**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**CONTRA COSTA COUNTY**

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| ALEXANDER WARNER, on behalf of himself and all others similarly situated,<br><br>Plaintiff<br><br>V.<br><br>FRY'S ELECTRONICS, INC., a California corporation, and DOES 1-10,<br><br>Defendants | MSC14-02052<br><br>RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS |

## I. Background

On November 6, 2014, plaintiff Alexander Warner filed a complaint, asserting causes of action for (1) unpaid minimum wages and (2) liquidated damages. On November 21, 2014, Fry's Electronics, Inc. (Fry's) filed a petition to compel arbitration, which was set for a hearing on January 29, 2015.

On December 23, 2014, plaintiff filed a first amended complaint, alleging (1) unpaid minimum wages (Lab. Code, § 1194); (2) liquidated damages (Lab. Code, § 1194.2); and (3) civil penalties (Lab. Code, § 2699). Given the filing of a first amended complaint, the January 29, 2015 hearing was taken off calendar at Fry's' request. On January 27, 2015, Fry's filed another petition to compel arbitration, which was set for hearing on March 12, 2015.

On March 12, 2015, prior to the hearing, plaintiff dismissed his first and second causes of action without prejudice, leaving only the Private Attorneys General Act of 2004 (PAGA) cause of action. On April 2, 2015, Fry's filed its answer to the first amended complaint.

The PAGA claim challenges the legality of defendant's compensation plan that in essence pays plaintiff the minimum wage as a "draw" against commissions.

## II. The Motion for Judgment on the Pleadings

On May 8, 2015, Fry's moved for judgment on the pleadings. It made three arguments: 1) the commission plan is lawful, 2) plaintiff is not an "aggrieved employee," and 3) the primary rights doctrine bars the PAGA claim. The Court issued a tentative ruling with respect to each of these arguments. At oral argument however, the parties focused their argument on the first point. Therefore, the Court addresses that at length here. Later in this Opinion and Order, it merely repeats the tentative ruling with respect to the latter two points; they were not contested, so they have become final.

### A. Is the commission plan lawful?

#### 1. The Plan

Since this is a motion for judgment on the pleadings, the Court has relatively little factual information before it. To the extent that the Court has "evidence" of the commission plan, it is stated in paragraphs 10-16 of the first amended complaint. That alleges essentially the following set of facts.

From January 2014 until June 2014, defendant, Fry's, employed plaintiff as a salesperson in its Concord store.

Plaintiff (and other Fry's' salespersons) is paid a commission on qualified sales. A salesperson's "minimum commission goal" for a pay period is an amount that equals the number of hours worked times the minimum wage. Thus, the commission is applied first to Fry's' obligation to pay a minimum wage to its employee.

If, during any weekly pay period, the commissions earned by a Fry's' salesperson total less than the minimum wage, Fry's advances its employee the difference in the form of a draw. It records that advance as a "commission draw" and carries on its books a "commission subsidy draw balance."

If, in a subsequent pay period, a salesperson earns a commission in excess of the minimum wage for that pay period, Fry's repays itself and reduces the "commission subsidy draw balance" by the amount by which that period's commission exceeds the minimum wage.

Pursuant to this policy, Fry's advanced plaintiff the difference between his earned commissions and the minimum wages that were due him, which it labeled a "commission draw" on his paystubs, and then repaid itself these amounts out of the commissions due plaintiff in subsequent pay periods, which it labeled a "commission draw payback" on his paystubs. [1]

Plaintiff claims this compensation plan violates California Labor Code section 1182.12 which requires that employers pay their employees the minimum wages due them and Labor Code section 221 which makes it unlawful for any employer to collect or receive from an employee any part of wages paid by an employer to an employee.

**2. The Law**

The parties agree that this is a case of first impression. Although there are lines of cases that are relevant to the analysis, there is no case that is directly on point.

Defendant relies heavily on one line of cases: those that approve "true-ups" and "chargebacks" in commission plans. Plaintiff relies heavily on a different line of cases: those that do not permit "averaging" over more than one pay period to "deem" the minimum wage paid

[1] Since this is a motion for judgment on the pleadings, the Court does not have before it evidence of what happens, for example, if plaintiff leaves defendant's employ with a negative commission subsidy draw balance. See, *Agnew v. Cameron* (1967) 247 Cal. App. 2d 619. There is nothing in the record to indicate whether there is an agreement that requires repayment.

in a given pay period.[2] The parties have been unable to cite (and the Court has not found) a case in which these two lines of authority intersect – other than this one.

**i. The DLSE letter**

In its opening brief, defendant first quotes a March 3, 1987 Opinion Letter of the Division of Labor Standards Enforcement ("DLSE") which says, in part,

> An employee covered by the Orders of the Industrial Welfare Commission must be paid at least the minimum wage for each period of employment. The minimum wage may be used as a draw against commission provided that the commission equals or exceeds the minimum wage for each pay period. The minimum wage which is paid as a draw against commission may be reconciled against earned commissions at regular intervals dependent upon the frequency commissions are earned and the amount involved. (Emphasis added.)

Defendant relies on the underlined language. It argues that the next clause does not undercut the fundamental opinion of the DLSE that the minimum wage may be used as a draw against commissions.

**ii. The "draw" cases**

In both its briefs and especially at oral argument, Fry's relied heavily on "draw against commission" cases that permit an employer to "true up" an employee's compensation for commissions that were not fully "earned" at the time the draw was paid.

To that end, defendant relies on a triad of cases, *Steinhebel v. Los Angeles Times Comms., LLC* (2005) 126 Cal.App.4th 696, *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, and *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal. App. 4th 800.

