property without the easement, which is around 5K more than the fair market value, than with the easement.

Is P protected under the shelter rule?

A boni fide purchaser (BFP) for value is a a grantee who takes the land by paying for it a fair market value and who is not receiving the land under any inheritance succession or other divestment without paying for it. A BFP who takes property without notice can claim protection against a defective title, meaning she can claim that the land is not a subject to the encumbrances. However, there is no evidence that Carol was a BFP, the facts support to the contrary that Al, her father, deeded the farm to her. Thus, she would not be protected under the shelter rule.

Can P claim breach of c**ovenant under the warrantee deed?**

A warrantee deed contains covenants against present and future incumbrances. Present warranties are such that the owner claims to have the rights to convey the property, against any claims by third parties. The warranties againt future encumbrances include owner's promise to cure any defect in the title, claims by third parties against the title, and imdimnify for any other claims against the property.

As stated above, it would be unjust to allo P to claim that she should receive more than she bargained for when she first entered into the agreement for sale of land in 2012. That provision in the contract should not amount to the level of unknown encumbrances which C should cure for P.

Question #2 Final Word Count = 1048

3)

1. **Dirt (D) against Builder (B)**

Applicable law

Article 2 of the UCC applies to merchants and to contract for sale of goods. Common law applies for all other contracts such as to service contracts. Here, we have a service contract for performance of excavating services by a general contractor and an excavating company. Thus, common law principles apply.

Formation of Contract

For a valid contract to form an offeror must make an offer which the offeree accepts, and their assent to the terms of the offer is supported by consideration. Consideration is a bargained-for exchange or a legal detriment for one party to perform and the other to take the obligation to also fulfill his contractual duties. Both parties usually assume the dangers that there could be some unforseen circumstances and these nuances are absorbed into their consideration to undertake the contractual duties.

Here, both parties were eager and ready to enter into a contract which obliged them to its terms. B was obligated to pay D. And D was required to perform excavating work for B.

Statute of Frauds

Certain contract must be in writing to be valid, such as any contract that conveys land, a contract which cannot be fulfilled within one year, suretiship, sale of goods over $500, in consideration of marriage, and executory agreements.

doesn't have to be in writing since the contract could be performed within one year. But it was nevertheless a valid written contract for personal services to construct for a fee of $1500000.

Any modification may also need to be in writing to be enforceable.

Anticipatory Repudiation

June 4th email amounts to anticipatory repudiation. Anticipatory repudiation is an unequivical statement of intent not to perform. A party which receives it can sue immediately, can wait until the due date of the contract, can seek adequate assurances from the other party before they continue under the contract obligations. Here, D received an unambigous email from B saying that B was refusing to agree to the new terms of paying 500K more for work. Therefore, B put D on notice that he was not agreeing and unlikely revoking the contract if the agreeing to the new terms was a condition for D to continue his performance.

D's inability to perform

Concurrect condition to the contract

D would argue that the conditional language for the contract was a concurrent condition to his performance "D agrees to have all of its equipment available as needed and shall refrain from undertaking other jobs". A concurrent condition can no longer be fulfilled, the contract may be recinded by the parties if the condition was essential to the contract and performance of the parties.

However, here it appears that it's merely a wish for the parties to ensure that the

work to be done promptly and without delays. The condition preceent can however make the parties duties dischargable under the contract to the point that they are not liable for breaches. A non-occurence of a condition precedent would be a good arguement for D since he couldn't make his equipment available as needed to perform since the unforeseeable circumstances of the state ban made it impossible. B on the other hand will argue that it's not a condition precedent which excuses D, it's a concurrent condition and D's performance was still possible even if the condition is breached.

Impossibility

When some unforeseen circumstances make it completely impossible or illegal for one party to perform, he may be relieved from his contractual liability to perform.

Here, "the unusual high pressure weather system which settled over the state" could be that impossibility. However, it's not the impossibility which completely blocks D from performance. B would argue that D could still perform and B would be correct in that argument.

D would instead claim that it's the "state ban on use of all diesel-powered equipment" which makes it impossible to perform. However, again B's counterclaim that the ban on a particular equipment does not make it impossible to do the escavating under the original contract.

D's counter argument could be that nobody in the area could have fulfilled the duties for $1500000 as shown by the price B ended up paying to another company in order to finish the job. B ended up paying $300000 more than it would have to D. However, at the original formation of the contract, parties might have already anticipated such circumstances which would make the performance more expensive. Here, D anticipated to do work for 1,300,000 and

making a profit of $200000. Simply by increasing his cost, it was not impossible for him to perform.

Therefore, the impossibility to fulfill the condition of using the equipment would be D's argument which is unlikely to be successful as stated above.

Impracticability

Common law usually does not relief one party under the contract for mere impracability to perform especially when the issue is the reduction of the anticipated benefit or financial burden on that party. Here, it appears that D could still perform the contract but it would make it more expensive for him to do so by $500,000. Thus the mere financial burden on D will not properly relieve him from his preexisiting obligation to do excavations under the contract. The fact that he would have lost his anticipated profit is usually not an excuse for impracticability under common law. Thus, D would be still liable for breach and not prevail against B.

Frustration of Purpose

Parties can be excused to perform if the intial "bargained for exchange" benefit of both parties is no longer achievable due to some unforeseen circumstances. In that instance both parties are relieved from their obligation to perform under the contract, where one is usually not obligated to pay and one is not obligated to perform. There was no frustration of purpose since it was for excavation which was still done by another contractor for an increased price.

