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

13  
14 AMBER GARCIA, Individually, and on  
15 Behalf of All Aggrieved Employees,

16 Plaintiffs,

17 vs.

18  
19 MACY'S WEST STORES, INC. dba  
20 MACY'S; an Ohio Corporation; MACY'S,  
21 INC., a Delaware Corporation; and DOES 1  
through 25, inclusive,

22 Defendants.  
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) Case No.: CIVDS1516007

) **PLAINTIFF'S REPLY BRIEF IN**  
) **SUPPORT OF PLAINTIFF'S MOTION**  
) **FOR SUMMARY**  
) **ADJUDICATION**

) Date: December 21, 2016

) Time: 8:30 a.m.

) Dept.: S24

) Judge: Hon. Donna Gunnell Garza

1 **I. INTRODUCTION**

2 Defendant Macy's Opposition redrafts Plaintiff's complaint so that it can defeat a claim that  
3 does not exist. Macy's states throughout its Brief that Plaintiff contends Labor Code § 226 is violated  
4 because "Macy's improperly included 'advance commission pay' as earned gross and net wages on the  
5 wage statements." (Macy's Brief p.1, lns. 6-8, p. 5, lns. 7-9; p. 6, lns. 23-28). There is no such claim in  
6 this case or any allegations of such a claim in Plaintiff's complaint. Macy's simply makes this claim up  
7 in order to dodge the actual claim prosecuted by Plaintiff.

8 Plaintiff does not allege a violation of § 226 because Macy's includes "advance commission  
9 pay" on the wage statements, which payment is simply a loan to the employees. To the contrary,  
10 Plaintiff alleges the violation of § 226 based upon Macy's failure to list the amount of commission  
11 wages actually earned (net and gross) when the commission advance becomes earned wages at the end  
12 of the 180-day return period. This information, which is mandated by § 226(a), is particularly  
13 important here because the amount of the Advance Commission Payment, which eventually becomes  
14 earned wages after 180 days, is reduced over the course of the 180-day Eligible Return Period by  
15 merchandise returns. However, the actual amount of the commission wages actually earned by the  
16 employees at the 180 day mark (as adjusted for returns) are never shown on the wage statement or any  
17 other document. This is a clearcut violation of § 226(a).

18 **II. FACTUAL CORRECTIONS**

19 Macy's plays fast and loose with the facts and misrepresents important undisputed material facts  
20 established by its corporate representatives.

21 **1. Macy's Statement:** "Once commission pay is paid it is never taken back and is not subject to  
22 downward adjustments." (Macy's Separate Statement of Undisputed Material Facts In Opposition to  
23 Plaintiff's Motion for Summary Adjudication, Response to Fact Nos. 9, 10, 11, 12; Macy's Fact No. 20;  
24 Macy's Brief p. 1/ln. 10, p. 2/lns. 14-15).

25 This is false. Macy's company representative Matt Homan, Senior Manager of Incentive  
26 Compensation for Macy's Stores, gave testimony establishing that commission pay *is* taken back and  
27 adjusted downward by chargebacks for returned merchandise. On this point, Mr. Homan gave the  
28 following testimony:

1 Q. So when a customer brings back a piece of merchandise, whatever it is, the value of that  
2 item is somehow - - the calculation is done and that amount is somehow worked into the current sales,  
3 net sales number for that employee for that week?

4 A. It's factored into the net sales and commission calculation for the week in which it's  
5 returned.

6 Q. And when it's factored into that net sales calculation in the week in which it's returned,  
7 that always reduces the amount of the net sales number, right? It never goes up when someone returns  
8 something?

9 A. ***Correct, a return would reduce the net sales number.***

10 Q. Which in turn would also reduce . . . the amount of advance commission payment for  
11 that week, right?

12 A. Yes, it would impact the commission they are paid for the week the return has happened.

13 Q. ***It would impact it downward, correct?***

14 A. ***Correct.***

15 (Homan Depo., pp. 33/12 – 34/6, attached as Exhibit “C” to Hanson Decl. ISO Plaintiff’s MSJ).

16 Thus, when merchandise is returned within the 180-day return period, the commission advance  
17 paid on that item of merchandise is taken back from the employee in the week the item is returned by  
18 subtracting the price of that item from that week’s commissionable sales, which in turn reduces the  
19 commission advance paid that week.

20 This tale-back downward adjustment policy is illustrated by looking at Amber Garcia’s  
21 commission payroll records for the first week in which she received a commission advance. For  
22 example, page 3 of Exhibit 4 to Matt Homan’s Deposition shows Ms. Garcia’s first wage statement  
23 where she received an advance commission payment. The advance is labeled “Commission” and is in  
24 the amount of \$179.13. The sales reports relating to this advance are pages 1 through 5 of Exhibit 3 to  
25 Homan’s Deposition. Pages 2 through 3 of Exhibit 3 titled Associate Sales>Returns Summary  
26 Statement (As of 06/28/2014), shows two returns that week totaling \$93.19 (\$63.20 + \$29.99). Ms.  
27 Garcia’s gross commissionable sales that week total \$4,115.49, but that number is reduced by \$93.19  
28 for the returns and reduced again by \$56.81 for employee discounts, resulting in a net number for  
commission calculation of \$3,965.49. (See pg. 3 to Ex. 3 to Homan Depo., attached as Exhibit “C” to

1 Hanson Decl.) Thus, the commission advance paid to Ms. Garcia that week was adjusted downward by  
2 subtracting the \$93.19 in returns from her commissionable sales number.

