

1 JULIA AZRAEL (Bar No. 109049)
2 JOHN S. CURTIS (Bar No. 50350)
3 KATHERINE L. CURTIS (Bar No. 222572)
4 **LAW OFFICES OF JULIA AZRAEL**
5 5200 Lankershim Blvd, Suite 850
6 North Hollywood, CA 91601
7 Tel: (818) 766-5177
8 Fax: (818) 766-5047
9 Email: jcurtis@azraelaw.net
10 kcurtis@azraelaw.net

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11 DAVID E. MARTIN, *pro hac vice* admittee
12 CATHERINE E. SISON, *pro hac vice* admittee
13 **MACY'S LAW DEPARTMENT**
14 111 Boulder Industrial Drive, 2nd Floor
15 Bridgeton, MO 63044
16 Tel: (314) 342-6719
17 Fax: (314) 342-6438
18 Email: david.e.martin@macys.com
19 catherine.sison@macys.com

By Christine Lockman
CHRISTINE LOCKMAN, Deputy

20 Attorneys for Defendants
21 MACY'S WEST STORES, INC., *et al.*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

AMBER GARCIA, an individual,
Plaintiff,

v.

MACY'S WEST STORES, INC. dba
MACY'S, MACY'S, INC., and DOES 1
through 25, inclusive,
Defendants.

Case No. CIVDS1516007
[Assigned to Honorable Donna Gunnell Garza;
Dept S24 for all purposes]

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY ADJUDICATION**

*(Filed concurrently with Defendants' Separate
Statement of Undisputed Material Facts,
Compendium of Non-California Authorities,
Declarations of David E. Martin and
Ragunathan Veeraraghavan, and Proposed
Order)*

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BY FAX

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Assem. Com. On Labor and Employment, Analysis of Sen. Bill No. 1255 (2011-2012
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1 Defendants Macy's West Stores, Inc. ("Macy's") and Macy's, Inc. hereby submit their
2 Memorandum of Points and Authorities in Opposition to Plaintiff Amber Garcia's ("Garcia")
3 Motion for Summary Adjudication, as follows:

4 In her motion for summary adjudication, Garcia seeks to recover civil penalties under PAGA
5 on behalf of herself and approximately 20,000 similarly-situated commissioned sales associates for
6 Macy's allegedly non-compliant wage statements. Based on her hyper-technical construction of Cal.
7 Lab. Code § 226(a), Garcia contends that Macy's improperly included "advance commission pay" as
8 earned gross and net wages on the wage statements. However, because Macy's is required by law to
9 characterize its commissioned sales associates' pay as "advance commission pay," must report that
10 pay as gross wages under federal law, and, once paid, never takes that pay back, Garcia's
11 construction of § 226(a) is unworkable, would lead to "mischief or absurdity," and fails as a matter
12 of law. Still further, Garcia fails to set forth sufficient material facts to establish each violation for
13 which she seeks to recover a civil penalty. For these reasons, her motion should be denied in its
14 entirety

15 **I. STATEMENT OF FACTS**

16 Macy's employed Garcia as a part-time commissioned sales associate in the Women's Shoe
17 Department at Macy's Victoria Garden store from June 15, 2014 to June 21, 2015.¹ (Defendants'
18 Separate Statement of Undisputed Facts ("SOF"), ¶ 13.) However, due to her suspension from
19 employment and subsequent leave of absence, Garcia stopped working as a commissioned sales
20 associate on March 5, 2015. (SOF, ¶ 14.) Macy's paid Garcia both hourly pay, based on a standard
21 hourly rate for the hours she worked, and commission pay, based on commissions she earned by
22 selling merchandise in her department. (SOF, ¶ 15.)

23 **A. Garcia's Commission Pay**

24 At the outset of her employment, Macy's provided Garcia with a copy of its Understanding
25 Commission booklet, explaining how Macy's would calculate her commission pay, and an
26 Associate Acknowledgement, which she signed, confirming that she received, read, and understood

27 _____
28 ¹ Macy's, Inc. does not employ Garcia or the similarly-situated commissioned sales associates and is improperly named
as a party defendant. (SOF, ¶ 1.)