Modification

UCC allows merchants to make modifications to their original agreements without reducing it to writing unless it's for more than $500 and without new consideration. However, the common law principles do not permit such modification and require that a modification of the contract be supported by consideration. Consideration is a legal destrument or a 'bargained-for exchange" between the parties. It can be an intangible benefit such as foregoing a right which you originally had.

Here, D's consideration would be to be D's right to recind the contract on June 2 when he notified B of the new requirement. But here B did not accept such modificaiton, thus there was no valid modification allowing D not to perfomed as originally agreed. Thus, D would not be successful in arguing that there was a valid modification.

Therefore, it's unlikely that D is released from his contractual duties based on the above arguments. B will adopt any counterarguments from D's suit to seek the difference in the contract price as stated below.

2. B vs. D. countersuit

Preexisting duty to perform

When a party is already an obligation to perform, he must not be relieved from his obligation absent a showing of a good cause based on the arguments above, such as for impracticability, impossibility, or frustration of purpose. D did not have a valid excuse here simply due to the ban by the state of use of certain equipment which made it more expensive for him to perform. Thus, D is liable for damages to B.

How much can B recover from D?

To put the party into the possition he would have been had the contract been performed, the law looks at the contract price, plus the foreseeable damages which resulted from the breach of the contract. The benefit to B is the excavation done. He anticipated it to cost 1,5000000 but instead paid 300K more due to D's breach. Since the consequential damages were foreseeable, he'll claim them against D.

Question #3 Final Word Count = 1318

END OF EXAM

4)

1. For the party to bring a lawsuit against a state in Federal Court it must first establish standing. It can be done by showing

RIPENESS

For the court to hear the case, there must be a live controversy at the time it is brought in court. It must not be a hypothetical issue, or a potential damage, or a contemplated harm in the future. The Plaintiff must allege that they had already suffered harm.

Here, there are two teachers who are bringing the suit: Paige (P) and Bob (B). P was served with written notice terminating her employment and she was refunded the money withheld with interest. Thus, P has probably suffered actual harm by being let go from her employment and it can show that her case is ripe for the court to hear it.

B has not suffered the same harm as P. He may be alleging that complying with the state requirement to go through a 10-hour certification in order to get his 10% salary back. He has likely be able to show that his case is also ripe for a hearing since his due process rights are infringed.

ABSTENTION

A case must actually satisfy justiciability, that the question presented is an actual question in law rather than asking a court to issue an advisory opinion. Here, the case presented can be heard on the merits and decided by the court. There is no need for an advisory opinion. The court will exercise it's judicial power to apply the law to the facts in order to determine plaintiffs' rights.

MOOTNESS

A case must not be moot or no longer in controversy when it is brought up in front of the court. This can also be shown by establishing that the harm is capable of repeating, such as the state X employees will continue to be deprived of their 10% salary over and over or they are still being deprived. Here, there is a clear pattern of the state X based on the legislation it had passed that they are going to withhold a teacher's salary. Thus, P and B will be able to show that the case is not moot and it's alive in all stages of litigation.

POLITICAL QUESTION

A court may refuse to hear a case when a political question is presented. This is not an issue here since the case presents a live controversy between private parties and the state action based on due process violation.

STANDING

A party to the suit must show his individual standing, that his personal rights were actually infringed and that the decision by the court will grant him relief. The party may also represent others in his own behalf if he establishes third party standing. Such organizational standing can be shown that the individual plaintiffs would have had standing based on the personal harm they'd suffered, that the organization's purpose is germane to the rights of the individuals it represents and that there is no need to have all individuals to bring their own claims and the organization can properly represent their rights in the case.

Here, P has standing since she can show that her personal right based on due process is infringed and that she had suffered some harm, which the court can provide relief for. B can also establish that his rights under due process were infringed when he is required to go through a 10-hour certification process in order to get his 10% salary back.

B can also assert his own deprivation of 10% salary and that he represents other similarly situated teachers since he and P are outspoken opponents of the law by

appearing at various community and school board meetings. However, neither B nor P alleged third party standing, thus the case will proceed to be heard as having two plaintiffs.

The counterargument to standing could be that B did not actually suffer any harm since his 10% is such a minimal amount that is doesn't satisfy the requirements of harm, moreover the sum is returned with interest upon completion of the certification, thus the teacher gets even more than he would have normally gotten.

STATE ACTION

The party must show that it was actually a particular action taken by the state that caused him/her an injury. It must not be an incidental damage by some third party that resulted in the State's incidental infringement on the Plaintiff's rights. The parties here can easily satisfy this requirement since it's the state legislation that is now in controversy.

PROCEDURAL DUE PROCESS

4th Amendment rights guarantee that the government shall not arbitrary and capriciously when it takes away a personal property or liberty of its citizens. It's applicable to the states through 14th Amendment. It requires a state to provide a notice and a hearing when it deprives it's citizens of property or liberty, unless it's impractical for the state to do so. The notice and the hearing should give a claimant an opportunity to be heard and present his/her side of the story in front of an impartial judiciary.

The first issue to look at is P's withholding of her salary and the termination of employment. As a public teacher in State X she might be considered a government employee whose rights may not be taken away without first providing her with a hearing. Her termination as a probationary teacher was done for any reason upon written notice within the first year of employment. Even

though such a restriction can be viewed as unconstitutional for a government employee, sometimes a state may have an important state interest which it is trying to protect without violating the constitution. Thus, it's unlikely that the court will side with P in viewing her dismissal for any reason as unconstitutional. The State X law may be serving an important state interest in protecting its funds for school education, thus dismissing non-tenour teachers without a notice would be serving such an interest.