3 As shown by Exhibit 3 to Matt Homan's deposition, these downward adjustments to Ms.  
4 Garcia's commission advance pay were made in every weekly pay period that she worked for Macy's  
5 as indicated in the columns labeled "Returns." (See Ex. 3 to Homan Depo.) Thus, any time a  
6 merchandise return was made, it directly reduced Ms. Garcia's commission advance in the week the  
7 return was made. In other words, commission advances paid in one week were reduced or taken back  
8 in later weeks when merchandise items were returned within the 180-day period. Macy's statement that  
9 commission pay is never taken back or adjusted downward is simply false.

10 **2. Macy's Statement:** Sales employees can determine the amount of commission pay earned by  
11 looking at their Associate Summary Statement Sales Productivity and Associate Sales>Returns  
12 Summary Statement Sales Productivity reports. (Macy's Separate Statement, responses to Fact Nos. 10  
13 and 12; Macy's Fact No. 40; Macy's Brief, p. 4/lns. 13-24).

14 This is false. The sales reports referenced by Macy's only show the employee their advance  
15 commission payment for that week as reconciled downward for merchandise returns made in that week.  
16 (See Ex. 3 to Homan Depo., attached as Exhibit "C" to Hanson Decl.). Although these reports have a  
17 column listing the returns for that week, the week in which the return items were originally sold is not  
18 identified on any of these reports. Thus, if an employee wants to know the amount of commission  
19 wages he or she actually earned in a pay period (which § 226(a) requires to be shown) when the  
20 commission advance previously paid for that week becomes earned wages at the end of the 180-day  
21 period, the sales reports are of no value. This is because the sales reports do not track returns back to  
22 the pay period in which the sale was performed, but only show returns made in the current pay period.  
23 Accordingly, at the 180-day mark, the employees have no way of determining what merchandise was  
24 returned that corresponds to the pay period in which the commission advance becomes earned wages.  
25 In short, the employees are totally in the dark as to the amount of commission wages they actually  
26 earned in any given one-week pay period.

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1 **III. ARGUMENT**

2 **A. Macy's Confuses The Employee Loan It Labels As "Advance Commission**  
3 **Payment" With Earned Commission Wages**

4 The distinction between an advance on wages (which is a loan by the employer to the employee)  
5 and earned wages is important here, but lost on Macy's. Indeed, it is a distinction with a huge  
6 difference to a Labor Code § 226 wage statement claim since § 226 only requires the employer to show  
7 *earned wages* corresponding with each pay period. Lab. C § 226(a).

8 Commission advances that are paid, but not earned until future conditions are met (i.e.  
9 expiration of merchandise return period) are not wages when paid, but simply a loan to the employee.  
10 *Steinhebel v. Los Angeles Times Communications, Inc.* (2005) 126 Cal. App.4<sup>th</sup> 696, 707; *Koehl v.*  
11 *Verio, Inc.* (2006) 142 Cal. App. 4<sup>th</sup> 1313, 1337. Macy's does not dispute, and its written policies  
12 clearly confirm, that the line item on the wage statements labeled "Commission" reflect a commission  
13 advance or loan to the employee, not earned wages. On this point, Macy's Understanding Commission  
14 handbook states in relevant part:

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

19 The "Eligible Return Period" is the period of time within 180 days of purchase.

20 (Ex. 2 to Homan Depo., p. 4, ¶¶ 3, 8, attached to Hanson Decl. as Exhibit "C.")

21 The problem here is not that Macy's lists the amount of the Advance Commission Payment or  
22 loan on each wage statement, but that Macy's never lists the amount of commission wages actually  
23 earned for any pay period when the advance becomes earned wages 180 days after the sale. Pursuant to  
24 Labor Code § 226(a), earned wages (gross and net) must be listed on the wage statement corresponding  
25 to the pay period in which the wages were earned. Here, in the pay period 180 days after the sale of the  
26 merchandise, the Macy's wage statement does not list the amount of commission wages earned  
27 corresponding to the sales that occurred 180 days earlier. Nor does Macy's provide its employees with  
28 any other document specifying the amount of commission wages earned in any pay period. Providing  
the employees with this information, as mandated by § 226(a), is particularly important here because

1 the line item on the wage statements labeled “Commission” only tells the employee the amount of the  
2 commission advance or loan for that week, but never tells the employee the amount of commission  
3 wages actually earned. As such, Macy’s violates Labor Code § 226(a).