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[2] Plaintiff also argues that the "true up" cases support his position.

**[a] *Steinhebel***

*Steinhebel* was the first of these cases. It involved "telesales employees" who sold subscriptions to the Los Angeles Times newspaper. They worked, in part, on a commission basis. The commission component was *in addition to* payment of the minimum wage:

> "It was stipulated that each telesales employee received his or her full hourly statutory minimum wage regardless of the net level of sales during a given pay period. Appellants therefore received a lawful compensation for their hours of work. Under the Agreement, telesales employees were further provided with an opportunity to obtain additional compensation for their productivity based on commissionable sales." *Steinhebel, supra,* 126 Cal.App.4th at p. 708.[3]

With regard to the commission component, the terms of employment defined a "commissionable order" to include a sale where the customer "keeps the paper for a minimum of 28 days without giving a specific stop date." *Id.* at p. 701. The agreement also provided,

> "Even though an order is not commissionable until the customer keeps it 28 days, The Times will pay you two weeks in advance for the order. Beginning on the second pay period after your start date, you will receive an advance against your commissions. The amount will be equal to the commissions attributable to the preceding pay period. However, if the subscription is rejected by The Times [an "in-house kill"] or by the customer before 28 days, the amount advanced in respect to the rejected subscription will be deducted from your compensation payable subsequent to the date of such rejection based on your commission rate

[3] The Court made this point twice. "Each telesales employee earned an hourly base pay at the statutory minimum wage. In addition to the hourly minimum wage, telesales employees received a commission payout for each verified sale they made. It was stipulated that each telesales employee received his or her full hourly wage regardless of his or her net level of sales during a given pay period." *Id.* at p. 701.

> for [the] current week and *you hereby authorize* such deductions." *Id.* at pp. 701-702.

The plaintiffs in *Steinhebel* challenged the Times' practice of charging back to employees amounts previously paid for sales that proved, in the end, not to be commissionable (*e.g.*, because the customer canceled within 28 days.) The Second District Court of Appeal (Division Eight) held:

> "[A]n employer may legally advance commissions to its employees prior to the completion of all conditions for payment and, by agreement, charge back any excess advance over commissions earned against any future advance should the conditions not be satisfied." *Id.* at p. 704.

It said that even though commissions are "wages" (*Id.* at p. 705), there were conditions subsequent that could keep a commission from being earned under the terms of the employment agreement. If those subsequent conditions were not met, there would be "in fact no sale." *Id.* Importantly, it reasoned,

> "The essence of an advance is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An *advance*, therefore, by definition is not a *wage* because all conditions for performance have not been satisfied." *Id.*

An advance on a commission did not constitute payment of a wage. *Id.* at p. 706.

Since the condition subsequent was not met, the "wages" were not "earned" and defendant did not violate Labor Code Sections 221 through 223 by deducting previously paid advances that proved not to be earned from current commission advances.

**[b] *Koehl***

*Koehl , supra*, 142 Cal. App. 4th 1313 was similar. It involved the sale of "internet access and web hosting services." The salespersons there earned a substantial "standard wage" or "base pay" of between $40,000 and $70,000 per year. In addition, they earned commissions on sales that produced revenue for their employer. *Id.* at p. 1318.

The commission plans changed from time to time, but the advance and "true up" were consistent features. The plans freely advanced payments to employees when a sale was booked, even though there were significant conditions subsequent to earning the commission. Thus, the employer reserved the right to recover the advance payments if the conditions subsequent were not fulfilled. Salespeople had an important role in working with the customer between booking and the fulfillment of the condition subsequent. Nonetheless, plaintiffs claimed the chargeback of previously paid commissions violated Labor Code Sections 203, 221, 223, 225, 400-410, and Business and Professions Code section 17200 et seq.

After a class action trial, the San Francisco Superior Court (Judge Dondero) found no violation of law. The First District Court of Appeal (Division Two) affirmed. It quoted, at length, from *Steinhebel*, which it found "persuasive." *Koehl*, *supra*, 142 Cal.App.4th at p. 1332.

The Court noted that the employer never invaded the employee's base pay. The "true up" occurred only with regard to the commission component of the employee's earnings. ("…Verio sought recovery of the advanced commission payments only from subsequently earned commissions, never from a sales associate's base pay.") *Id.* at pp. 1325-1326.

In explaining its reasoning, the Court dwelled at some length on the question of whether commission payments are "wages." It framed the issue this way:

> The pertinent statutes are found in division 2 of the Labor Code (§ 200 et seq.) entitled "Employment Regulation and Supervision," which begins with the definitions in section 200: "As used in this article: (a) 'Wages' includes all

> amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] (b) 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment." (Stats. 1937, ch. 90, § 200, pp. 185, 197.) Thus, commission payments can be wages under the express description of section 200 and applicable cases. (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal. Rptr. 2d 46] (*Hudgins*) ["Commissions are wages within the meaning of section 221. (§ 200.)"]; *Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 207–208 [10 Cal. Rptr. 819, 359 P.2d 251] [holding commissions are "wages"].)
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> If the commissions at issue here are wages, then Verio's attempt to recover them could run afoul of section 221, which provides in its entirety that "[it] shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Section 221 is, of course, the basis of Appellants' fundamental contention below, and here, a contention necessarily premised on a determination that the commissions were wages. Judge Dondero concluded they were not. We agree with Judge Dondero. *Koehl*, *supra*, 142 Cal.App.4th at pp. 1329-1330.