1 the booklet. (SOF, ¶ 16.) As explained in the booklet, Macy’s calculated Garcia’s commission pay
2 based on her “net sales.” On a weekly basis, Macy’s calculated her “net sales” by, among other
3 things, subtracting from her “gross sales” (i.e., the purchase price of the merchandise she sold) her
4 “eligible” merchandise returns (i.e., the purchase price of merchandise she sold that a customer
5 returned within 180 days of its purchase). (SOF, ¶ 17.) Macy’s then determined Garcia’s weekly
6 commission pay by multiplying her commission rate by her “net sales” and then subtracting from
7 that amount her hourly pay (Commission Pay = [commission rate x net sales] – hourly pay). (SOF, ¶
8 18.)

9 Consistent with the requirements of California law, and because a commission owed for the
10 sale of merchandise cannot be determined until the expiration of the 180-day period for the return of
11 that merchandise, Macy’s specified that Garcia’s weekly commission pay was in fact an “advance”
12 and was unearned until the expiration of the 180-day eligible return period.² (SOF, ¶ 19.) However,
13 since any return of merchandise is factored into the calculation of “net sales” for the week that the
14 merchandise is returned, Macy’s also specified that, once Garcia received her weekly commission
15 pay, that pay would *never* be taken back and would *never* be “reduced” or “adjusted downwards.”
16 (SOF, ¶ 20.) As Macy’s Senior Manager of Incentive Compensation testified:

17 The return is used in the net sale calculation in the week it is returned. So each
18 week you have to think of as a separate calculation, so any commission that has
19 been paid . . . [Macy’s] will not take that back; that is for all intents and purposes
earned, your money.

20 (SOF, ¶ 21.) In part because Macy’s did not “take back” any of Garcia’s commission pay, it
21 reported *all* of Garcia’s “advance” commission pay in 2014 as “wages” on her W-2 and Garcia
22 reported *all* of those wages as income on her 2014 tax return. (SOF, ¶ 22.)

23 For purposes of “making a final accounting” of commissions owed, Macy’s further specified

24 _____
25 ² Unless otherwise provided for in a commission agreement, once a commission is paid an employer cannot charge back
26 any portion of that paid commission against future commissions as such a chargeback would constitute an illegal
27 deduction from wages within the meaning of Cal. Lab. Code § 221. If, however, the commission agreement clearly
28 indicates that the commission paid is an “advance” and is not “earned” until certain conditions are met, then the
employer may charge back previously paid commissions against future commissions. See, e.g., *Steinhebel v. Los
Angeles Times Communications, Inc.* (2005) 126 Cal. App. 4th 696, 707 (“[i]n referring to ‘wages’ paid, section 221
prohibits an employer only from collecting or receiving wages that have already been earned by performance of agreed-
upon requirements”; *Koehl v. Verio, Inc.* (2006) 142 Cal App. 4th 1313, 1337 (same).

1 that all of Garcia's commissions, except for commissions on merchandise that is on order and needs
2 to be delivered (e.g., "Big Ticket" or furniture and mattress sales), would be "deemed earned" at the
3 time she received her final commission pay (i.e., the end of the second pay period following her
4 termination). (SOF, ¶ 23.)

5 **B. Garcia's Wage Statements**

6 Macy's paid Garcia each week based on a Sunday to Saturday pay period. (SOF, ¶ 24.) For
7 work performed in a given pay period, Macy's paid Garcia her hourly pay on the Friday following
8 the pay period and, because of the auditing process involved in calculating her "net sales," her
9 commission pay on the second Friday following the pay period. (SOF, ¶ 25.) On the Tuesday
10 following a pay period, Macy's made available to Garcia the wage statement itemizing the pay she
11 would receive on Friday. (SOF ¶ 26.)