4 Finally, the fact that federal law may require commission advances to be reported as “gross  
5 income” for tax purposes does not convert the advance into wages under California law. Indeed,  
6 California law is clear: commission advances do not become earned wages until the employer’s  
7 specified conditions are satisfied, which condition here is the expiration of the 180-day return period.  
8 *Steinhebel, supra*, 126 Cal. App. 4<sup>th</sup> at 707; *Koehl, supra*, 142 Cal. App. 4<sup>th</sup> at 1337. Accordingly, at  
9 the 180-day mark, the Macy’s employees’ earned commission wages must be listed on the wage  
10 statements pursuant to the mandate of § 226(a).

11 **B. An Employee Can Recover Civil Penalties for Violation of Labor Code § 226(a)(6)**

12 Although Plaintiff contends that Macy’s violated numerous sections of Labor Code § 226(a)  
13 when it issued wage statements that did not accurately report wages actually earned after the 180 day  
14 return period (including gross wages, net wages, deductions, etc), Macy’s opposition oddly focuses on  
15 Section 226(a)(6), which requires start and end dates on a wage statement, and therein Macy’s  
16 erroneously suggests that “Cal. Lab. Code § 2699.5 [...] was amended, effective October 2, 2015, to  
17 exclude the recovery of civil penalties for violations of § 226(a)(6)” (Macy’s Brief, p. 11/lns. 6-8). This  
18 is patently false and reveals Macy’s clear misunderstanding of PAGA.

19 In short, Labor Code § 2699.5 merely designates Labor Codes violations that cannot be cured  
20 under PAGA’s Section 2699.3(a), whereas Labor Code violations that are not listed under Section  
21 2699.5 may be cured by the employer within 33 days of Plaintiff submitting the claim letter to the state  
22 agency, as set forth in Section 2699.3(c). Thus, the removal of Section 226(a)(6) from Section 2699.5  
23 merely means that employers may now attempt to cure the violation after it receives the LWDA claim  
24 letter. In this case, Macy’s did not attempt to cure the violations. Accordingly, Plaintiff may seek  
25 penalties under PAGA for the 226(a)(6) violation.

26 Accordingly, Macy’s defense here represents a misunderstanding of PAGA, as nothing within  
27 the recent amendment prohibits the right to recovery PAGA penalties for a Section 226(a)(6) violation,  
28 unless the employer timely cured the violation, which Macy’s indeed did not attempt.



1 Finally, the point cannot be lost that Plaintiff alleges multiple violations of Section 226(a) –  
2 including many subsections that are enumerated within Section 2699.5 – and as long as Macy’s wage  
3 statements violate any one of the subsections of 226(a), then Plaintiff is entitled to summary judgment  
4 as a matter of law. As set forth in the motion and this reply, Plaintiff has achieved this standard due to  
5 Macy’s failure to state the amount of wages actually earned after the 180-day return period.

6 **C. Macy’s “Substantial Compliance” Argument Is Without Merit**

7 Although Macy’s argues that it cannot be held liable under Labor Code § 226(a) because the  
8 wage statements “substantially complied” with the law, this evidences another gross misunderstanding  
9 of PAGA and perhaps an attempt to mislead the court.

10 Defendant cites *Downtown Palo Alto Com. For Fair Assessment v. City Council* (1986) 180  
11 Cal.App.3d 384, 394 for the following proposition: “unless the intent of the state can only be served by  
12 demanding strict compliance with its terms, substantial compliance is the governing test.” However,  
13 Defendants reliance on this case is misplaced, as Labor Code § 226(a) **does** demand strict compliance  
14 by its very terms, as it states that employers “shall” (i.e., **must**) comply with its requirements.

15 Case law relied on by Defendant further confirms this to be true. “The wage statement **must**  
16 contain the information specified in [Labor Code § 226(a)].” *Soto v. Motel 6 Operating, L.P.* (2016) 4  
17 Cal.App.5th 385, 390 (emphasis added) (citing *Heritage Residential Care, Inc. v. Division of Labor*  
18 *Standards Enforcement* (2011) 192 Cal.App.4th 75, 80). Indeed, Labor Code § 226(a) is “is highly  
19 detailed, containing nine separate categories that **must** be included on wage statements.” *Soto*, supra at  
20 391 (emphasis added).

21 For this reason, Defendant’s “substantial compliance” argument is without merit. Furthermore,  
22 Defendant cannot logically argue substantial compliance, as it failed to list the amount of commission  
23 wages actually earned for any pay period when the advance becomes earned wages 180 days after the  
24 sale.

25 **D. The PAGA Civil Penalties Are Not Determined At The Summary Judgment**  
26 **Hearing**

27 Plaintiff is not asking the Court to determine the amount of PAGA civil penalties to assess by  
28 way of summary judgment because this is done after summary judgment is granted. *People v. Superior*  
*Court* (2015) 234 Cal. App. 4<sup>th</sup> 1360, 1384. Moreover, contrary to Macy’s claims, the calculation of

1 civil penalties under PAGA is not complicated because it is done pursuant to a precise statutory  
2 formula set forth in Labor Code § 2699(f)(2).

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiff requests that summary adjudication be granted on the PAGA  
5 claims.

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10 Dated: December 16, 2016

**FERNANDEZ & LAUBY LLP**

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By:   
Brian J. Mankin, Esq.  
Attorneys for Plaintiff Amber Garcia on behalf of  
the State of California and Aggrieved Employees

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