The Court closely examined many commission cases, including then-recent cases such as *Steinhebel, supra*, 126 Cal.App.4th 696, *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal. App. 4th 28, and *Hudgins, supra*, 34 Cal. App. 4th 1109 as well as older cases which upheld commission payment plans. It determined "cases have long recognized, and enforced, commission plans agreed to between employer and employee, applying fundamental contract

principles to determine whether a salesperson has, or has not, earned a commission." *Koehl*, *supra*, 142 Cal.App.4th at p. 1331. It also found that it is not uncommon for commissions to be paid in advance, subject to being earned only when certain conditions ripen. *Id.* at p. 1334. It also observed that employers are forbidden from making certain kinds of deductions as part of their commission plans. *Id.* at pp. 1335-1336.

Finally, the Court determined,

> "We conclude, as did the court in *Steinhebel*, that "[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." (*Steinhebel*, *supra*, 126 Cal.App.4th at p. 707.) The commissions here were not so earned, as Appellants expressly admitted. *Koehl*, *supra*, 142 Cal.App.4th at p. 1337.

**[c] *DeLeon***

*DeLeon*, *supra*, 207 Cal.App.4th 800 is not much different. The employees there sold cell phone plans. The sales representatives "received an hourly wage plus monthly commissions as described in the compensation plans." *Id.* at p. 804. As with the cases discussed above, commissions were paid in advance of being fully earned, and if a commission proved not to be earned, the employee was "charged back." However, "[t]he chargeback provision did not affect base pay." The chargeback was deducted only from future commission advances. *Id.* at pp. 804-805.

On summary judgment, the trial court found the chargeback provision did not violate Labor Code section 223 (nor, therefore, derivative claims under Labor Code sections 201, 202, 204, 223, 226, 510 or 1198 failed).

The Second District Court of Appeal (Division Three) affirmed. It held that these "[c]ommission [p]ayments…are [a]dvances, [n]ot [w]ages [u]ntil the [c]onditions [h]ave [b]een [s]atisfied." *Id.* at p. 808. As in *Koehl,* it wrote,

> Sales commissions are wages. (*Steinhebel v. Los Angeles Times Communications, LLC* (2005) 126 Cal.App.4th 696, 704–705 [24 Cal. Rptr. 3d 351] (*Steinhebel*).) But, the right to commissions depends upon the terms of the contract for compensation. (*Koehl v. Verio, Inc*. (2006) 142 Cal.App.4th 1313, 1330 [48 Cal. Rptr. 3d 749] (*Koehl*).) Contractual terms must be met before an employee is entitled to commissions. (*Steinhebel*, *supra*, at p. 705.) *DeLeon*, *supra*, 207 Cal.App.4th at p. 808.
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> …
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> DeLeon's right to commissions was subject to certain conditions as set forth in the compensation plans. Commissions were earned and payable only if the customer did not discontinue the cell phone service plan during the applicable chargeback period. Until then, DeLeon had not made a commissionable sale. (See *Steinhebel*, *supra*, 126 Cal.App.4th at p. 705.) Although the parties dispute whether the retail sales representatives did, or did not, have further responsibilities after the sale, this is immaterial because DeLeon's commissions depended upon the conditions set forth in the compensation plans. (Compare *Steinhebel*, *supra*, at p. 706 with *Koehl*, *supra*, 142 Cal.App.4th at p. 1332.) As specifically described in the compensation plans, DeLeon received advances and his commissions were earned at the expiration of the chargeback period. Section 223 refers to the underpayment of wages. Commission advances are not wages. (§ 200.) *Deleon*, *supra*, 207 Cal.App.4th at p. 809.

The Court found there was no violation of Labor Code Section 223. *Id.* at p. 810.

It is essential to note that in all of these cases (and those they cite) the courts were concerned with payment of commissions in excess of base wages. As far as can be discerned, the chargebacks in these cases did not touch an employee's minimum (base) wage. They only discuss the conditions under which the employee would receive payments in excess of the minimum wage.

So, for example, when the cases talk about commissions not being earned yet, they are talking about a component of compensation that is different from the minimum wage, which is earned and must be paid timely for all hours worked.

**iii. The minimum wage cases**

Looking at the case through a different lens, plaintiff relies on the minimum wage calculation cases.

**[a] The DLSE letter**

Like defendant, plaintiff refers to the same March 3, 1987 Opinion Letter of the Division of Labor Standards Enforcement quoted above. However, plaintiff underscores a different part of that quotation:

> An employee covered by the Orders of the Industrial Welfare Commission must be paid at least the minimum wage for each period of employment. The minimum wage may be used as a draw against commission <u>provided that the commission equals or exceeds the minimum wage for each pay period</u>. The minimum wage which is paid as a draw against commission may be reconciled against earned commissions at regular intervals dependent upon the frequency commissions are earned and the amount involved. (Emphasis added.)

He argues that once the minimum wage is paid, it cannot be reduced by a commission plan that, in effect, *lends* the employee the minimum wage, subject to recapture in a subsequent pay period. He reads the DLSE letter as saying that if the commission earned in a given pay

period does not equal or exceed the minimum wage, then it cannot be used as a draw against commission.

**[b] *Peabody* and *Harris***

To fortify his argument, plaintiff relies on a line of cases different from those relied on by defendant. He leans heavily on *Peabody v. Time Warner Cable, Inc*. (2014) 59 Cal.4th 662. There, our Supreme Court answered a question posed by the United States Court of Appeals for the Ninth Circuit by holding that an employer may not attribute commission wages paid in one pay period to other pay periods to satisfy California's compensation requirements. *Id.* at p. 665.