12 At the outset of her employment, Garcia signed a "Direct Deposit Authorization." (SOF, ¶
13 27.) By signing the authorization, Garcia authorized Macy's to make her wage statements
14 exclusively available to her electronically, through the company's "My In-Site" portal, accessible
15 from work, or its employeeconnection.net website, accessible from home. (SOF, ¶ 28.) Garcia only
16 accessed wage statements using the employeeconnection.net website. (SOF, ¶ 29.)

17 Using her employee identification number and unique password on the
18 employeeconnection.net website, Garcia could access her "My In-Site" page, which contains
19 information related to her employment. (SOF, ¶ 30.) By clicking on the "My Pay" link on "My In-
20 Site," Garcia's could access and/or print her most recent wage statement and, by clicking on the
21 "Associate Statement" link on that wage statement, Garcia's could access and/or print her
22 commission statement corresponding to that wage statement. (SOF, ¶ 31.) By clicking on a "drop
23 down" box on her "My Pay" page, Garcia could access and/or print her earlier wage and commission
24 statements. (SOF, ¶ 32.)

25 From October 30, 2014 to March 6, 2015,³ Garcia accessed her wage statements on *only one*
26 occasion – Tuesday, December 2, 2014 – and on that occasion reviewed *only two* of her wage

27 _____
28 ³ In her brief, Garcia asserts she is seeking to recover civil penalties for the period beginning "one year before the filing
of [her] complaint" on October 30, 2015. As such, the relevant time period begins on October 30, 2014. Garcia Brief at

1 statements – the wage statements for the November 16 to November 22, 2014 pay period and for the
2 November 23 to November 29, 2014 pay period. (SOF, ¶ 33.)

3 Garcia’s wage statement for the November 16 to November 22, 2014 pay period and her
4 corresponding commission statement set forth the types of information Macy’s recorded on those
5 statements. (SOF, ¶ 34.) The “Hours, Units and Earnings” section of her wage statement itemizes,
6 among other things, her hourly rate (\$9), hours worked (40) and hourly pay (\$360); her overtime
7 hourly rate (\$13.50), overtime hours worked (6.32), and overtime hourly pay (\$85.32); and her
8 commission pay (\$46.40). (SOF, ¶ 35.) The statement sets forth all of her itemized pay in her
9 “Total Gross” (\$492.53) and, after deducting from the “Total Gross” her federal and state taxes
10 itemized in the “Taxes” section of the statement (\$99.08), sets forth her “Net Pay” (\$393.45). At the
11 bottom of the statement, Garcia is advised to “see [her] Associate Summary Statement for additional
12 information on [her] commission pay.” (SOF, ¶ 34.)

13 By clicking on the “Associate Statement” link on that same wage statement, Garcia’s
14 corresponding commission statement appears. (SOF, ¶ 36.) The commission statement clearly
15 reflects that her commission pay on the wage statement relates to the November 9 to November 15
16 pay period (“Commission Payment *as of 11/15/14*”; “Your net sales x commission % *for the week*
17 *is*”) and it explains how Macy’s calculated the \$46.40 commission pay appearing on her wage
18 statement. (SOF, ¶ 37.) Insofar as it is pertinent here, the first part of the statement – “Associate
19 Incentive Summary Statement” – sets forth a “high level summary” of Garcia’s gross sales, net sales,
20 commission calculation, and commission pay for the week. (SOF, ¶ 38.) And the third part of the
21 statement – “Associate Transaction Detail Statement” – sets forth a “transaction-by-transaction”
22 summary” of Garcia’s sales, returns, net sales, and commission calculation for the week. (SOF, ¶
23 39.) By looking at the third part of the statement, Garcia could track whether merchandise was
24 returned within the 180-day eligible return period. (SOF, ¶ 40.)