The second issue is the withholding of the 10%. When a person is deprived of his property, he must be given a notice and opportunity to be heard. Here, the is no final deprivation, this is a condition on the teachers to undergo a certification, before the funds are given to them plus the interest for that period. Thus, there is no deprivation. Attachment of the strings by the state in order to achieve an important interest is a permissible way to exercise it's powers under police power.

TAXATION

A state may impose taxes on its citizens and commerce if such taxes are not preempted by Federal law or if there are no exemptions. The taxation should serve an important state interest, have substantial nexus between the activity taxed and the advanced interest, and it may be applicable when the state is the market place participant. The state may validly exercise it's police power to protect the health, welfare, and safety of its citizens.

Here, the State's X action is more like a taxation for the purposes of eliminating a problem within its state's public schools. The requirement to withhold 10% of teacher's salary for no more than two years appears to be a taxation which is aimed to serve an important state interest such as addressing its failing public schools they require teachers to undergo certification process before the funds are returned to them. It appears there is a close nexus between the purpose of the withholding and the goal the state is trying to reach. They are improving the education system, which is considered a state function. The problem here is also

that the teachers are not really deprived of their salary, they are simply required to comply with certification requirement which is an appropriate application of the condition by the state.

2. Court's ruling on State and AG's motion

SUITING PROPER STATE OFFICIAL

States are immune from being sued in Federal Court by citizens under 11th Amendment. However, in order to bypass such a requirement a plaintiff must name a state official who is responsible to carry out the state laws and was acting in the scope of his official duties.

As stated above, the plaintiffs erred by naming the State X in their complaint contrary to the requirement of 11th Amendment. Thus, it was inappropriate to name State X and that case should be dismissed.

However, it was the proper way to bring an action by naming Attorney General (AG) as the defendant. This portion of the case should survive and proceed to be heard on the merits. The plaintiffs had properly named the state official to be in compliance with the constitutional requirement.

Question #1 Final Word Count = 1442

5)

1. Condo

CAlifornia (CA) is a community property state, where it's presumed that all property acquired during marriage by the spouses is community property (CP). Absent an agreement to contrary parties salaries, increase in value of houses, and other assets and debts acquired during marriage are CP. Separate Property (SP) is property acquired before marriage, through inheritance by one spouse, debts acquired before marriage, and rents and profits deriving from SP.

At divorce the parties split their CP equally, but SP remains the property of that spouse. At death, one party may divest his/her share of CP and his/her SP in a will, but the other spouse is still entited to his/her share of CP.

A valid prenuptual (prenup) agreement must comply with CA statute requiring that the parties make a full disclosure of their debts and assets before entering into such an agreement, that both parties sign it. They must be given seven days between the agreement is presented and the time the prospective spouse signs it. The parties should also be represented by separate counsel who represents only that party's interest, but such a requirement can be waived by a written consent. There is a presumption of undue burden if one party prepared an agreement and imposed improper means to induce the other party to sign it, especially if the date of the wedding was approaching. The agreement must also satisfy Statute of Frauds requiring it to be in writing and signed by the party to be charged.

To see if Harry(H) and Wanda (W) had a valid agreement in 2003, the court will look at the agreement as well as the intent of the parties. Even though W and H intended to prepare a document and intended to maintain their salaries as their SP, the writing is itself defective. It's ineffectively assigning their salaries as their

own SP because there is no evidence that the parties waited between being presented and the date they actually signed the agreement. Here, they also intended to waive legal counsel, but it's not clear if such an agreement was a mutual and voluntary agreement by each of them. One party may till induce the other to sign and waive. There is also no evidence that the parties made full written disclosures about their assets to each other prior to entering into the agreement. Such a disclosure would have made the required asset to be bound by the terms voluntary and intellegint. However, absent of the showing that they satisfied CA statutory requirements for a valid prenuptual agreement, the courts will likely look at their assets and depts as CP.

A counterargument may be presented to show that there was in fact a valid prenup because after the marriage, the parties intended to maintain a separate nature of their salaries by opening only one joint savings account and depositing $5000 from their salaries into the account. Thus, H and W intended to maintain the separate nature of their salaries and contributed only minimally into CP by opening this joint account where they apportioned only some of their salaries. This argument would still be rebutted because it may be assumed that they intended to create a joint savings rather than keeping their properties separate.

The condo is presumably a CP of H and W since it was acquired after the marriage in 2004. Even though H used his salary to buy a condo and took a title in his name alone, the presumption of CP arises absent an agreement to contrary. As stated above, their prenup is unlikely to be valid. H used his income , which CA law treats as CP of both spouses during marriage making the condo CP of both spouses which they must split equally in divorce.

A SP is the one that one party holds solely in his/her name and if it's acquired before marriage, or with separate funds. There is also a presumption that when SP is used during marriage for the benefit of the marriage it could be a gift to CP. Moreover, more information about a mortgage if any can be useful to determine

if both W and H good creditworthness was a factor for the lender to award such a mortgage. If both spouses combined income was used to finance the purchase, regardless of only one spouse being named on the title, the propery would nevertheless be viewed as CP.

Even if the prenup is valid, since 1985, the parties are required to make a written instrument showing a valid transmutation of a property from one character to another, such as if the property was SP, and the party wanted to now make it a CP, there must be a valid writing.

Having taken the title in his own name alone, H would not be able to show a valid transmutation. For it it be valid the writing must show both the intent to change the character of the property and the written instrument which validly conveys that property from one form into another legal form. Thus, a mere showing by H that he took the title in his own name alone, would not satisfy valid transmutation.

Thus, W will argue that the condo is CP, that H either intented to make a gift to CP, even if not, there was no valid transmutation. She would seek one half of the value of the condo from H at divorce.