The case involved a Time Warner account executive who was paid hourly wages plus commission. She allegedly worked 45 or more hours a week, but received no overtime pay. In addition, in some weeks, her hourly compensation was less than the minimum wage.[4] After removing the case to federal court, Time Warner sought summary judgment, arguing "commissions should be reassigned from the biweekly pay periods in which they were paid to earlier pay periods." *Id.* at p. 666. By doing that, defendant argued, it would meet the requirements of the Labor Code.

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[4] As the Ninth Circuit explained, "Peabody argues that, for all of California's compensation requirements, the minimum wage threshold must be earned within each workweek and paid within the corresponding pay period for which the exemption is claimed. Under this calculation, Peabody received only $769.23 in the majority of her biweekly pay periods, because Peabody received her large monthly commission in only about half of the pay periods. Dividing the $769.23 amount by 45 hours for two weeks, Peabody's pay would reflect only $8.55 per hour for that pay period, which is insufficient to qualify for the commissions paid exemption. Peabody therefore argues that, while she qualified for the commissions paid exemption in the pay periods when she was paid her commission, TWC is unable to claim the exemption for the workweeks in which Section 3(D)'s minimum wage requirement was not met.

On the other hand, TWC argues that Peabody's earnings should be calculated based on the broadcast month (which ended every four or five weeks), so that Peabody's commissions count towards the pay period for which they were earned rather than the actual pay period in which the commissions were paid. Peabody received a large commission at the end of every broadcast month. Under, TWC's proposed calculation method, a pay period of four weeks multiplied by 45 hours per week and divided by $12.00 per hour would result in a requirement that Peabody earn over $2,160 to qualify for the commissions paid exemption…. *Peabody v. Time Warner Cable, Inc*. (9th Cir. 2012) 689 F.3d 1134, 1136-1137.

In footnote 2, the Ninth Circuit observed, "if TWC is unable to average commission payments, Peabody may also be able to assert minimum wage violations for hours Peabody worked beyond the normal 40-hour workweek." *Id.* at p. 1136, n.2.

Our Supreme Court rejected Time Warner's argument. It said that (i) Labor Code section 204 requires that all wages (including commissions that are fully earned) be paid semi-monthly and (ii) "[w]hether the minimum earnings prong is satisfied depends on the amount of wages *actually paid* in a pay period. An employer may not attribute wages paid in one pay period to a prior pay period to cure a shortfall." *Id.* at pp. 668- 669.

The Court unanimously concluded, "we hold that an employer satisfies the minimum earnings prong of the commissioned employee exemption only in those pay periods in which it *actually pays* the required minimum earnings. An employer may not satisfy the prong by reassigning wages from a different pay period." *Id.* at p. 670.

Plaintiff also cites *Harris, supra*, 138 Cal. App. 4th 28. There, the Second District Court of Appeal (Division Four) reversed a grant of summary adjudication for the defendant on the unlawful commission deduction claim. The facts of the case involve a convoluted compensation plan that permitted augmenting employees' wages by earning "points" by selling subscriptions to defendant's financial newspaper. Although the facts are unlike those in this case, plaintiff cites it for the proposition that,

> Labor Code section 221 prevents an employer from taking back any wages from an employee after they are earned. The statute provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Wages are defined broadly to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Lab. Code, § 200.) The statute illustrates California's strong public policy favoring the protection of employees' wages. (*Ralphs Grocery Co. v. Superior Court* (2003) 112

Cal.App.4th 1090, 1096–1097 [5 Cal. Rptr. 3d 687].) *Harris*, *supra*, 138 Cal.App.4th at pp. 40-41.

**[c] The pay averaging cases**

In addition, plaintiff cites his own triad of cases, *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 4th 314, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal. App 4th 36, and *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. Dec. 20, 2012) 913 F. Supp. 2d 1001.

**[i] *Armenta***

In *Armenta*, Osmose, Inc.'s employees were paid more than the minimum wage under a collective bargaining agreement. However, Osmose did not pay them for all hours worked, only those it regarded as "productive" hours. So, it did not pay for time spent (i) in necessary travel, (ii) loading equipment and supplies into vehicles, (iii) doing paperwork, and (iv) maintaining company vehicles. *Armenta*, *supra*, 135 Cal.App.4th at p. 317.

Plaintiffs sued, seeking compensation at the minimum wage rate for the time spent in these "non-productive" hours. Defendant argued that plaintiffs had already received the minimum wage for those hours, because if one averages an employee's total pay over all the hours worked ("productive" and "non-productive") the hourly rate exceeded the minimum wage—even though it was less than the hourly rate negotiated in the collective bargaining agreement.

Although federal law permits such averaging, the Second District Court of Appeal (Division Six) held it was not permissible under California law. *Id.* at p. 324. The Court first looked to Wage Order No. 4,

> The minimum wage applicable to respondents is set forth in California Wage Order No. 4, section 4(A), which currently provides: "Every employer shall pay to each employee wages not less than … [$6.75] per hour *for all hours worked*." (Italics added.) Wage Order No. 4, section 4(B) provides: "Every employer shall

pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (Italics added.) This language expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked. The averaging method utilized by the federal courts for assessing a violation of the federal minimum wage law does not apply here. (Emphasis added.) *Id.* at p. 323.