25 From the earliest date for which Garcia seeks to recover for inaccurate wage statements
26 (October 30, 2014) to the date Garcia’s employment ended (June 21, 2015), Macy’s made available

27 3. In her deposition, Garcia testified that she did not review any of her wage statements after March 6, 2015. (SOF, ¶
28 33)

1 to Garcia a total of 21 wage statements. (SOF, ¶ 41.) Of these 21 wage statements, 11 statements
2 reflect that she did not receive commission pay for the pay periods encompassed by those
3 statements. (*Id.*)

4 **II. ARGUMENT**

5 **A. Macy's Properly Included Advance Commission Pay in "Gross Wages Earned"** 6 **and "Net Wages Earned" on its Wage Statements**

7 Based on her construction of Cal. Lab. Code § 226(a), Garcia contends that Macy's wage
8 statements are "inaccurate" because commissioned sales associates' advance commission pay is
9 included in their "gross wages earned" and "net wages earned." Garcia Brief at 8-9. However, as
10 Macy's must report that pay as gross wages under federal law and as that pay, once paid, is never
11 taken back, Garcia's construction of § 226(a) is inconsistent with its purpose, unworkable, and, if
12 accepted, would result in "mischief or absurdity."

13 In construing a statute, a court is "'to ascertain the intent of the enacting legislative body so
14 that [it] may adopt the construction that best effectuates the purpose of the law'":

15 Generally, the court first examines the statute's words, giving them their ordinary
16 and usual meaning and viewing them in their statutory context, because the
17 statutory language is usually the most reliable indicator of legislative intent. . . .

18 "When a statute is capable of more than one construction, [the court] must . . .
19 give the provision a reasonable and commonsense interpretation consistent with
20 the apparent purpose and intention of the lawmakers, practical rather than
21 technical in nature, which upon application will result in wise policy rather than
22 mischief or absurdity."

23 *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 567 (citations omitted). Indeed, the
24 court must "resist blind obedience to the putative 'plain meaning' of a statutory phrase where a
25 literal interpretation would defeat the Legislature's central objective." *Looney v. Superior Court*
26 (1993) 16 Cal. App. 4th 521, 532 (citation omitted); *see also Farnow v. Superior Court* (1990) 226
27 Cal. App. 3d 481, 486 ("[t]he words of a statute will not be literally construed if this would cause an
28 absurd result, or if it would fail to give effect to the manifest purposes of the statute"). Moreover, the
court must construe "[e]very statute . . . with reference to the whole system of law . . . so that all
may be harmonized and given effect." *Id.* (citation omitted.)

1 Section 226(a) “requires the employer to document the basis of the employee’s *compensation*
2 *payments.*” *Gattuso*, 42 Cal. 4th at 574 (emphasis added). It is intended “to provide transparency
3 as to the calculation [of the employee’s] wages,” *Morgan v. United Retail, Inc.* (2010) 186 Cal.
4 App. 4th 1136, 1149 (citation omitted), and thereby “assist the employee in determining whether he
5 or she has been compensated properly.” *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal. App. 5th 385,
6 390. In short, by “requiring greater wage [statement] information,” the Legislature sought “to
7 [e]nsure that employees are adequately informed of *compensation received* and are not short
8 changed by their employers.” Assem. Com. On Labor and Employment, Analysis of Sen. Bill No.
9 1255 (2011-2012 Reg. Sess.), attached as Exhibit F to Defendants’ Compendium of Non-California
10 Authorities.

11 Insofar as it is pertinent here, § 226(a) provides:

12 Every employer shall . . . at the time of each payment of wages, furnish each of his or
13 her employees . . . an accurate itemized statement in writing showing (1) gross wages
14 earned . . . (4) all deductions, provided that all deductions made on written orders of
15 the employee may be aggregated and shown as one item, [and] (5) net wages earned .

