



1 SAN BERNARDINO, CALIFORNIA - WEDNESDAY, DECEMBER 21, 2016

2 MORNING SESSION

3 DEPARTMENT S24

HON. DONNA GUNNELL GARZA, JUDGE

4 APPEARANCES:

5  
6 (KIRK HANSON, BRIAN MANKIN and PETER  
7 CARLSON, Attorneys at Law, for AMBER  
8 GARCIA; JOHN CURTIS and DAVID MARTIN,  
9 Attorneys at Law, for MACY'S WEST  
10 STORES, INC.)

11 (Traci A. Troli, C.S.R.,  
12 Official Reporter, CSR 13302.)

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14  
15 (In Open Court:)

16 THE COURT: Number 3 on calendar. Garcia versus  
17 Macy's West Store.

18 MR. HANSON: Good morning, your Honor. Kirk  
19 Hanson for plaintiff.

20 MR. MARTIN: Good morning, your Honor. David  
21 Martin for defendant Macy's.

22 MR. CURTIS: Good morning, your Honor. John  
23 Curtis for defendant Macy's.

24 MR. MANKIN: Good morning, your Honor. Brian  
25 Mankin for plaintiff.

26 MR. CARLSON: Good morning. Peter Carlson for

1 the plaintiff.

2 THE COURT: I looked this morning and I said I  
3 had three cases on calendar, why are there so many counsel,  
4 and then I realized it was on this case.

5 This is on for a summary adjudication in this  
6 matter. I'm going to give you a tentative, and then I'd  
7 like to hear some arguments from you concerning these  
8 issues.

9 I will indicate I've just had an opportunity to  
10 go through it, so I might require even further briefing or  
11 further argument from counsel in this matter.

12 I will indicate for the record that as far as  
13 objections to separate statements, in this matter, I am  
14 going to at this point -- the ones that I received were  
15 improper if they were just to statements and not to  
16 evidence in this matter, so I wouldn't be considering them.

17 With respect to the summary adjudication that I  
18 have before the Court, my tentative was to grant. And the  
19 reason why the tentative was to grant the motion for  
20 summary adjudication is that case law in this matter that  
21 was being discussed, I think it was the *Steinhebel* and  
22 other case law, those dealt with Section 221. This is --  
23 before us is Section 222. This Court couldn't find a lot  
24 of case law on that area.

25 What I did have is concentration that was placed  
26 in the other case law, but not in this case law, of what I

1 was considering going through this. The reason why I was  
2 tentatively granting is because I used the declarations of  
3 Kirk Hanson, David Martin, and then the other name that  
4 starts with a V that there's just no way I can pronounce  
5 it, I believe it's V-e-e-r-a-r-a-g-h-a-v-a-n, in this  
6 matter.

7 But in going with 221, I didn't see any great  
8 argument showing that Macy's wage -- I found that Macy's  
9 wage statements do not accurately show the amount of  
10 commission wages that are actually earned during that pay  
11 period. That's off of Code Section 221, not 226.

12 As I indicated, I didn't see any argument really  
13 on point with respect to that code section. I'll hear from  
14 the parties. That's the Court's tentative.

15 MR. HANSON: Okay. Thank you, your Honor. Kirk  
16 Hanson for plaintiff.

17 I think if -- I'm trying to summarize the Court's  
18 tentative, under Labor Code 221 -- well, I think -- and you  
19 mentioned the *Steinhebel* case, I think that case really  
20 helps the plaintiff in this one because the court in this  
21 case was very clear. In fact in that *Steinhebel* case the  
22 commissions -- the way the commissions were earned were  
23 identical to the way they're earned here.

24 In other words, there were sales made, but the  
25 sales didn't become final and earn commissions until, I  
26 think it was, 28 days later. What they would do is any

1 time there was a cancellation they would subtract that  
2 number from the commission advance on the next pay period.

3 THE COURT: And my tentative is to grant the  
4 motion.

5 MR. HANSON: Right. Okay. I think we're on the  
6 same page. That makes me feel good.

7 THE COURT: Okay. My tentative is to grant. But  
8 what I'm indicating is that issue that I'm looking at --  
9 and I took into consideration 226, but 221 is the area in  
10 which I'm looking under because I didn't find that the wage  
11 statement accurately reflected what was earned during that  
12 time period. And I understand it's difficult based on the  
13 facts presented, there's that 180 days to adjust.