The Court then cited Labor Code Sections 221, 222 and 223 for the principle "that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." *Id.*

Finally, it concluded that the "strong public policy in favor of full payment of wages for all hours worked" embodied in California's labor laws distinguishes California's legal regime from the federal plan. *Id.* at p. 324. It held that wage averaging, such as is permitted under federal law, is not permitted under California law. *Id.*

**[ii] Gonzalez**

*Gonzalez*, *supra*, 215 Cal.App.4th 36 involved auto repairmen who were paid on a "piece-rate" basis. That is, they were paid for "flag hours" when they were assigned to work on a car.[5] While waiting for work, plaintiffs were expected to perform various non-repair tasks. However, their employer did not pay them for the time spent during their work shift waiting for a piece of work. As in *Armenta,* defendant claimed that it was unnecessary to do so, since when averaged plaintiffs' pay exceeded the minimum wage.

In fact, defendant made sure that the employees received at least the minimum wage. At the end of each 80 hour pay period, it multiplied the number of hours an employee worked times the minimum wage to be sure the "flag rate" payments for that pay period exceeded the

[5] It appears that a "flag hour" is an amount of time defendant estimates should be required for a particular type of repair. It may or may not coincide with how long a job actually takes. *Id.* at p. 41.

"minimum wage floor." If it did not, defendant paid an additional amount to make up the shortfall.

The Second District Court of Appeal (Division Two) affirmed an award of unpaid wages to plaintiffs. Initially it observed,

> "State wage and hour laws 'reflect the strong public policy favoring protection of workers' general welfare and "society's interest in a stable job market." [Citations.]' [Citations.]" (*Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1297 [140 Cal. Rptr. 3d 867] (*Cash*).) They are therefore liberally construed in favor of protecting workers. As our Supreme Court has stated, "'[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' [Citations.]" (*Brinker, supra,* 53 Cal.4th at pp. 1026–1027; see *Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1103 [56 Cal. Rptr. 3d 880, 155 P.3d 284] [given the Legislature's remedial purpose, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees"].)" *Gonzalez*, *supra,* 215 Cal.App.4th at p. 44.

The Court reviewed the reasoning of *Armenta* and noted that defendant sought to distinguish that case by saying that "piece-rate" work (in *Gonzalez)* is different from the hourly rate (in *Armenta*). It rejected that distinction, saying,

> By its terms, Wage Order No. 4 does not allow any variance in its application based on the manner of compensation. Subdivision 1 of the wage order states that subject to exceptions that are not applicable here: "This order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations *whether paid on a time, piece rate, commission, or other basis* …."

(Cal. Code Regs., tit. 8, § 11040, subd. 1, italics added.) Subdivision 4(B) similarly requires uniform application of the minimum wage requirements regardless of how an employee is paid: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, *whether the remuneration is measured by time, piece, commission, or otherwise*." (Cal. Code Regs., tit. 8, § 11040, subd. 4(B), italics added.) *Gonzalez*, *supra*, 215 Cal.App.4th at p. 49.

The Court of Appeal also found that the absence of a collective bargaining agreement, setting a wage higher than the minimum wage did not meaningfully distinguish *Gonzalez* from *Armenta*. *Id.* at p. 50. It affirmed the trial court.[6] *Id.* at p. 55.

**[iii] Balasanyan**

*Armenta* involved an hourly wage. *Gonzalez* involved a "piece rate." *Balasanyan*, *supra*, 913 F.Supp.2d 1001 applied *Armenta* to a commission compensation scheme.

Nordstrom paid certain employees on a commission basis. There were two classes involved in the case. As to one (the Balasanyan class), Nordstrom provided a guaranteed minimum commission based on "selling time." The phrase "selling time" included "30 minutes of daily stocking assignments as well as up to 40 minutes of pre-opening and post-closing time." *Id.* at p. 1002. Nordstrom separately paid an hourly rate for "non-sale time" which was time spent on stocking, and pre-opening and post-closing in excess of the time included in "selling time." *Id.* at p. 1003. Plaintiffs complained that they should have received an hourly rate (not

[6] Responding to what must have been a "parade of horribles" argument in the employer's argument, the Court of Appeal noted the limited holding of its decision. "The instant case concerns only automotive service technicians compensated on a piece-rate basis. We do not address or consider employees who are compensated under commission payment plans or any other incentive-based compensation systems." *Id.* at p. 54.

commissions) for the 30 minutes of stocking and the 40 minutes of pre-opening and post-closing time.[7] *Id.*

The District Court denied Nordstrom's motions for summary judgment – which contended its plan did not violate the California minimum wage law (Labor Code §§ 1194 and 1197). Among the reasons argued by Nordstrom was that "its commission plan, which guaranteed that Plaintiffs received an effective minimum hourly draw rate that exceeded minimum wage for all selling time, therefore complied with federal and state minimum wage laws." *Id.* at p. 1004.

The District Court first observed that California law has long recognized and approved "draw against commission" plans. But then it squarely applied *Armenta* to Nordstrom's commission plan. It found that,

> …the crux of *Armenta* is that compensation must be directly tied to the activity being done, whether it is selling on commission or preparing to sell on commission. *Armenta* instead suggests that Nordstrom's averaging method for commissioned employees is prohibited and that the Plaintiffs' claims, if true, are valid. *Armenta*, 135 Cal. App. 4th at 323.
>
> *Balasanyan*, *supra*, 913 F. Supp. 2d at p. 1006.