16 Cal. Lab. Code § 226(a). Section 226 does not define “gross wages earned” and “net wages earned”
17 and elsewhere in the statute uses these terms interchangeably with “gross wages paid” and “net
18 wages paid.” *See, e.g.*, Cal. Lab. Code §§ 226(e)(2)(B)(i) and (ii) (entitling an employee to recover
19 damages if he or she “cannot promptly and easily determine” either “[t]he amount of the *gross*
20 *wages* or *net wages paid*” or “which deductions the employer made from *gross wages* to determine
21 the *net wages paid*”) (emphasis added)). Moreover, Macy’s must report that pay as gross wages
22 under federal law. *See, e.g.*, Rev. Rul. 72-78, 1972-1 C.B. 45 (advance commission pay is
23 “includable in gross income in the year received”). At the very least, then, it is ambiguous whether
24 advance commission pay should be included in “gross wages earned” and “net wages earned” within
25 the meaning of § 226(a).

26 Yet, when viewed in the context of § 226, the legislative intent underlying § 226, and
27 existing law, the only reasonable and commonsense construction of these terms necessarily requires
28 that advance commission pay be included in “gross wages earned” and “net wages earned.” Section

1 226(a) requires an employer to itemize “deductions” from an employee’s pay, including deductions
2 for federal and state taxes. Under federal law, advance commission pay is considered wages for
3 income tax withholding purposes. 26 U.S.C. § 3401(a); Rev. Rul. 69-239, 1968-1 C.B. 414
4 (“[a]dvance commissions . . . are wages . . . for Federal employment tax purposes”). Advance
5 commission pay is reportable as “gross income” to the employee in the year of receipt, even if it is
6 subject to repayment. *North American Oil Consolidated v. Burnet* (1932) 286 U.S. 417, 424; Rev.
7 Rul. 79-311, 1979-2 C.B. 25 (“gross income means all income from whatever source derived,”
8 including advance commission pay, and the amount of such advance commission pay should be
9 “included in the gross income of the taxpayer for the taxable year in which received”). To this end,
10 an employer is required to issue a W-2 to an employee who received taxable wages, including
11 advance commission pay, at the end of the calendar year and to report both the total amount of
12 taxable wages for income tax withholding purposes and the total amount of taxes deducted from
13 those wages. 26 U.S.C. § 6051(a); 26 C.F.R. § 31.6051-1(a)(1)(i).

14 Given the employer’s obligation to deduct federal taxes from an employee’s advance
15 commission pay, if advance commission pay is not included in an employee’s gross and net wages
16 earned, the employee would be in no position to understand “the basis [of his or her] compensation
17 payments,” *Gattuso*, 42 Cal. 4th at 574, or to “determin[e] if he or she has been compensated
18 properly.” *Soto*, 4 Cal. App. 5th at 390. Far from providing “transparency,” an employee’s wage
19 statement would set forth a bewildering array of numbers that seemingly have no logical connection
20 with each other. For example, assume for a given pay period that an employee receives \$200 in
21 hourly pay and \$700 in advance commission pay and that the employee’s pay is taxed at a 20% rate.
22 If advance commission pay is not included in gross and net wages earned, the employee’s wage
23 statement would, as shown below, merely ferment confusion:

24	Gross Wages Earned:	\$200 (hourly pay)
25	Taxes Withheld:	\$180 (20% of \$900 in total pay)
26	Net Wages Earned:	\$ 20 (gross wages earned less taxes)
27	Check Amount:	\$720 (total pay less taxes)

1 Compounding the confusion, the employee, when receiving a W-2 at the end of the year, would be
2 unable to reconcile the W-2 (which would include advance commission pay in gross wages) with the
3 wage statements (which would not).

4 In contending that advance commission pay should not be included in gross and net wages
5 earned, Gracia asserts that her wage statements were “inaccurate” because they did not record, after
6 the expiration of the 180-day eligible return period, when her advance commission pay became
7 “earned.” Garcia Brief at 8-9. However, the Court of Appeals has already rejected the identical
8 contention and, by logical implication, her construction of § 226(a). In *Soto*, the Court of Appeal
9 rejected the contention that vacation – a form of “wages” that is earned each week an employee
10 works – should be included on an employee’s wage statement as it is earned, even if it is not paid:

11 The reference to ‘gross wages earned’ and ‘net wages earned’ . . . must be read in
12 connection with section 226(a)’s directory language, which states that ‘at the time
13 of each *payment of wages*,’ the employer must ‘furnish . . . an accurate itemized
14 statement’ of these *earned wages*. . . . This mandate requires the employer to
‘itemize[]’ the constituent parts of the total amount *to be paid* to the employee.