H will likely argue that the prenup was valid and it governs the distribution of assets at divorce. And at most W would be able to recover any amounts used for imrovement of H's SP, i.e. condo rather than 1/2 of the value of the condo.

2. Joint savings account.

The same rules of CP apply as discussed above, but here the account is even held jointly, giving a stronger presumption of CP over the funds in the account. The contributions even if they were spouses SP, were used to create a presumptively valid CP fund. Thus, the joint account balance would be H and

W's CP to be devided equially.

3. Rental Property

The rental property was acquired by funds which were already presumptively CP, thus the source of the purchase can be easily traced back to the account to determine the nature of the property. Tracing back to the original source of funds will determine the character of the property to the same form it was originally held. Since the joint savings account is a CP of H and W, thus the rental property is CP. The fact that W took the property in her name along does not make it her SP as discussed above for the Condo. The presumtion of CP in CA will likely trump this evidence of W's attempt to take it in her SP.

The community will be entitled to the entire value of the rental property, the rents and losses that came out of that rental property. These amounts will be split equally between the spouses upon dissolution of the marriage.

4. Hospital bill.

SP also starts to exist upon parties permanent separation when there is no intent to resume their marriage. Moving out is likely to be viewed as a physical permanent separation of the spouses giving rise to the presumption of SP from that point on. The spouses can also enter into a valid written agreement which will govern the distribution post permanent separation if they do not wish to follow CA statutory law. There is no showing of a writing though, thus, the presumption of SP at the time of permanent separation governs.

However, spouses are assumed to be fiduciaries of the marriage. They must still act in the best interest of the marriage and to provide for necessities of the other spouse. When one spouse incurres a debt for a necessity such as food, shelter, medical care, the assets of the community and that spouses SP will need to cover such an expense even if the spouses are already permanently separated.

Here, W's debt of $50,000 is emergency surgery for a medical condition, thus it's a necessity of life. A dept would otherwise be a SP after permantent separation but in this instance both spouses still owe a duty to provide such services to each other till final termination upon dissolution. The hospital will first look into W's SP to see if it's enough to satisfy the debt. Then it can look into the spouses CP. It won't be able to reach H's SP though.

Question #2 Final Word Count = 1422

6)

Accepting Representation and being a member of Equal.

Under ABA rules, an attorney owes a duty of confidentiality to his client, that he will not represent or accept representation that adversely effect's his client's case, that the attorney will not disclose any facts discovered during representation, and such duty is attached to a client as soon as a client (or even a prospective) client reasonably thought that attorney-client relationship was formed.

Under ABA rules an attorney may accept representation if he reasonably believes under the circumstances that he can provide competent representation to a client. However, California (CA) rules doesn't take into account a "reasonable lawyer" standard and allows an attorney to proceed with representation when s/he believes in good faith that a competent representation is possible.

An actual conflict may arise when an attorney already had represented a client or obtained information by which he is bound to other parties so it precludes him from even accepting a new client. A personal conflict arises from an attorney's close relationship with another party, from his personal association or knowledge of someone or something about a case. In this case an attorney should inform client of such a conflict, get his/her informed written consent, and he is permitted to continue representation. An attorney may also be imputed a conflict of interest if he is in a firm which had previous representation of an adverse client. Then, such an attorney is not permitted to accept representation unless a firm follows stringent rules to create an ethical wall. Moreover, a representation is defined as accepting a client, it does not necessarily exist if an attorney was arguing for a certain position in a different case, or if he advocated for a particular law to be passed.

Here, Len is a member of Equal, a non profit organization which seeks to help low- income families to purchase homes. Even though he has never represented Equal in his capacity of an attorney, he is aware of the goals and purpose of Equal, which is to seek a statute enacted to require all new residential developments contain a certain percentage of low-income housing. Since Len is a member of such an organization which promotes a cause for low-income families, he has likely obtained a personal conflict of interest which arises from him standing for the same position. It may also be an actual or implied conflict of interest if there was some particular deliberation between Equal's members during the drafting process of the proposed statute, which gave Len an unfair advantage or some confidential facts about Equal's position. Thus, at least Len was required to provide a full disclosure to ABC about his involvement with Equal and getting ABC's consent to representation.

Here, Lan accepted representation of ABC who is actually the client, not Pat individually. Thus, the duty of confidence, zelous representation and duty of competence is owes to the corporation, not to Pat.

Representing ABC

Duty of competency

An attorny is requires to defend his client zealously, advocate in a timely manner, using the attorney's proper knowledge and expertise in the area. An attorney should not accept a case s/he is not knowledgable in or has expertise in and s/he cannot represent client's interest without undue delay or substantial cost to the client. To cure such a lack of competency an attorney may associate herself with an experienced lawyer in that area and informing the client of such an association.

Here, Len personally thinks that the statute is a good law and secretely hopes

that ABC is not successful. It may be assumed that his personal conflict and sensere belief in the goals of Equal, will prevent him from providing competent and zealous representation to ABC. Moreover, it appears that Len personally does not agree with ABC's objective. Even though an attorney is not required to have the same personal views as his client, an attorney may nevertheless be at least required to provide full and competent representation of his client's case to the best of his abilities. There is indication that Len has probably breached his ethical duties to ABC since he wouldn't have been able to provide competent representation based on his personal believes and stands against commercial development.

There is insufficient evidence of Len's actual competensy in the area of corporate law and construction development. It could be inferred that since he associates himself with an organization such as Equal, he is somewhat knowlegeable in this field. Thus, he has was probably not imposed any substantial burden on the client if he had enough skill and expertise in the area.