It quoted Section 47.7 of the Department of Labor Standards and Enforcement Policies & Interpretations Manual,

> DLSE has opined that employees must be paid at least the minimum wage for all hours they are employed. Consequently, if, as a result of the directions of the employer, the compensation received by piece rate or commissioned workers is reduced because they are precluded, by such directions of the employer, from earning either commissions or piece rate compensation during a period of time,

[7] The allegation as to the Maraventano class was slightly different. *Id.*

> the employee must be paid at least the minimum wage (or contract hourly rate if one exists) for the period of time the employee's opportunity to earn commissions or piece rate.
>
> *Id.*

It held,

> The Armenta line of cases is quite clear: employees must be directly compensated at least minimum wage for all time spent on activities that do not allow them to directly earn wages. Although the Armenta line of cases did not involve Draw Against Commission plans, Nordstrom's employees are not being compensated directly for stocking, pre-opening, or post-closing time, during which they usually cannot earn a commission. *Id.* at p. 1007.

In short, *Balasanyan* extended *Armenta* to a commission compensation plan.

**iv. Our case**

The first thing to note is that none of the cases cited by the parties is dispositive. Defendant's cases focus on commission plans that do not implicate the minimum wage. In each, the employees were paid a base wage that equaled or exceeded the minimum wage. In each, whatever adjustments were made to the commissions (for chargebacks or true-ups) affected only the commission increment of the compensation scheme; not the base wage. In our case, Fry's' compensation scheme implicates the minimum wage.

Likewise, plaintiff's cases - which focus on how one determines if a minimum wage has been paid—involve fact patterns different from ours. His cases appear to deal with situations in which an employee was not contemporaneously given a minimum wage, but the employer sought to "look back" across pay periods or "average" pay within a pay period to justify the wage payment.

Here, plaintiff *received* the minimum wage contemporaneously. Defendant never sought to advance or pay less than the minimum wage. But if plaintiff's commission sales were not enough to *earn* the minimum wage defendant *advanced* the minimum wage as a draw. In later pay periods, that draw was subject to repayment out of plaintiff's then-earnings.

The second thing to note is that defendant has moved for judgment on the pleadings. Thus, the record before the Court is scant. That was not true of any of the cases cited above on which the parties rely: *Steinhebel* (summary judgment), *Koehl* (trial), *DeLeon* (summary judgment), *Peabody* (certified question involving summary judgment), *Harris* (summary adjudication), *Armenta* (trial), *Gonzalez* (trial), and *Balasanyan* (summary judgment).

On this record, and without the benefit of controlling authority, the Court must draw on the relevant statutes, cases and administrative materials. It is, of course, aided by the general rule that

> "'[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees.' [citations omitted] To that end, we narrowly construe exemptions against the employer, 'and their application is limited to those employees plainly and unmistakably within their terms.' [citations omitted.]" *Peabody*, *supra*, 59 Cal.4th at p. 667.

Clearly California law permits commission plans. Equally clearly, the terms of a commission plan are determined as a matter of contract law. However, there are limits on an employer's ability to chargeback or true-up advances or draws paid under commission plans. See, *e.g., Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal. 2d 319; *Quillian v. Lion Oil Company* (1979) 96 Cal. App. 3d 156; *Hudgins*, *supra*, 34 Cal. App. 4th 1109; *Sciborski v. Pacific Bell Directory* (2012) 205 Cal. App. 4th 1152, 1166-1168.

The parties do not dispute that defendant has an obligation to comply with Labor Code section 1197 that the minimum wage be paid to plaintiff; nor do they dispute that plaintiff may bring suit for a violation of that obligation. Lab. Code, § 1194.

Likewise, they agree that a Wage Order governs this case:

> "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." Cal. Code Regs., tit. 8, § 11070, subd. 4(B).[8]

Finally, there is no dispute that the statutory definition of "wages" provides that,

> "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.
>
> Lab. Code, § 200, subd. (a).

Defendant argues that it "paid" the minimum wage at all times. In the sense of transferring money to plaintiff, that is correct.

But plaintiff says that under the terms of defendant's commission plan that "payment" was more like a loan. If a salesperson did not earn enough commissions in a two-week pay period, defendant "advanced" the minimum wage as a "draw" against future commissions.

That frames the dispute here.

The cases are clear. Under California law, an employee is entitled to be paid the minimum wage for each and every hour worked. And she must be paid that minimum wage in the pay period in which those hours were worked.

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[8] This is Wage Order 7. At times, the parties cited Wage Order 4. At oral argument there seemed to be agreement that the relevant terms of the two Wage Orders were identical.

As discussed above, when applying Labor Code section 200 to the commission cases, courts have discussed whether a commission or an advance against a commission is a wage. *Steinhebel* said,

> "The essence of an advance is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An *advance*, therefore, by definition is not a *wage* because all conditions for performance have not been satisfied."
>
> *Steinhebel*, *supra*, 126 Cal.App.4th at p. 705.

Similarly, in *Koehl* the First District Court of Appeal said,

> The pertinent statutes are found in division 2 of the Labor Code (§ 200 et seq.) entitled "Employment Regulation and Supervision," which begins with the definitions in section 200: "As used in this article: (a) 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] (b) 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment." (Stats. 1937, ch. 90, § 200, pp. 185, 197.) Thus, commission payments can be wages under the express description of section 200 and applicable cases. (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal. Rptr. 2d 46] (*Hudgins*) ["Commissions are wages within the meaning of section 221. (§ 200.)"]; *Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 207–208 [10 Cal. Rptr. 819, 359 P.2d 251] [holding commissions are "wages"].)

> If the commissions at issue here are wages, then Verio's attempt to recover them could run afoul of section 221, which provides in its entirety that "[it] shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Section 221 is, of course, the basis of Appellants' fundamental contention below, and here, a contention necessarily premised on a determination that the commissions were wages. Judge Dondero concluded they were not. We agree with Judge Dondero. *Koehl*, *supra*, 142 Cal.App.4th at pp. 1329-1330.

