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Amber Garcia, on Behalf of the State of California
and Aggrieved Employees

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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN BERNARDINO

14
15 AMBER GARCIA, Individually, and on
16 Behalf of All Aggrieved Employees,

17 Plaintiffs,

18 vs.

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20 MACY'S WEST STORES, INC. dba
21 MACY'S; an Ohio Corporation; MACY'S,
INC., a Delaware Corporation; and DOES 1
22 through 25, inclusive,

23 Defendants.

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

) **PLAINTIFF'S MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF PLAINTIFF'S MOTION**
) **FOR SUMMARY ADJUDICATION**

) Date: December 21, 2016
) Time: 8:30 a.m.
) Dept.: S24

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 This case involves Defendants Macy’s West Stores, Inc. and Macy’s Inc.’s (“Defendants”)
3 violations of the wage statement requirements of Labor Code § 226(a) with respect to the commission
4 wages paid to their California sales employees. The problem is summarized as follows: Pursuant to
5 Defendants’ commission wage policy, commissions are not earned at the time of sale, but only become
6 earned wages at the end of the 180-day Eligible Return Period. During the 180 day period, the
7 commission amount is reduced by merchandise returns and exchanges. However, once the commissions
8 become earned wages (at the end of the 180-day waiting period), these earned wages are not included on
9 the employees’ wage statements, as required by Labor Code § 226(a). Thus, the employees are totally in
10 the dark as to the amount of commission wages they have actually earned.

11 Defendants’ commission policy states:

12 “Commission is not earned at the time of sale. Rather, commission on
13 merchandise you sell is earned when the Eligible Return Period has
14 expired and the merchandise has not been returned within that period of
15 time. So that you do not have to wait to receive payment of commissions
16 until they are earned (at the end of Eligible Return Period), Macy’s pays
17 you commission pay in advance of when it is earned. This pay is an
18 Advance Commission Payment and is most often referred to as
19 ‘Commission Pay.’

20 The ‘Eligible Return Period’ is the period of time within 180 days of
21 purchase.”

22 Commissions are wages (Lab. C. § 200(a)), and thus, when earned, must be included in the gross
23 and net wages reflected on the wage statement, as required by subdivisions (a)(1) and (a)(5) of Labor
24 Code § 226. Defendants violate subdivisions (a)(1) and (a)(5) of § 226 with respect to all commission
25 wages earned by their California sales employees because, at the time when the commissions become
26 earned wages (180 days after the sale), these wages are not included in the gross and net wages line
27 items on the wage statement or listed anywhere else on the wage statement. As such, the gross and net
28 wages reflected on the wage statements are wrong. In fact, once the employee’s commissions become
earned wages (e.g. 180 days after the sale), there is no document that Defendants provide to their sales

1 employees that shows them how much they actually earned in commission wages.

2 If Defendants take the position that the commission advance paid to the sales employees prior to
3 the end of the 180-day return period somehow qualifies as earned wages, despite contrary statements in
4 their Understanding Commission handbook, then Defendants' wage statements violate § 226(a)(4)
5 because the deductions from commissions for returned merchandise are not shown on the wage
6 statement, and also violate § 226(a)(6) because the inclusive dates of the pay period shown on the wage
7 statement do not match the pay period in which the commissions were earned.

8 Finally, summary adjudication on the PAGA claim does not require proof of injury and intent
9 under § 226(e), but only requires proof of the violation under § 226(a). Lab.C. § 2699.5; *McKenzie v.*
10 *Federal Exp. Corp.* (C.D. Cal. 2011) 765 F. Supp.2d 1222, 1231-1232; *Willner v. Manpower Inc.* (N.D.
11 Cal. 2014) 35 F. Supp.3d 1116, 1135-1136. And, to prevail on the PAGA claim, Plaintiff need not
12 prove the amount of the civil penalties owed, as civil penalties are not an element of a cause of action.
13 *People v. Superior Court* (2015) 234 Cal. App.4th 1360. Instead, the trial court determines the amount
14 of civil penalties owed after the finding of liability giving rise to the assessment of civil penalties. *Id.* at
15 p. 1384.