14 MR. HANSON: Right. And that's really what the  
15 case is about. That's our whole 226 claim. You make a  
16 sale this week, you get an advance on that sale, which is  
17 basically a loan commission advance, but that doesn't  
18 become your earned money, your earned income, until  
19 180 days later after the return period has expired.

20 That's the problem. When you go and look at  
21 Ms. Garcia's pay stub, or any other employees pay stub, at  
22 the 180 day mark there's no line item that says for -- now  
23 it's 180 days, this is what you earned. All the pay stub  
24 show is the commission in advanced for that week and it  
25 just rolls forward.

26 We have no problem with them showing a commission

1 advance. We're not saying that's the problem. What we're  
2 saying is that nowhere on any of the pay stubs is there  
3 ever a reconciliation showing the employee how much they  
4 actually earned in commission wages.

5 That's actually what 226 says has to be on there.  
6 It says you have to show 226(a)(1) gross wages earned.  
7 That's the way the statute reads. Then 226(a)(5) says net  
8 wages earned. And we know, and I don't think those facts  
9 are disputed -- Macy's policies are very, very clear that  
10 you don't earn the wages as commissions until 180 days  
11 later. And they never get a reconciliation never telling  
12 them how much they earned.

13 And if you look at all of the sales activities  
14 reports they have, they're very lengthy, they're very  
15 confusing. It would be impossible for an employee to try  
16 to go through 180 days of those records to try and figure  
17 out how much did I actually earn from Week 1 of sales,  
18 because there's no date on the returns.

19 It shows returns, but it doesn't say what pay  
20 period those returns go to or anything like that, so it's  
21 impossible. But I think -- that's all, I think, we have on  
22 the plaintiff's side if you have any questions.

23 THE COURT: Yeah. And that's basically what the  
24 Court was indicating in this matter. Under 221 there's  
25 nothing that shows that there are -- actually shows the  
26 commissions that were actually earned during each pay

1 period, and that's what --

2 MR. HANSON: Correct.

3 THE COURT: -- the Court was focussing on.

4 Yes, sir.

5 MR. MARTIN: Yes, your Honor. If you can bear  
6 with me. First I want to go back to the *Steinhebel* case  
7 because I think that's very significant for a number of  
8 reasons.

9 The Advanced Commission Policy, Macy's Advanced  
10 Commission Policy, as the court in *Steinhebel* says, is a  
11 longstanding practice in the industry. It is a benefit to  
12 employees. And I -- and what's being attacked here is that  
13 whole process, that whole advanced commission payment  
14 process.

15 And as the *Steinhebel* court said, and I want to  
16 quote from it, it said that "such advances work for the  
17 benefit of employees and are to be encouraged." Then it  
18 goes on to say that "should we hold such a beneficial  
19 arrangement in violation of the statute the most likely  
20 result would be the elimination of commissions and any  
21 incentives or opportunity for employees to earn income  
22 exceeding their hourly wage in proportion to their  
23 efforts."

24 In other words -- now, the reason I start with  
25 that, your Honor, is because there is no practice -- given  
26 the longstanding practice of advanced commission pay

1 system, there is going to be a necessity, a disparity,  
2 between when commissions are paid and when they are earned.

3 Now, you said that there's no guidance provided  
4 to you regarding how that's to be treated on a wage  
5 statement, but there is some guidance and it comes from the  
6 Fourth Appellate District. It's the *Soto v. Motel 6* case  
7 that's cited in our brief.

8 They analyzed the statute and they begin their  
9 analysis with 226(a) and it's opening remarks which  
10 specifically say that -- that specifically says -- I  
11 apologize, your Honor.

12 THE COURT: That's fine.

13 MR. MARTIN: "That every employer shall at the  
14 time of each payment of wages furnish an itemized  
15 statement. It is to be accompanied with the payment of  
16 wages."

17 What the *Motel 6* case says is that you must  
18 itemize -- you must -- what is required by the statute is  
19 to itemize the amounts to be paid that are being paid in  
20 conjunction with the wage statement. It is to identify the  
21 components of the current monetary system.

22 And we at Macy's, under that guidance and under  
23 the guidance of the federal law, are required to show  
24 the -- itemize the amounts paid, so we include it in gross  
25 wages earned.