So too, in *DeLeon*: "Commission advances are not wages. (§ 200.)" *DeLeon*, *supra*, 207 Cal.App.4th at p. 809.

Since this question arises on a motion for judgment on the pleadings, there is nothing in the record to indicate what conditions subsequent might affect whether a commission paid in one period is fully earned. But it appears that under either of two different scenarios defendant has failed to establish that on these pleadings it is entitled to a judgment that it has complied with Labor Code sections 1194 and 1197.

The first is a circumstance in which a commission seemingly earned in one pay period is "trued up" in a subsequent period. If that is done, then under *Steinhebel*, *Koehl* and *DeLeon* such an advance cannot be considered a wage. Defendant does not meet its obligation to pay the minimum wage by paying a commission advance. An advance is not a wage. It is only once all the conditions (precedent and subsequent) to the complete earning of a commission have occurred, that a commission is considered a wage.

> "[O]nce the express contractual conditions are satisfied, the commission is considered a wage and an employer cannot recoup the commission once it has been paid to the employee. (See *Koehl*, *supra*, 142 Cal.App.4th at pp. 1329–1337; *Steinhebel*, *supra*, 126 Cal.App.4th at pp. 704–705.)

*Sciborski*, *supra,* 205 Cal.App.4th at p. 1167.

On the other hand, the minimum wage is fully earned when the employee gives his labor. It is a wage and cannot be recouped. Thus, if defendant is giving plaintiff a commission advance, it is not paying a wage; nor, perforce, the minimum wage.

The second scenario is slightly different and depends on the meaning of the word "pay." Defendant asserts that since it advances the money to plaintiff it has paid him. But that is not the usual meaning of the word "pay." When a laborer receives pay, one does not commonly expect that the employer may take it back.

Plaintiff is entitled to be paid the minimum wage for each hour worked. That seems to mean that he is entitled to have that minimum amount of money without any strings attached. To say that he is being "advanced" the minimum wage – subject to reducing future earnings by the amount of the advance—implies that he did not have an unconditional right to that minimum wage; he had yet to earn it by future performance in a different pay period.

That seems to run afoul the general notions against pay shifting limned in *Peabody.* "An employer may not attribute wages paid in one pay period to a prior pay period to cure a shortfall." *Peabody*, *supra*, 59 Cal.4th at p. 669.

It also seems to run afoul of the well-known general rule that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." *y Id.* at p. 667.[9]

In addition, denying defendant's motion gives fuller meaning to the March 3, 1987 DLSE Opinion Letter cited by both parties: "The minimum wage may be used as a draw against

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[9] See also, "'[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' (*Industrial Welfare Com. v. Superior Court, supra*, 27 Cal.3d at p. 702; see also *Murphy*, at p. 1103 [given the Legislature's remedial purpose, 'statutes governing conditions of employment are to be construed broadly in favor of protecting employees'].)" *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1026-1027.

commission provided that the commission equals or exceeds the minimum wage for each pay period." Essentially, the minimum wage may be used as a draw only if the commission earned is equal to or greater than the minimum wage. If the commission earned in a given pay period is *less* than the minimum wage, then the minimum wage must absolutely be paid and cannot be used as a draw.

Because there are so few facts in evidence, the Court cannot fully evaluate this commission plan. But it is notable that in the cases cited by defendant, the commission plans seemed to be lucrative enough that the question of whether the employee was earning the minimum wage did not arise. Here, the first amended complaint and the context of the arguments suggest that this plan may leave the employees earning much closer to the minimum wage – whether by "advance" or commission. It is simply unknowable at this point.[10]

There is one more point to be addressed: Plaintiff says that defendant violates Labor Code section 221 by taking back the "advance" in a future pay period. Defendant argues that section 221 applies only to "secret" arrangements to reduce compensation.

It is true that section 221 covers secret arrangements. And indeed, it may have originated in a legislative reaction to secret efforts to reduce a worker's pay. But that is not to say it is *limited* to secret arrangements.

Indeed, defendant's argument is belied by the passage in *Koehl* that addressed section 221,

> "If the commissions at issue here are wages, then Verio's attempt to recover them could run afoul of section 221…." *Koehl, supra*, 142 Cal.App.4th at p. 1330.

The commission plan in *Koehl* was not secret. Yet the First District Court of Appeal said that had the commissions (that may or may not have been fully earned) been wages then the

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[10] In some cases that may call into question whether this is a bona fide commission plan. DLSE Enforcement Policies and Interpretations Manual (June 2002) § 50.6.1.4 as quoted in *Muldrow v. Surrex Solutions Corp.* (2012) 208 Cal. App. 4th 1381, 1397.

employer's effort to recover them could be a violation of section 221. Since the minimum wage here is, indeed a wage, any effort to recapture them – directly or indirectly through an offset against future earnings – could violate section 221.

There are other cases that apply section 221 in "non-secret" settings. See *Hudgins*, *supra*, 34 Cal.App.4th at pp. 1117-1124 [retailer commission policy unlawful because it deducted wages for unidentified returns, which potentially penalized an employee for the misconduct of other employees or customers]; see also *Sciborski*, *supra*, 205 Cal.App.4th at pp. 1166-1174 [employer recouping sales commission through wage deductions violated section 221]. Thus, the Court rejects defendant's argument that Section 221's reach is limited to clandestine arrangements.

**B. Is Plaintiff An Aggrieved Employee?**

Fry's argues that plaintiff's PAGA cause of action fails because he lacks standing to prove he was "aggrieved" under the PAGA. "'Aggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Lab. Code, § 2699, subd. (c).