16 **II. RELEVANT PROCEDURAL HISTORY**

17 Plaintiff satisfied the PAGA prefiling notice requirements on April 8, 2015, and September 22,
18 2015, respectively, by sending written notice via certified mail to the California Labor and Workforce
19 Development Agency ("LWDA") and Defendants, setting forth the alleged violations of the Labor Code
20 and the supporting facts. (See April 8, 2015, letter and September 22, 2015, letter attached to Hanson
21 Decl. respectively as Exhibits "D" and "E.") Thereafter, Plaintiff waited over 33 days from the date the
22 letters were mailed to file her complaint, and filed her complaint on October 30, 2015.

23 **III. THE UNDISPUTED MATERIAL FACTS**

24 During the applicable statutory period (e.g. one year before the filing of the complaint up
25 through the present), Defendants issued weekly wage statements to their California sales employees that
26 are all in the same format. The hard copy paper version of the wage statement is in the same format as
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1 the online computer version. (See Plaintiff's Separate Statement of Undisputed Material Facts
2 ("PUMF") filed herewith, Nos. 2, 3, and 4).

3 Defendants' policies concerning commissions paid to its California sales employees are set forth
4 in Defendants' Understanding Commission handbook. (PUMF No. 6). The Understanding Commission
5 handbook states: "Commission is not earned at the time of sale. Rather, commission on merchandise
6 you sell is earned when the Eligible Return Period has expired and the merchandise has not been
7 returned within that period of time." (PUMF No. 7). The Eligible Return Period is the period of time
8 that is 180 days after the sale. (PUMF No. 7).

9 So that the employees do not have to wait to receive payment on commissions until the time the
10 commissions become earned wages (at the end of the 180 day Eligible Return Period), Defendants
11 provide the employees with an advance on commissions which it refers to as an "Advance Commission
12 Payment," "Commission Pay," or "Commission." (PUMF Nos. 7, 8). However, Defendants are clear
13 that, "Macy's pays commission pay in advance of when it is earned." (PUMF No. 8). The Advance
14 Commission Payment is a loan to the employee based upon commission wages that will be earned in the
15 future. (PUMF Nos. 7, 8, 9, 10).

16 The line item on the subject wage statements labeled "Commission" does not show earned
17 commission wages (commissions that became earned wages after the expiration of the 180-day Eligible
18 Return Period), but shows the amount of the commission advance or Advance Commission Payment
19 based upon the sales made by the employee in the prior one week pay period. (PUMF Nos. 9, 10).
20 However, the commission advance amount shown on the subject wage statements in the line item
21 labeled "Commission" does not match the amount the employee eventually earns in commissions for
22 that week (as determined at the end of the 180-day Eligible Return Period) because the commission
23 advance shown on the wage statement is adjusted downward by merchandise returns and exchanges that
24 occur over the 180-day Eligible Return Period. (PUMF Nos. 9, 10, 11, 12).

25 Defendants do not show the amount of commission wages actually earned by the employee
26 (commissions that become earned wages at the end of the 180-day Eligible Return Period) on the wage
27 statements they provides to their California sales employees or include the amount of earned
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1 commission wages in the gross or net wages line items on the wage statements. (PUMF No. 11). In
2 fact, Defendants do not provide their California sales employees with any document at the end of the
3 180-day Eligible Return Period showing the amount of commission wages actually earned by the
4 employee for any given week of sales. (PUMF Nos. 11, 12).

5 **IV. LEGAL STANDARDS ON SUMMARY ADJUDICATION**

6 California Code of Civil Procedure section 437c(f) permits summary adjudication as to a single
7 cause of action within an action, and “a motion for summary adjudication may be made by itself or as an
8 alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion
9 for summary judgment.” Cal. Civ. Proc. section 437c(f)(2). California Code of Civil Procedure section
10 437c(c) permits summary adjudication of a cause of action when “all the papers submitted show that
11 there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a
12 matter of law.” “The moving party must “support the ‘motion’ with evidence including ‘affidavits,
13 declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice’
14 must or may ‘be taken.’” *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844, citing Cal. Civ.
15 Proc. section 437c(b). On summary judgment, “the moving party bears the burden of persuasion that
16 there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. However,
17 there is only a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier
18 of fact to find the underlying fact in favor of the party opposing the motion in accordance with the
19 applicable standard of proof.” *Aguilar, supra*, 25 Cal.4th at p. 845.