26 What is being proposed here is diametrically



1 opposite and in contradiction with the holding in the *Soto*  
2 case which is after payment is received at some point  
3 180 days later, after payment is received, you are to  
4 somehow increase the gross wages earned on the wage  
5 statement without any corresponding payment, which rather  
6 than promote transparency, rather than give the employees  
7 an opportunity to understand exactly how their commissions  
8 they're paid is being calculated would lead to other  
9 confusion.

10 I think in addition to all of that, if you think  
11 about it -- we have an example in our brief of what it  
12 would look like, what a wage statement would look like if  
13 the plaintiff's argument was accepted. I have an example  
14 if you get \$700 in commission wages, you get \$200 in hourly  
15 pay and you're taxed at 20 percent.

16 When you do all the math the net pay would be  
17 about \$20. The amount of the check would be, I believe,  
18 around \$700. It's in the brief. There is no  
19 correspondence. It makes no sense. And so that's why it's  
20 included the way it is included.

21 If you buy the plaintiff's argument, the question  
22 becomes, how can you possibly comply with their version of  
23 the wage statement statute? How would it be -- how would  
24 it lessen the confusion on the employee's part?

25 One; to increase gross wages without any  
26 corresponding payment, leads to confusion. Two; if you --

1 if you accept their argument that returns should be  
2 recorded in deductions, then what you have is -- how can  
3 you put on a single statement returns that could be 50, 60,  
4 70 returns during a week or less? And the same thing with  
5 the inclusive pay period date. How would you do that?

6 Let's go to, for instance, Ms. Garcia. They're  
7 seeking to -- they're seeking to recover from October 30th,  
8 2014, to the present. Ms. Garcia obviously was employed on  
9 October 30th, 2014. She stopped working in that essence on  
10 March 5th.

11 Okay. If there's 180-day return period, what  
12 wage statement violates the statute if it -- if you must  
13 indicate when it's been earned? She would have left the  
14 company by the time they were earned.

15 What do you do with the fine jewelry associate  
16 who only comes in for three months who was only -- and then  
17 leaves after three months? When do they get to -- when do  
18 they find out what their gross wages earned are? When do  
19 you send them a statement? Three months after they leave,  
20 even though there's no corresponding payment?

21 And the same issues arises with the pay period,  
22 inclusive dates of pay period. So the logical result would  
23 be it cannot be done. You face astronomical penalties.  
24 You cannot have an advanced commission pay program which  
25 are beneficial to employees and the logical result is,  
26 that's over. They get paid on an hourly amount.

1           That adheres to no one's benefit, not --  
2           certainly not to Macy's. There's no profit to be had.  
3           They're not incentivized to do it. And certainly not to  
4           the employees.

5           In other words, if accepted, what is happening is  
6           the entire advanced commission pay structure has to be  
7           abolished. That cannot be what the statute says, and  
8           that's not what the *Motel 6* case says, because the *Motel 6*  
9           case says you only are required to disclose -- itemize the  
10          components of the pay for the money being received for that  
11          paycheck.

12          Under the system proposed and the analysis  
13          proposed by the plaintiffs, that would lead to mischief and  
14          absurd results.

15          I would also propose that both -- we cited to  
16          some length the *Gattuso* case, that's a Supreme Court case  
17          where they found no fault in including in gross wages  
18          earned on a wage statement, increase pay that simply  
19          reflects reimbursement of business expenses. They found no  
20          fault with that.

21          They said so long as there's means to allocate --  
22          that the employee has allocated what is a business expense  
23          and what's earned. And they took a practical, commonsense  
24          approach to the construction of 226(a) and they led to a  
25          conclusion that it is consistent with the conclusion that  
26          we would urge the Court to accept here.

1           The same thing in *Motel 6*, too, because in that  
2 case the wages are earned before they're paid because their  
3 vacation wages are earned before they're paid. They're  
4 only payable when you leave employment. And in that case  
5 they said, no, the *Motel 6* case, since you only require  
6 itemized the components of pay being received in that wage  
7 statement, and sense you're not getting paid for vacation  
8 wages in that statement, then you don't have to disclose  
9 it.