Equal's filing of reports

Financial Integrity

An attorney is required to have a written retainer unless it's for less than $1000, it's with a corporation, or with client who was previously represented, and or if the client didn't want to have a written agreement, or it was not feasible under the circumestances to obtain it. Under ABA, attorneys fees must be reasonable, when CA says they must not be unconsionable, and he should not waste his client's money.Lan was not required to have a written agreement here, since he represented a corporation.

Duty not to mislead the public

An attorney must not mislead the public, should not allow a client to do so either. Under Sherbain - Oxley Act, a corporate lawyer must be in compliance, he must not report misleading facts, must not allow a client to do so either and must attempt to correct the misrepresentation. Only if he failes to do all of the above steps he is allowed to report to the appropriate government agency enough to correct the representation.

Duty of Confidence

Attorney should have informed the director's up the chain of command, attempt to talk them out of wrong doing if feasible under the circumstances, only then his disclosure to appropriate gov agency would be appropriate without breach of confidence. ABA allow breach of confidence in order to avoid bodily injury to another or death. However, CA law doesn't permit breach of confidentiality for financial reasons. The penalty here is a substantial civil fine, which is not a danger of death or serous bodily injury to another.

Sometimes, an attorney should allow client to testify in a narrative, don't cross examine, don't perpetuate a crime of fraud or misleading the public. Here, a client is already in a law suit, thus, Lan should have sought court's intervention. Lan breached his duty not to mislead the public. Lan failed his duty by taking no action with respect to the impending filing of the false report.

A lawyer may seek permissive withdrawal when he no longer thinks he can represent the client with competence, when there is a potential conflict which will impede on the lawyer's ability to advocate for his client, when a lawyer's beliefs, physical or mental abilities make his representation inadequate, or when the client does not comply with the lawyer's requirements such as paying attorney's fees or uses attorney's services for commission of a crime or fraud. If such

withdrawal does not create an undue burden on the client or his case, a court will likely permit a lawyer to withdraw. If there is however, a substantial risk that a client's case may be prejudiced, such as there is a motion or another action is pending and the time frame doesn't allow a client to seek substitute counsel, a court will require a lawyer to continue with representation until the client's case is no longer prejudiced and s/he can obtain a different counsel. Moreover, a lawyer must seek mandatory withdrawal when the conflict of interest is so severe that no further representation is feasible. A lawyer may seek a meeting with a judge in chambers to explain the conflict and recuse himself from representation.

Question #3 Final Word Count = 1301

END OF EXAM

1)

From: Office of the County Counsel
TO: Standish & Lobert, LLP counsel for Santa Maria
RE: Intended Conveyance of Wildomar Property

Dear Mr. Michael Standish:

We are the counsel for the Riverdale Regional Park District (from now on Riverdale). This is our official response to your letter of July 22, 2016.

As you are aware, in 1995 the property was acquired by a purchase of the lot "Wildomar" by recommendation and later adoption (in June 1995) by the Board of Directors for $980,000. The resolution was passed in regular session. The District accepted as a gift the difference between the purchase price and the value of $420,000.

In 2016 the notice of intent to convey Wildomar was issued because the Riverdale has been unsuccessful in obtaining the funds necessary to develop the property into a regional park as a result making it a health and safety hazard. The price was set at $2,100,000 and for the sale to happen on August 15, 2016.

It is our position that Riverdale did not need to seek the voting quorum for the proposed transfer of land since it did not fall within the requirements.

1. Riverdale holds the position that it may validly convey the Wildomar Property without satisfying the Act's voter-consent is sound ude the law and supported by

the facts as stated below.

The facts show that the property was acquired from a private party with the proper voting by the board. However, it's true that no voting took place to designate it as a park. Under *Baldwin*, the courts are required to read the statute in its plain language. Here, §40 of the Act states in plain language that a district may take real property and dispense of it necessary to the full exercise of it's powers. Thus, the district took the land in contemplation of developing it later into a park, but it was not required to designate as a park.

We can also establish that the district exercised was in full compliance to dispense of the property. Under §63, "in the opinion of the board, any real property owned by the district, ... becomes unnecessary for the purposes of the district, the board, may sell such property." Here is exactly what Riverdale is going to do and it is specifically allowed to do so under the Act.

Santa Maria's argument that the district may not sell the property due to the failure to vote is flawed. Under §40 of the Columbia Regional Park District Act ("Act"), a regional park district may not convey any interest in any real property without the consent of a majority of the voters of the district voting if that interest has been "actually dedicated and used for park purposes." Since the property was never dedicated for public use there is no need for voting. When Wildomar was first acquired, there was hope to receive funding for the property to be properly turned into a regional park. However, the funding fell through and the property was never a park, it soon became a nuisance giving rise to health and safety problems as the public has continued to frequently use it without parking, restrooms, and other facilities. The mere fact that the public used it for hiking and hunting does not elevate the property held by a district to a level of a park.

VOTING REQUIREMENTS ARE NOT NEEDED FOR THIS PROPERTY BECAUSE THE PROPERTY WAS NEVER DEDICATED FOR PARK

PURPOSES.

Meaning of "dedicated"

Under *Baldwin,* "common law dedication entails... an offer by a private owner, and acceptance by a public entity, or a real property subject to a specified restricted public use in perpetuity". When Riverdale accepted the property in 1995, it paid $950,000 for it and accepted the difference as a gift. The property was not acquired full as a gift and there was no designation for which purpose it was actually acquired. In fact the purchase agreement states to the contrary that the General Manager was authorized to take the necessary and appropriate action to complete the purchase including obtaining the funds to pay the purchase price. The cost of closing, purchase and other related expenses were estimated and paid by Riverdale. In *Baldwin,* the court opined that sometimes a price reduction may be viewed as a "donation", however, when it's conditioned on a payment of a purchase price, it does not create a particular use restriction in land. Therefore, simply because Riverdale paid a reduced price for Wildomar, there is strong evidence that the district was participating in a fair market transaction paying a fair price for the property.