20 **V. THE STATE AND THE AGGRIEVED EMPLOYEES ARE ENTITLED TO SUMMARY**
21 **ADJUDICATION ON THE SECOND CAUSE OF ACTION UNDER PAGA FOR WAGE**
22 **STATEMENT VIOLATIONS**

23 The nature of a PAGA action has been explained by the California Supreme Court: the employee
24 plaintiff suing under PAGA does so as the agent of California’s Labor and Workforce Development
25 Agency (LWDA) and represents the same legal right and interest as the LWDA – namely, the recovery
26 of civil penalties. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 985. The employee’s action under
27 PAGA is a substitute for an action brought by the state itself, and is fundamentally a law enforcement
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1 action designed to protect the public. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348,
2 381. “A PAGA representative action is therefore a type of *qui tam* action.” *Id.* at 382. “The
3 government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.”
4 *Id.*

5 **A. The PAGA Wage Statement Claim Has Only One Element**

6 A PAGA claim for civil penalties based upon violations of the wage statement requirements of
7 Labor Code § 226(a) is a simple claim with only one element: proof that the wage statement is missing
8 or incorrectly states any of the information required by § 226(a). Because a PAGA wage statement
9 claim seeks the *civil penalties* provided by PAGA under Labor Code § 2699(f), and not the *statutory*
10 *penalties* found in Labor Code § 226(e), a PAGA wage statement claim only requires proof of a
11 violation of subdivision (a) of § 226, without any proof of the “injury” and “intent” elements of
12 subdivision (e). *McKenzie v. Federal Exp. Corp.*, 765 F. Supp.2d 1222, 1232-1233 (C.D. Cal. 2011);
13 *Willner v. Manpower Inc.*, 35 F. Supp.3d 1116, 1135-1136 (N.D. Cal. 2014).

14 The same violation of a Labor Code provision may give rise to both civil penalties under PAGA
15 and statutory penalties found in the underlying Labor Code provision. *Caliber Bodyworks Inc. v. Sup.*
16 *Court*, (2005) 134 Cal. App.4th 365, 377-378. “The civil penalties recovered on behalf of the state
17 under the PAGA are distinct from the statutory damages to which employees may be entitled in their
18 individual capacities.” *Iskanian, supra*, 59 Cal.4th at 381. The same violation of any of the wage
19 statement requirements of Labor Code § 226(a) gives rise to two distinct types of penalties: (1) civil
20 penalties recoverable by the State under § 2699(f) of PAGA; and (2) statutory penalties recoverable by
21 the employees under subdivision (e) of § 226. The PAGA civil penalties are “designed to protect the
22 public and penalize the employer for past illegal conduct.” *Brown v. Ralphs Grocery Co.*, (2011) 197
23 Cal.App.4th 489,499; see also *Arias v. Superior Court*, (2009) 46 Cal.4th 969, 986. By contrast, the
24 statutory penalties in subdivision (e) of § 226 are paid entirely to the employees as compensation for
25 injuries suffered as a result of the violation(s) of § 226(a). In a wage statement case, both types of
26 penalties are recoverable upon proof of one or more violations of the wage statement requirements of §
27 226(a). *Caliber* at pp. 377-378. In this lawsuit, Plaintiff only seeks recovery of civil penalties under
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1 PAGA on behalf of the State of California and Aggrieved Employees. Plaintiff is not seeking the
2 statutory penalties available to employees in class actions under Labor Code § 226(e).