15 *Soto*, 4 Cal. App. 5th at 392 (citations omitted). In other words, “an employer is required to identify
16 only those statutory items that are part of the employee’s *current monetary compensation*” and thus
17 to provide the employee “with an itemized statement identifying the *specific wages being paid at the*
18 *time of payment*.” *Id.* at 393 (emphasis added).

19 Even though advance commission pay is by definition “paid” before it is “earned,” Macy’s
20 properly included such pay on the wage statements when it was “*paid*” and “part of the employee’s
21 *current monetary compensation*.” Moreover, § 226(a) cannot be construed to require an employer to
22 include such pay, once it is “earned” but after “*the time of payment*,” as gross and net wages earned
23 on a later wage statement. Indeed, increasing the gross and net wages earned in a later wage
24 statement *without* a corresponding monetary payment would only beget still more confusion.

25 As the purpose of § 226(a) is to provide “transparency” so that an employee can ascertain
26 how the employer calculated his or her weekly compensation, § 226(a) must be construed to include
27 advance commission pay in “gross wages earned” and “net wages earned.” Indeed, the California
28 Supreme Court resorted to a similarly “practical rather than technical” construction of § 226(a) in

1 *Gattuso*. *Gattuso*, 42 Cal. 4th at 567. In *Gattuso*, the Court held that an employer could satisfy its
2 business expense reimbursement obligations by increasing an employee's base or commission rates.
3 *Id.* at 570-72. In the process, it rejected the proposition that, by including a reimbursement
4 component in an employee's pay and reporting that pay as "gross wages earned" on the wage
5 statement, the employer would violate § 226(a). While the Court concluded that there is "a valid and
6 important distinction between wages (as payment for labor performed) and business expense
7 reimbursement," it nevertheless construed § 226(a) to allow for the inclusion of such a form of
8 reimbursement in "gross wages earned" so long as, either separately or on the wage statement itself,
9 the employer provided the employee with a basis for apportioning "any increases in compensation
10 between compensation for labor performed and business expense reimbursement." *Id.* at 572-75. In
11 like fashion, Macy's includes its commissioned sales associates' advance commission pay in "gross
12 wages earned" and provides these associates with detailed commission statements so that they can
13 track whether the merchandise they previously sold and for which they received an advance
14 commission was returned within the 180-day eligible return period. (SOF, ¶¶ 38-40.)

15 **B. Macy's Is Not Required to Include Merchandise Returns in "Deductions" on Its**
16 **Wage Statements**

17 Garcia contends that, if advance commission pay "somehow qualifies as earned wages," then
18 both her and the other commissioned sales associates' wage statements violate § 226(a)(4) because
19 they do not itemize merchandise returns as "deductions" on their wage statements. Garcia Brief at
20 9. Garcia's contention is devoid of merit.

21 Whether § 226(a) is construed to include advance commission pay as "gross wages earned"
22 and "net wages earned" does not change the character of advance commission pay and does not
23 suddenly require Macy's to itemize merchandise returns as deductions on a wage statement. As the
24 courts have repeatedly explained, "an employer may legally advance commissions to its employees
25 prior to the completion of all conditions for payment and, by agreement, charge back any excess
26 advance over commissions earned against any future advance should the conditions not be satisfied."
27 *Steinhebel*, 126 Cal. App. 4th at 704. Where, as here, the return of merchandise for which an
28

1 advance commission was previously paid is factored into the “net sale” calculation for future
2 commissions, they do not constitute deductions from wages and thus need not be itemized on a wage
3 statement. *Steinhebel*, 126 Cal. App. 4th at 708 (“when a charge-back occurs, [the employer] does
4 not take back wages,” but “merely reduces the amount of the next advance to the employee to
5 account for the fact that the earlier advance never ripened into a commissionable order”).