Actual Use is not enough to establish designation

We find that your argument of "Actual Use" contrary to the clear reading to law. You allege that the property has functioned as a regional park despite not being developed into one is also contrary to the facts.

The Act is actually the governing statutory provision giving authority for park districts. The courts should read a provision authorizing particular action by particular means as discretionary for the action but mandatory for the means. *Baldwin*. Therefore, the courts will likely look directly at the Act's language for determination of the district's rights.

Also under *Osuna on Real Property,* there are two types of dedication: statutory dedication and common law dedication. Common law dedication is available "in the absence of a statute". Here, however, we actually do have statutory provisions specifically on point. Normally, common law does not even involve a payment of a price for the property, it usually dials with the property given as a gift then it views that such property could be a subject to a specified restricted public use in perpetuity. There are two types of dedication under common law: express or implied. When there is a basis for finding an offer, either express or implied, by the property owner to give the property for public use, an acceptance, either express or implied, by the public entity to receive the property for the same use. Since the facts support the opposite, the offer was for the sale of the land, the sale contract mentioned nothing about designating the land for public use, there was no common law presumption for dedicating the land as a park.

Wildomar's conveyance by deed for park purposes is invalid

Thus, your counterargument that under *Baldwin,* a real property interest may be "dedicated" by an offer by a private owner, and an acceptance by a public entity, having the character of a gift as well as a contract is an incomplete representation of the facts and the law. The court clearly opined that a restriction on land usage under perpetual restriction, may still be overcome by the showing that the district did not accept it under that restriction. In that case, the ordinance states in plain language, that the City may "accept donation" of the land for public recreational purposes but only "upon payment... of $200,000." Thus, the ordinance's language is interpreted as an acceptance of the "donation" conditioned on the payment. Here, the district took many steps none of which indicated the acceptance of the restriction, the district voted, entered into an authorization to purchase and then into the actual purchase agreement for sale

of the property and all these documents lacked the condition on use of the land as a park. Thus, the condition was not satisfied by merely placing it into the final deed.

Other means of dedication to park purposes

Moreover, under Osuna on Real property, the restrictive use may be express or implied, but unless the private owner's offer is a gift as well as a contract, there is no dedication of the property and hence no restriction on its use. There is no supporting evidence that the mere difference in price reduction amounted to a gift to Riverdale from a public owner. The public owner was in fact fairly compensated. And no restriction was placed on the use of Wildomar as the time of purchase, thus there is no implied or express restriction.

We are aware that you believe that §40 and 65 should be read as meaning the same requirement for "dedicated." However, the sections are distinct as stated below. Under §65 real property interest is "dedicated" by a regional park district by simply acquisition, meaning that the legal title to all property acquired by the district under the provisions of this Act is dedicated for the uses and purposes set forth in the Act. ".

§65 states that the legal title... shall immediately vest in the district and shall be held in trust for, and is dedicated and set apart for, the uses and purposes set forth in the Act. The board may hold, use, acquire, manage, occupy, and possess such property, as provided in this Act. As stated before, the courts are required to look into the plain meaning of the Act.

The plain meaning is defined in *Teller Irrigation District v. Collins* (1988), where the court found that the provisions of §65 have been held to create a public trust over all of the district's property, which the district itself as the owner of the legal title, the residents of the district as the owners of the beneficiary title, and the

district's board of director's as the trustees. Thus, the districts are merely required to act as trustees for the benefit of the public. This is the very purpose of the sale of Wildomar. In *Teller*, the court held that the district held the property in trust for purposes of irrigation. The board of directors repeatedly stressed that the property was not properly converted and developed as a park, it was in fact hazardous and could potentially lead to law suits, which will impose a public burden. Riverdale, in fact exercised it's fiduciary duties of a trustee to act reasonably and in the best interest of the public by proposing the sale for over the amount it was originally acquired for. Moreover, the proposed change in its condition will still meet the public interest in creating a pleasurable area for walks and hiking, but it would also improve the overall appearance of the community by having a college campus instead of an abandoned plot of land.

It continues to be our position that under §40, Wildomar does not meet the requirements of voter consent since it was not actually dedicated. It's true that under §40 a real property interest is "actually dedicated" by a district so it's a subject to the voter-consent requirement only by the "adoption of a resolution by the Board of Directors" dedicating that interest. But as discussed above, there was no actual or implied dedication of the property for a purpose of a park. Moreover, it was actually the district's duty to act as trustees and seek to use the land for the best interest of the community.

Sant Maria's position "the adoption of a resolution by a district's Board of Directors is an alternative method of "actual dedication for an easement under § 40 in addition to simple "acquisition" under §65, it's not a method of "actual dedication" for any other real property interest.

Additionally, the easement or any other interest in real property may be actually dedicated for park purposes by the adoption of a resolution by the board of directors, and any interest so dedicated may be conveyed under Section 40. In

the event that a court finds that there was some dedication of the property for park purposes, it can be shown that the board of directors have the power under §43 and 63 to convey such a property as it may deed necessary under it's powers to act in the best interest of the community and as necessary for the full exercise of its power. §63 provides specific power to the board, to dispose by sale or otherwise of any real property owned by the district when it becomes unnecessary. The board will apply the proceeds to purposes of the district.