3 A plain reading of the PAGA statute illustrates the single element of proof required for the
4 PAGA wage statement claim (e.g. the violation of § 226(a)). Labor Code § 2699.5 provides for the
5 recovery of PAGA civil penalties for “any alleged violation of . . . **subdivision (a) of Section 226 . . .**”
6 Section 2699.5 specifically excludes all other subdivisions of § 226, including subdivision (e) and its
7 elements concerning proof of “injury” and “intent.” Thus, there is no injury or intent elements that
8 apply to the recovery of PAGA civil penalties based upon violations of the wage statement requirements
9 of § 226(a). Indeed, the Courts that have analyzed this issue have held that wage statement claims under
10 PAGA only require proof of the violation under § 226(a), and do not require proof of the elements of §
11 226(e). *McKenzie* at pp. 1232-1233; *Willner* at pp. 1135-1136.

12 In *McKenzie v. Federal Exp. Corp.*, *supra*, 765 F. Supp.2d 1222, plaintiff prosecuted a PAGA
13 wage statement claim under § 226(a) based upon defendant’s failure to include the pay period beginning
14 date on the paystub and correct hourly rates. Plaintiff maintained that she only needed to prove a
15 violation of § 226(a) to recover civil penalties under § 2699(f) of PAGA. The Court agreed holding:

16 Consistent with the holding in [*Lopez v. G.A.T. Airline Ground Support,*
17 *Inc.*, 2010 WL 2839417 (S.D. Cal. 2010)], **this Court also finds that**
18 **proving a violation of subsection (a) of Section 226 is sufficient by itself**
19 **to warrant civil penalties under PAGA.** Section 2699.3 plainly provides
20 that a civil action to recover penalties under Section 2699(f) requires a
21 violation of one of the provisions listed under Section 2699.5. CAL.LAB.
22 CODE § 2699.3(a). When looking at the provisions listed under Section
23 2699.5, the statute specifically lists “subsection (a) of Section 226,” but
not Section 226(e). That language persuades the Court that, for the
purposes of recovering PAGA penalties, one need only prove a violation
of Section 226(a), and need not establish a Section 226(e) injury.

24 *Id.* at p. 1232, *emph. added*; see also *Willner v. Manpower*, *supra*, 35 F. Supp.3d at p. 1136 [same].

25 In sum, a PAGA wage statement claim, unlike an individual or class action wage statement
26 claim, only requires proof of one element: a violation of any of the requirements of § 226(a).

1 Finally, the amount of the PAGA civil penalties is not an element of the PAGA claim for
2 purposes of summary adjudication because civil penalties are distinct from damages, and are not an
3 element of the claim. *People v. Superior Court* (2015) 234 Cal.App.4th 1360, 1383-1384 [summary
4 judgment/summary adjudication on a claim involving civil penalties does not require adjudication of the
5 amount of the civil penalties]. The amount of the civil penalties is determined by the trial court after
6 granting summary adjudication on the underlying claim. *Id.* at p. 1384.

7 **B. Plaintiff, The State Of California, And The Aggrieved Employees Are Entitled**
8 **To Summary Adjudication With Respect To Defendant's Commission Pay Wage**
9 **Statement Violations**

10 Labor Code § 226 (a) states in pertinent part:

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12 Every employer shall, semimonthly or at the time of each payment of
13 wages, furnish each of his or her employees, either as a detachable part of
14 the check, draft, or voucher paying the employee's wages... an accurate
15 itemized statement in writing showing (1) gross wages earned,...(4) all
deductions...(5) net wages earned, (6) the inclusive dates of the period for
which the employee is paid...

16 The earned wages that must be included on the wage statement pursuant to § 226(a) include
17 commission wages because, for purposes of the definition of the term "wages," there is no difference
18 between commission wages, hourly wages, piece rate wages, or any other method of wage calculation.
19 Lab. C. § 200(a). Indeed, on this point, Labor Code § 200(a) states: "'Wages' includes all amounts for
20 labor performed by employees of every description, whether the amount is fixed or ascertained by the
21 standard of time, task, piece, *commission basis*, or other method of calculation." Emph. added.