10           That is a commonsense, practical interpretation  
11 that allows -- of 222 that makes sense. And that's what we  
12 urge, that anything else would be utter chaos for the  
13 employees.

14           I would respectfully submit that what would  
15 happen is -- and I don't do this lightly -- what would  
16 happen given an astronomical penalties phase is that the  
17 advanced commission pay system, that's been long recognized  
18 by the court, would have to be abolished. It is  
19 inconsistent with the intent and purpose of 226(a) and  
20 that's what happened.

21           And, by the by, I just want to point out that  
22 Macy's is extraordinarily transparent in how it pays its  
23 individuals. It takes an inordinate amount of time and  
24 effort and an inordinate amount of disclosure to show them  
25 exactly what's happening to their commissions. And Counsel  
26 can show you exactly how they're paid.

1 THE COURT: Thank you.

2 And, Counsel, I will -- what this Court is  
3 looking at is what was given to this Court as far as the  
4 evidence presented, the declarations, and the case law of  
5 all counsel.

6 This Court is not ruling on a policy of any  
7 party. This Court is going to be ruling on this case  
8 specifically and the facts that go along with it, but I do  
9 take into consideration your arguments.

10 Yes, sir.

11 MR. HANSON: Very brief response. Very quickly.

12 On the *Motel 6* case, that's a great case for the  
13 plaintiffs. What that case says is, first of all, it was  
14 only a vacation paid claim. There was no 226 claim in that  
15 case. I mean, related to commissions. So when it says the  
16 vacation pay is paid, it's got to show you on the wage  
17 statement.

18 Well, we're arguing the same thing here as to  
19 commissions will become earned wages and have to show up on  
20 the pay stub. That's it. So those cases are essential to  
21 each other.

22 We're not challenging this advanced commission  
23 policy. We're not saying it's a bad thing. It's fine to  
24 give them an advance to have some money. What we're saying  
25 is we know that in 180 days after every week of sales  
26 there's a number that's actually taken off earned

1 commission wages.

2 They have never told what that number is. Talk  
3 about confusion. They have no way of ever knowing what  
4 they actually earned in commissions. It is impossible  
5 because of the way the sales approach reports are set up.

6 The fix is simple. It's not complicated. They  
7 can do it. All they have to do is put in the statement  
8 180 days after you've made your sales, on the pay stub, it  
9 is -- this line commissions is how much you earned.

10 Now, if you think it's wrong, then you go into  
11 the records, if you're an employee, to try and challenge  
12 it, but you have to know how much you earned for that pay  
13 period. And it's not there. It's not there.

14 MR. MARTIN: I just have two quick observations.

15 Number one is the -- Ms. Garcia specifically  
16 testified, and I asked her questions in her deposition,  
17 could she track her returns and know what was earned, and  
18 she specifically said yes. And that is in -- I think it's  
19 Statement 228. And that was also supported by Mr. Homan.  
20 You can track it. You can do it. Employees do it all the  
21 time. The -- so I -- that is not a fact that's been  
22 established that they cannot do it.

23 I just want to observe one other point, is  
24 they're -- what plaintiffs are essentially asking for is a  
25 declaratory judgment from the Court. Essentially they're  
26 saying under theses circumstances, these wage statements

1 violate the law.

2 There are no facts in the record that indicate --  
3 which you have to prove for summary adjudication every  
4 violation for which you seek to recover a penalty, and  
5 there is nothing in the record which would indicate which  
6 one of Ms. Garcia's wage statements violates the law.

7 As I said, if she started work on October -- if  
8 we're going back from October 30th, 2014, and she left work  
9 on March 5th, what wage statement violates the law, because  
10 at that time the 180-day period hadn't even expired.

11 We even get -- and, of course, when you  
12 extrapolate it out so it reads employees, there are a whole  
13 mountain of issues that they have failed to come forward  
14 with any facts to show which wage statement violates the  
15 law. And that is part of their burden to show, and they  
16 haven't done it.

17 MR. HANSON: Final comment, your Honor --

18 THE COURT: Yes.

19 MR. HANSON: -- really quick.

20 This motion isn't about damages. We don't have  
21 to prove damages in this summary judgment proceeding. We  
22 will, if we come back to this Court, do it, but that's a  
23 separate whole mini trial, and the Court has wide  
24 discretion to determine -- the amount doesn't formulate the  
25 statute, and do the math. It's not that complicated. And  
26 then other evidence may come in and the Court may keep the

1 penalties that are set forth or they may want to reduce  
2 them, but the Court makes that call.