6 **C. Macy’s Properly Disclosed the Pay Periods on its Wage Statements and Garcia**
7 **Cannot Recover Under This Theory of Liability for Wage Statements Issued**
8 **After October 2, 2015**

9 Garcia contends that, if advance commission pay “somehow qualifies as earned wages,” her
10 and the other commissioned sales associates’ wage statements violate §226(a)(6) because “the
11 inclusive dates of the pay period shown on the wage statement do not match the pay period in which
12 the commissions were actually earned.” Garcia Brief at 9. Her contention is again devoid of merit.

13 Once again, whether § 226(a) is construed to include advance commission pay as “gross
14 wages earned” and “net wages earned” does not change the character of advance commission pay
15 and suddenly require Macy’s to set forth the pay period the advance commission pay is “actually
16 earned” rather than the pay period it is “paid.” Section 226(a) requires an employer to furnish “an
17 accurate itemized statement in writing showing . . . (6) the inclusive dates of the period for which the
18 employee is *paid*.” Thus, Garcia’s and the other sales associates’ wage statements fully comply with
19 § 226(a)(6).

20 As construed by the courts, “showing” requires an employer “to make evident or apparent” to
21 the employee. *Morgan*, 186 Cal. App. 4th at 1146. Moreover, an employer can satisfy the
22 requirements of § 226(a)(6) by providing employees additional disclosure documents with their
23 wage statements. *Id.* at 1145 (“[t]ime cards or other records, if attached to a paycheck, would
24 satisfy section 226’s requirement for a statement of *total hours worked*”; citation omitted). By
25 clicking a link on an electronic wage statement, commissioned sales associates can immediately
26 access the corresponding commission statement. (SOF, ¶ 36.) The commission statements
27 unequivocally “make evident or apparent” to the employee the inclusive dates of the pay period in
28

1 which the sales were made that generated his or her advance commission pay. For example, by
2 clicking on the link to her wage statement for the November 16 to November 22, 2014 pay period,
3 Garcia can access the corresponding commission statement which reflects that her commission pay
4 was for the November 9 to November 15, 2014 pay period (“Commission Payment *as of* 11/15/14”;
5 “Your net sales x commission % *for the week* is”). (SOF, ¶¶ 36-37.)

6 In any event, Cal. Lab. Code § 2699.5, allowing for the recovery of civil penalties for
7 violations of § 226(a), was amended, effective October 2, 2015, to exclude the recovery of civil
8 penalties for violations of § 226(a)(6). Cal. Lab. Code § 2699.5 (allowing civil penalties *only* for
9 violations of “paragraphs (1) to (5), inclusive, (7) and (9) of subdivision (a) of Section 226(a)”).
10 Garcia, then, cannot recover civil penalties regarding alleged violations of § 226(a)(6) with respect
11 to wage statements issued after October 2, 2015.

12 **D. Macy’s Substantially Complied with Cal. Labor Code § 226(a)**

13 Even if the Court were to adopt Garcia’s construction of § 226(a), Macy’s cannot be held
14 liable under § 226(a) because the wage statements it furnished Garcia and the other commissioned
15 sales associates substantially complied with § 226(a). *See, e.g., Downtown Palo Alto Com. For Fair*
16 *Assessment v. City Council* (1986) 180 Cal. App. 3d 384, 394 (“unless the intent of the statute can
17 only be served by demanding strict compliance with its terms, substantial compliance is the
18 governing test”).