22 **1. The Labor Code § 226, Subdivision (a)(1) And (a)(5) Violations**

23 Subdivisions (a)(1) and (a)(5) of Labor Code § 226 mandate that the employee's wage statement
24 accurately state the amount of gross wages earned and net wages earned, which includes gross and net
25 wages earned from commissions.

26 At the time when Defendants' California sales employees' commission advance becomes earned
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1 commission wages (e.g. at the end of the 180-day Eligible Return Period), the amount of the employees'
2 earned commission wages are not included in the gross and net wages line items on the corresponding
3 wage statement. (PUMF Nos. 7, 8, 9, 10, 11). Thus, the amounts for gross and net wages reflected on the
4 wage statements are wrong, and therefore, violate Subdivisions (a)(1) and (a)(5) of § 226. (PUMF Nos.
5 9, 10, 11).

6 **2. The Labor Code § 226(a)(4) Violation**

7 If Defendants try to defeat the Labor Code § 226, subdivision (a)(1) and (a)(5) claims by arguing
8 the Advance Commission Payment somehow qualifies as earned wages (despite numerous policy
9 statements to the contrary in all of Defendant's policy manuals and reference materials) as reflected in
10 the line item on the wage statements labeled "Commission," then Defendants violate subdivision (a)(4)
11 of § 226 that requires the listing of all deductions. This is because the line item on the subject wage
12 statements labeled "Commission" is a number that has been adjusted downward for deductions caused
13 by merchandise returns and/or exchanges occurring in the prior one week pay period. (PUMF Nos. 9,
14 10). Section 226(a)(4) is violated with respect to every wage statement listing an amount in the line item
15 labeled "Commission" because nowhere on the wage statements do they show the deductions from the
16 commission wages for merchandise returns and/or exchanges. (PUMF Nos. 9, 10).

17 **3. The Labor Code § 226(a)(6) Violation**

18 If Defendants argue the Advance Commission Payment somehow qualifies as earned wages
19 (despite numerous policy statements to the contrary in all of Defendants' policy manuals and reference
20 materials), then the subject wage statements violate Labor Code § 226(a)(6) because the inclusive dates
21 of the pay period shown on the wage statement do not match the pay period in which the commissions
22 were actually earned. (PUMF No. 10). For example, Plaintiff Garcia's wage statement, at page 3 of
23 Exhibit 4 to PMK Homan's Deposition, shows \$179.13 in the line item labeled "Commission" with a
24 corresponding pay period shown on the wage statement of 06/29/2014 through 07/05/2014. However,
25 this pay period is wrong with respect to the \$179.13 in commission wages because the \$179.13 was
26 earned based upon work Ms. Garcia performed during the pay period of 06/22/2014 through 06/28/2014,
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1 not 06/29/2014 through 07/05/2014. (Homan Depo., 70/18—73/17, and Exhibit 4, p.3 to Homan Depo.,
2 attached as Exhibit C to Hanson Declaration).

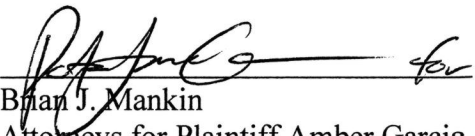
3 Thus, if Defendants argue that the Advance Commission Payment, as shown on the subject wage
4 statements in the line item labeled “Commission,” is earned wages, then § 226(a)(6) is violated with
5 respect to every wage statement showing an amount for Commission pay because the pay period on the
6 wage statement is not the pay period in which the commission pay was earned. (PUMF No. 10).

7 **VI. CONCLUSION**

8 For the foregoing reasons, Plaintiff, on behalf of the State of California and the Aggrieved
9 Employees, is entitled to summary adjudication against Defendants on the Second Cause of Action in
10 the Complaint filed by Plaintiff Amber Garcia.

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12 Dated: September 30, 2016

FERNANDEZ & LAUBY LLP

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15 Brian J. Mankin
16 Attorneys for Plaintiff Amber Garcia on behalf of
17 the State of California and Aggrieved Employees
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