3 And I just want to make sure before we go that  
4 this issue of returns, I think it was Exhibit 3 to the  
5 Homan deposition, which I think is Exhibit C to my  
6 declaration -- I apologize if we have exhibits within  
7 exhibits -- but you have these sales reports called  
8 Associate Sales Return Summary.

9 There is a column for returns and it gives -- all  
10 it does is give the amount. It doesn't say what was  
11 returned, it doesn't say what sales period it goes to. In  
12 other words, what are the items sold.

13 So if you're trying to -- great. You know  
14 there's a return this period, yet you have no idea what  
15 that goes to. You can't go back to Week 1 in sales and  
16 figure out from this information, well, which one of these  
17 returns comes off that number for that week. It's  
18 impossible. You can't do it.

19 Thank you, your Honor.

20 THE COURT: Thank you.

21 I will indicate this Court's issue is basically  
22 the summary adjudication just to determine if there is a  
23 triable issue with respect to 226 in this matter or the  
24 second cause of action.

25 I will note in this matter, as I indicated, that  
26 my tentative was to grant the motion. I'm going to take it



1 under submission because I want to reread the *Motel* case in  
2 this matter and the other cases that were cited. I did  
3 have an opportunity to fully read some of the other cases,  
4 but that one I did not, so I would like to.

5 Yes, sir, would you like to speak?

6 MR. CURTIS: I'm going to wait until you're  
7 finished.

8 THE COURT: Okay. You just wanted to stand up.

9 MR. CURTIS: No. I was going to speak, but I  
10 wanted to wait to hear what you had to say before. It  
11 could follow that.

12 THE COURT: Thank you.

13 So what I am going to do is take it under  
14 submission, and I hope to get it out prior to this week.  
15 Unfortunately it's a very busy week. Everybody wants their  
16 motions in before the holidays. But I do want to give both  
17 sides a fair opportunity.

18 As I indicated in my tentative, the Court relies  
19 not only on the arguments presented in court, but more  
20 importantly the evidence submitted.

21 MR. CURTIS: Your Honor, what I wanted to  
22 address, briefly, we have a trial date in this matter set  
23 for February of next year, I believe it's February 21.

24 As your Honor well knows, from looking at the  
25 papers, there is no appellate court that has specifically  
26 addressed this issue as it relates to Labor Code Section

1 226(a). This will be a case of first impression.

2 What I am asking the Court to consider, One,  
3 whether they would continue the current trial date in  
4 February; and, Two, to certify this issue under 166.1 as an  
5 issue where the appellate court might very well want to  
6 address it for the benefit of the trial court before we  
7 proceed with proceedings that may be based on something the  
8 appellate court doesn't agree with.

9 THE COURT: Yes, sir.

10 MR. HANSON: We would oppose that, your Honor.  
11 We want to move this case forward. That's our job as  
12 plaintiffs counsel. We would oppose that.

13 THE COURT: Well -- and I understand the  
14 arguments made. The Court is not amenable to certifying  
15 the issue. The Court will make a decision based upon what  
16 I have before it at this time. As I've indicated, I have  
17 read the papers. I do want to give a fair opportunity for  
18 all of the arguments being heard.

19 My concern being, in this matter, is getting the  
20 information back out to you prior within the 60 days before  
21 trial, which 60 days before trial was December 15th, which  
22 we have already gone past that date.

23 And so I don't -- because of the Court's delay in  
24 rendering a decision, I don't want to jeopardize both  
25 sides, in this matter, by putting you behind the eight  
26 ball, so to speak, because of the Court's needing further

1 time to address the issue, so I'm -- it's not -- if counsel  
2 wishes a very short continuance, I wouldn't object to that  
3 just because I want to give you the time.

4 Other than that, this is an important issue and  
5 it's extremely important because the Court's tentative this  
6 morning was to grant, so any time the Court is leaning  
7 towards the granting of a motion for summary adjudication  
8 or summary judgment, I like to double check my facts in  
9 this matter and the evidence presented to give a fair  
10 opportunity to the parties.