2. We believe that your client's position is meritless due to the fact that the land was in fact purchased and the board of directors exercised its discretion to dispose of the property as necessary and needed. These duties on the board are actually imposed by the presumption that the board must act in the best interest of the community. The sale of an undeveloped and unregulated plot of land which was deemed unsafe is in fact the exercise of board's prudence. The land will still be used by the community, as a community college with trails for running and hiking, with athletic facilities, and as an open space for recreational activities. The sale proceeds will be used for other regional parks for their improvement and development.

In conclusion, that our position has strong basis and we are fully prepared to move forward with the conveyance despite your threat of litigation and your client's strong conviction that she will win this action just like she won all previous ones.

Sincerely,

/../

Question #1 Final Word Count = 2173

END OF EXAM

1)

TO: Jeff Su

FROM: applicant

DATE: July 28,2016

RE: Wong v. Pavlik

Dear Mr. Su:

You asked me to prepare a memorandum with explanation of the law and the supporting facts we have to proceed with this case. My analysis is below:

1. Do we have enough facts to support certification of a class of current and former employees for recovery of back wages under the UCL?

As you suggested in your memo, we will of course need to confirm that everything that Wong told in the interview is supported by actual facts. Based on what we already know, I outlined the procedural and statutory requirements for certification of a class of current and former employees to recover back wages under the UCL.

WONG'S PERSONAL CAUSE OF ACTION

Under the UCL Wong is likely to bring an action on behalf of himself an as well as other current and former employees of Defendant based on Pavlik's failure to credit Wong for all hours worked, to pay overtime wages, to pay wages when due, to pay wages due upon termination, to provide rest and meal periods, and to obtain written authorization for deducting or offsetting wages. *Arentz* (2009). You have outlined the penalties and violations in your interoffice memo: failure to pay all wages, waiting time penalties, failure to provide pay stubs, one hour's extra pay for each missed meal period, to pay one and one-half for overtime, and requirements for meal periods, as well as failure to pay less than min wage.

Here, the told us that Pavlik still has not paid him for the last week of his work, that Pavlik almost never paid Wong for working through his lunch break, that Wong was not compensated for working overtime amounting to 9-10 hours per day without compensation, that Pavlik didn't pay for Wong's work on Saturdays. And when Wong questioned Pavlik about such unfair labor practices, Pavlik simply fired him.

The court in *Arentz* opined that a party seeking cerficiation of a class bears the burden of establishing that there is an ascertainable class and a well-defined community of interest amount the class members. Thus, Wong can proceed with his own claim without further class action certification but must comply with the class action certification requirements if he wishes to seek civil penalties for himself and other employees under the PAGA.

CLASS ACTION SUIT

The UCL provides jurisdiction under §17203 where "any person may pursue representative claims ... on behalf of others only if ...[it] meets ... §17204 and § 382 of the Code of Procedure". §17204 allows a person who has suffered injury in fact and has lost money to bring and action for relief and §382 of the Code of Procedure allows one person to sue for the benefit of all if the parties are numerous and it's impractical to bring them all before the court. The court in Arentz stated that §382 authorizes class actions but makes it a conditionary to Plaintiff's successful showing of compliance with §17204. These two provisions must be read together and satisfy the stringer requirements of class action certification.

Additionally, the court in *Westlund v. Palladin Farms (*2001) opined that for a plaintiff to property certify the class action s/he must follow the §382 of the

Columbia Code of Procedure and Rule 23 of the Federal Rules of Civil Procedure. The second prong for this requirement came from *Campbell v. Omnibus* (1999), where the court interpreted Rule 23 to apply to class actions brought in federal courts. Thus, the representative would have to establish the following elements:

- Numerousity: the class is so numerous that joinder is impracticable;
- Commonality: there are questions of law or fact common to the class;
- Typicality: the claims or defenses of all representative parties are typical of the claims; and
- Adequacy of Representation: the representative parties will fairly and aqequately protect the interest of the class.

Since under the facts of Westlund, the elements of commonality, typicality and adequacy of representation were not satisfied because the wage violations alleged vary from group to group and the factual components necessary to establish the violations are likely to vary from individual to individual, the court denied class action certification. Moreover, the court added that "questions of fact and law common to class members predominates over questions of fact and law affecting only individual members".

This is what we have based on Wong's interview:

- Numerousity. Wong told us that there are lots and lots of people who came and went from Pavlik because of the high turn over rates. There were: butchers, skinner,deboners, carcass handlers, other bookkeepers, clean up crew, and other administrative staff. On average the plant maintains around 350-400 employees and with a high turn over multiplied by many years, the number of past employees would be enormous. Thus, these facts show that it would be impractical for each member to bring a separate action.

- Commonality. This is a more difficult element because Wong alleged several different vilations, such as:

Some butchers were paid overtime, but nobody else got paid overtime including Wong himself even when overtime was recorded by the employees.

Cleaning crew was paid less than minimum wage of $8 per hour.

Many employees were not paid for taking lunch break including Wong himself.

Some employees were not immediately paid their final pay after being fired and were required to sign a release. Their payment was often done in cash.

No paystubs with explanation of benefits, taxes withheld and hours worked were handed out to some employees.

Pavlik was keeping alternative bookkeeping when he showed the goverment inspectors one set of books and actually kept the other set for his own records.

Pavlik didn't pay Wong for last week of work.

Pavlik employed illegal immigrants without properly registering such employees.

Therefore, since the facts and law at issue vary from employee to employee, the court may view this elements as not being satisfied. However, the court in Westlund clarified that questions of fact and law common to class members predominates over questions of fact and law affecting only individual members, the main questions remain common among all employees, such as the question of law whether Pavlik violated labor and wage laws is still the governing issue over all individual employees. Thus, we likely have a strong argument that this prong of commonality is satisfied.