19 Macy’s provided Garcia and the other commissioned sales associates detailed wage
20 statements that, in furtherance of § 226(a)’s purpose, “provided transparency as to the calculation of
21 wages,” *Morgan*, 186 Cal. App. 4th at 1149, and enabled them to “determin[e] whether [they had
22 been] compensated properly.” *Soto*, 4 Cal. App. 5th at 390. Indeed, Garcia conceded she fully
23 understood the basis of her pay and that she could— if she had bothered to review more than the two
24 wage and commission statements she did review – track whether merchandise for which she
25 previously received a commission was returned within the 180-day eligible return period. (SOF, ¶¶
26 33, 40.) Under these circumstances, Macy’s, at the very least, substantially complied with § 226(a).
27 *See Hernandez v. BCI Coca-Cola Bottling Co.* (C. D. Cal. April 12, 2012) 2012 U.S. Dist. LEXIS
28

1 55301, *17-22 (holding that the employer substantially complied with § 226(a) as “all of the
2 information to determine whether [an employee is] being paid for all hours of work at the
3 appropriate rates of pay” was included on the employees’ wage statements).

4 **E. Garcia Has Failed to Establish the Violations for Which She Seeks a Civil**
5 **Penalty**

6 As the party moving for summary adjudication, Garcia bears “the burden of persuasion that
7 there is no triable issue of material fact and that [she] is entitled to judgment as a matter of law.”
8 *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850. In other words, she must demonstrate
9 that she is entitled to judgment as to each wage statement for which she seeks to recover a civil
10 penalty.⁴ Rather than present all the material facts necessary to demonstrate each such violation,
11 Garcia simply contends in the abstract that all of her wage statements – as well as those of
12 approximately 20,000 similarly-situated sales associates – violate § 226(a). For this reason alone,
13 the Court should deny her motion for summary adjudication.

14 Garcia would have this Court believe that, if it adopts one of Garcia’s three alternate theories
15 of recovery, the Court can simply “count” the wage statements that violate §226(a). Given the
16 myriad factual scenarios arising from Macy’s payment of advance commission pay, many of which
17 if raised may well be disputed, it is not so simple. If the Court were to adopt Garcia’s contention
18 that Macy’s improperly included advance commission pay in “gross wages earned” and “net wages
19 earned,” would Garcia’s 11 wage statements that do not reflect commission pay – not to mention
20 similar statements for the other commissioned sales associates – violate § 226(a)? As Macy’s deems
21 all commissions earned at the time it pays an associate his or her final pay, would those wage
22 statements reflecting final commission pay violate § 226(a)? If the Court were to adopt Garcia’s
23 contention that Macy’s failed to itemize in its wage statements deductions for merchandise returns,
24 how would it be determined if merchandise was returned in a pay period and thus which wage

25 _____
26 ⁴ In her brief, Garcia contends that “civil penalties are not an element of [her] cause of action.” Garcia Brief at 3. Even
27 if correct, it is important to point out that a court may hold a hearing to determine the amount of any civil penalties
28 because, under PAGA, it “may award less than the maximum penalty authorized if, under the facts and circumstances of
the case, a greater amount would be ‘unjust, arbitrary and oppressive, or confiscatory’.” Cal. Lab. Code § 2699(e)(2).
Before such a hearing or determination, however, Garcia must establish she is entitled to judgment as to each wage
statement for which she seeks a civil penalty.

1 statements violate § 226(a)? If the Court were to adopt Garcia's contention that Macy's failed to
2 indicate on its wage statements the inclusive dates of the pay period in which advance commission
3 pay was actually earned, how would it be determined when such pay was actually earned and thus
4 which wage statements violate § 226(a)? Put simply, Garcia has failed to establish the necessary
5 material facts entitling her to the relief she requests.

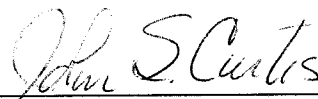
6 **III. CONCLUSION**

7 For the foregoing reasons, Macy's requests the Court to deny Garcia's Motion for Summary
8 Adjudication in its entirety and to issue it such other and further relief as the Court deems
9 appropriate.

10 DATED: December 7, 2016

LAW OFFICE OF JULIE AZRAEL

11
12
13 By:



John S. Curtis
Attorneys for Defendants
MACY'S WEST STORES, INC. dba MACY'S;
Macy's, Inc.; and DOES 1-25, inclusive.