11 So that's where I am at at this point. If -- I'm  
12 amenable to a short continuance if that's something you  
13 might require based upon the Court's ruling in this matter.  
14 That's something you can meet and confer about and come  
15 back and, you know, talk for a few minutes, and I will work  
16 you all into my schedule.

17 I will say, I'm presently booking cases for  
18 September, but I'm willing to go 60 days out from where we  
19 are right now just because I need time to review this  
20 matter.

21 MR. CURTIS: And, your Honor, I think Statute  
22 166.1 contemplates a written request made by one of the  
23 parties. I prepared that request so that it can, at least,  
24 be submitted to the Court.

25 THE COURT: Did you file it downstairs?

26 MR. CURTIS: Or here.

1 THE COURT: It's usually filed downstairs and  
2 they give it to me so they can reserve a date for it to be  
3 heard.

4 MR. CURTIS: It's just a request. I don't think  
5 you have a formal hearing, you've indicated already.

6 THE COURT: Okay. Then just -- you can file it  
7 here as long as it's been served on the other side.

8 MR. CURTIS: I already served it on the other  
9 side.

10 THE COURT: And with respect to the trial dates,  
11 you're presently set for February 16th for readiness,  
12 February 21st for trial. I know Counsel is making that  
13 request, but tentatively I'm denying, but I'll read the  
14 paperwork that you have.

15 Counsel.

16 MR. HANSON: Nothing more from plaintiffs,  
17 your Honor. Thank you.

18 THE COURT: I'm going to have you all -- because  
19 I'm trying to get this ruling out prior to the holidays, I  
20 will indicate I'm gone the week after, so it might -- I'm  
21 willing -- you know, it puts us all in a difficult  
22 position, but I'd like to get this out, but I still want  
23 the time to actually read the cases and analyze them.

24 MR. HANSON: Okay.

25 THE COURT: So with respect to the trial dates,  
26 where are you all at this point?

1 MR. CURTIS: Well, we're going to want some  
2 additional time.

3 MR. HANSON: We have to think about it,  
4 your Honor. We don't --

5 THE COURT: Why don't you all take a step outside  
6 to meet and confer, because I'm sure you have experts too  
7 you want to take into consideration. I'll call you in  
8 after the calendar after you've had an opportunity to meet  
9 and confer. We'll take it from there.

10 All right, sir.

11 MR. CURTIS: Thank you, your Honor.

12 (Pause in the proceedings.)

13 MR. HANSON: Your Honor, we have concurred, so  
14 sometime in later April, if you have something.

15 THE COURT: I have the date of April 6th, will  
16 that work? That's for readiness. I know that's the  
17 beginning of April --

18 MR. HANSON: That's for readiness? Yes. I think  
19 that will be okay with us.

20 THE COURT: April 10th for trial.

21 And what I will indicate, on that date there's  
22 only two other cases set, so the likelihood is even greater  
23 that you'll get out.

24 MR. HANSON: Okay.

25 MR. CURTIS: And what would be the trial date,  
26 April 10th?

1 THE COURT: April 10th at 10 A.M.

2 MR. HANSON: And the only additional day we  
3 wanted to continue was the discovery cutoff. I can't  
4 remember what it is currently. I don't know if the Court  
5 has it handy.

6 THE COURT: You want to continue it according to  
7 Code?

8 MR. HANSON: Yes.

9 THE COURT: So we will continue the discovery  
10 cutoff according to Code. Is that all discovery or only  
11 expert discovery?

12 MR. HANSON: I think all discovery.

13 THE COURT: All discovery; okay. We'll continue  
14 it according to Code. The new cutoff date -- and you have  
15 filed your documentation, sir?

16 MR. CURTIS: I did.

17 THE COURT: Okay.

18 MR. CURTIS: In light of the Court's  
19 announcement, I did not include an Order. You want an  
20 Order, just a written request to certify it under 166.1?

21 THE COURT: You know, let me look at it. I'll  
22 look it up, see if it fits. My tentative is to deny it,  
23 but I will get it out today. If I require an Order, I'll  
24 have you prepare one.

25 MR. CURTIS: I appreciate it. Thank you.

26 MR. MARTIN: Thank you, your Honor.

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THE COURT: Thank you.

MR. HANSON: Thank you, your Honor.

**(The foregoing proceedings were concluded  
for the day.)**