- Typicality. The issues of typicallity can be established by showing that the representative parties are typical to cause of action against Pavlik, since his failure to follow labor code requirements resulted in basically the typical losses for this class of plaintiffs.
- Adequacy of Representation. Wong can adequatly represent the class since

he has suffered personally by the wrongdoing of Pavlik's unfair labor practices. We can also look at the language from PAGA to determine who is an aggrieved employee: "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed". Wong as a head bookkeeper with years of experience at Pavlik's plant, is the perfect representative because he knows what employees were typically employed there, he knows of the violations. Moreover, the actually suffered most of the alleged violations against Pavlik, thus he would have a vested interest to fairly represent aggrieved parties' interests.

2. Our arguments in support for Wong's **representative claim under PAGA** on behalf of current and former employees for **back wages** without having to satisfy class certification.

Under the traditional requirements we may still be able to successfully show the certification requirements. However, in the alternative, we can follow the arguement from Arentz to allege that we do not need to satisfy class action certification by showing:

1. Labor Code §2699 (a) "nothwithstanding any other provisions of law an aggrieved employee may bring an action against the employer "on behalf of himself and other current or former employees" ; and 2. unlike the UCL § 17203, PAGA does not expressly require that representaive actions comply with Code of Procedure §382; and 3. a private plaintiff suing under this act is essentially bring a law enforcement action designed to protect the public.

Because Wong is going to bring an action on behalf of other current or former employees who were disadvantaged by Pavlik's unfair labor practices, he is acting within the scope of §2699. We must, however, comply with the notice and factual and legal statement requirements before moving forward with our claim under PAGA.

In Arentz, the court viewed a private plaintiff acting as a law enforment agent. Wong can be viewed as such since he was the head bookkeeper at Pavlik's plant. He had on many occasions spoke up on behalf of other employees, and was in fact fired for another attempt to stand up for employees who were shorted and treated unfairly. He can be viewed as a private individual acting in a government agency capacity.

However, the courts interpreted the Act as "authorizing a representative action only for the purposes of seeking statutory penalties for Labor Code violations, and an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties". When a person is represented by a goverment agency, it is viewed as if that person were a party. But it allows for an unfair result if a nonparty aggrieved employees where s/he could provit from a judgment in an action under PAGA, because the recovery of penalties requires a proof of the violation. But some Labor Code violations are remedies in addition to civil penalties (lost wages, work benefits, unpaid overtime, etc.). Thus, if an employee prevails, the defendant is bound by the resulting judment. Then a nonparty employees may invoke issue preclusion and obtain remedies other than civil penatlies for the same Labor Code violations. But the court in *Talbott* has clarified this inconsistency by stating that a representative suit for civil penalties under PAGA can also be maintained, in the same action, calims for unpaid wages for members of the class he purpots to represent. Thus, Wong will be able to show that he is not only seeking to recover civil penalties under PAGA, but he is seeking to obtain losses for unpaid wages of the class of current and former employees. Therefore, he is not required to establish a representative claim in order to proceed with his claim for back wages.

Whether Wong should be able to show that he can be the representative under PAGA is an issue for a court to decide on the merits. The court in Talbot opined that a "plaintiff should at least have the oportunity to produce the

evidence, at which time the quesiton of the merits can be tested". Therefore, after conducting discovery, we may have more information to support our claim under PAGA.

3. The monerary relief for the claims:

a. Under the UCL and who may recover civil penalties:

The UCL § 17206 provides that "a civil penalty ... of $2,500 for each violation.... shall be assessed and recovered ... by the Attorney General". It appears that the penalties under this code are recoverable only if the case is brought by the Attoreny General on behalf of "the people of the State of Columbia".

We can seek to make an argument that Wong steps into the shoes of the goverment agency and should be able to seek recovery of civil penalties just like an attorney general would be able to. However, we might need to further investigate such a path because the clear reading of the statute does not allow for recovery by a private person acting on behalf of a class.

b. Under PAGA what prerequisites we need to satisfy before we can file suit:

As stated above, we must first comply with the notice requirement. §2699 states that civil panelties can be collected in an alternative "through a civil action brought by an aggrieved employee" if s/he satisfied §2699.3 which requires such an employee to commence a suit only after:

- the agrgrieved employee gives written notice by certified mail to the Labor and Workforce Development Agency with an allegation containing sections of the code violated, facts and theories in support of such violation
- the agency notifies the employer and the aggrieved employee by certified mail

that it doesn't intent to investigate within 30 days.

- if the notice is not provided within 33 days, the aggrieved employee may commence a civil action

The court in *Arentz* was faced with a similar issue and deterimed that sometimes in the benefit of the community and saving goverment time, a plaintiff may act as a private attorneys general to recover civil penalties for Labor Code violations with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. After satisfying the notice requirement, a plaintiff may bring an action.

Thus, we must first serve a notice with a concise statement of the law and fact by certified mail, then wait for 30 calendar days, and only upon receiving or not receiving a notice from the Labor and Workforce agency can we proceed with out civil suit.

c. Under PAGA the employees get to keep all civil penalties we could recover.

§558 imposes civil penalties against an employer who violates this chapter and under subsection (3) the wages recovered under this section will be paid to the affected employee. However, as stated above, Talbott court found that the representative standing n the shoes of the state labor law enforcement agency, can recover unpaid wages through private enforcement of §558. Moreover, "other remedies" under the Labor Code can be sought "consurrently with an action taken under PAGA" and the Labor Commissioner can issue citations for recovery of both unpaid wages and civil penalties. Thus, employees can nevertheless keep the civil penalties under the Act if the Labor Commissioner issues a citation.

Question #1 Final Word Count = 2309

END OF EXAM