Fry's argues that plaintiff is prevented from proving that he was an aggrieved employee under PAGA because he previously dismissed the statutory claims upon which his claim for PAGA penalties is predicated. In support of this argument, Fry's relies on *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, *Elliot v. Spherion Pacific Work, LLC* (C.D. Cal. Aug. 13, 2008) 572 F.Supp.2d 1169 and *Wentz v. Taco Bell Corp*. (E.D. Cal. Dec. 4, 2012) 2012 U.S. Dist. Lexis 172049.

The Court rejects Fry's' argument. To prevail on a claim for PAGA civil penalties, a plaintiff must prove a violation of some underlying provision of the Labor Code. However, plaintiff is not required to simultaneously pursue the underlying Labor Code violation as a separate cause of action. Stand-alone PAGA actions are not uncommon. See *Home Depot*

*U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210; see also *Williams v. Superior Court* (2015) 237 Cal.App.4th 642. In *Williams*, a plaintiff brought a stand-alone PAGA action and the trial court granted the employer's motion to compel arbitration of the underlying Labor Code violation. *Williams, supra*, 237 Cal.App.4th at pp. 644-645. The appellate court reversed, holding that the PAGA claim could not be split and under *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348 could not be compelled to arbitration, leaving the PAGA claim to be heard in the superior court. *Williams, supra*, 237 Cal.App.4th at pp. 647-650..

In *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, the court held that although an employee has no private right of action to enforce Labor Code section 226.8, an employee who claims that section 226.8 has been violated may pursue a claim for PAGA civil penalties for that violation. *Id*. at p. 341, fn. 15. If a PAGA plaintiff need not have a private right of action to challenge the underlying Labor Code violation, there can be no requirement that a plaintiff must allege an underlying Labor Code violation as a separate cause of action in order to pursue a PAGA claim.

*Price* and *Elliot* are distinguishable. In *Price* and *Elliot*, the courts held that the PAGA claims failed because the underlying Labor Code violations failed. *Price, supra*, 192 Cal.App.4th at p. 1147; *Elliot, supra*, 572 F.Supp.2d at pp. 1181-1182. In the absence of actual Labor Code violations, there was nothing to which a claim for PAGA penalties could attach. Here, there has been no adjudication of the merits of the underlying Labor Code provisions plaintiff contends have been violated.

Fry's' reliance on *Wentz* appears to be misplaced. In *Wentz*, plaintiff asserted causes of action under PAGA and under the underlying Labor Code sections. *Wentz, supra*, 2012 U.S. Dist. Lexis 172049, at *1-3. After the case was removed to the federal court, the district court severed the PAGA claim and remanded other Labor Code claims to the superior court. *Id.* Taco Bell Corp. brought a motion to dismiss the PAGA claim. *Id.* at *3. The district court agreed

with Taco Bell's argument that a bare PAGA claim fails in the absence of underlying wage and hour and California Labor Code claims. *Id.* at *12. The district court dismissed the action without prejudice and remanded the PAGA claim to the superior court to rejoin plaintiff's other claims. Id. at *18. As a federal trial court decision, *Wentz* is not binding on this Court on the question of state law. *Stone Street Capital, LLC v. Cal. State Lottery Comm'n* (2008) 165 Cal.App.4th 109, 123, fn. 11. Also, the *Wentz* court's outcome on the facts presented (that where Labor Code claims are being pursued in the superior court, the related PAGA claim should proceed there as well) does not compel the conclusion that a plaintiff can never pursue a stand-alone PAGA claim where a plaintiff is not splitting his claims between different forums. See *Madison v. U.S. Bancorp*. (N.D. Cal. Jan. 27, 2015) 2015 U.S. Dist. Lexis 9361, *17, fn. 8.

**C. Does the primary rights doctrine bar the PAGA claim?**

Finally, Fry's argues that the primary rights doctrine precludes plaintiff's PAGA cause of action.

The primary rights theory is invoked most often when a plaintiff attempts to divide a primary right and enforce it in two suits. *Crowley v. Katleman* (1994) 8 Cal.4th 666, 682. "The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [Citations omitted]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata. [Citation omitted]." *Id.*

Here, neither of these circumstances is present. Plaintiff has dismissed his Labor Code claims without prejudice. He is pursuing no other lawsuit where he asserts those claims, so the first primary right application discussed in *Crowley* does not bar the PAGA claim. Plaintiff has not lost another suit on the merits asserting those violations, so the second primary right application described in *Crowley* does not bar the PAGA claim.

*Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562 is distinguishable. *Villacres* concerned the effect of a prior class action settlement of Labor Code wage and hour claims on a subsequent lawsuit for PAGA penalties. *Id.* at p. 569. In *Villacres*, defendants asked the court to adopt a categorical rule that employees must assert all known Labor Code violations and PAGA penalties in a single suit, at least where the violations are related to wages. *Id*. at p. 580. However, the court did not decide the broad issue of whether the primary rights theory treats all wage-related Labor Code violations and PAGA penalties as a single cause of action. *Id*. at p. 581. Instead, the court focused on the specific circumstances of that case and found that the release in the prior class action settlement was broad enough to bar the PAGA claims as a matter of res judicata. *Id*. at pp. 581, 589-591. Unlike *Villacres*, the instant action is not a second suit brought after a settlement or loss on the predicate Labor Code claims.

*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788 is inapposite. In *Boeken*, the court held that res judicata barred a plaintiff who dismissed her loss of consortium action with prejudice from pursuing a later wrongful death action arising from the same primary right—the right to her husband's continued companionship. *Id*. at pp. 791-792. *Boeken* is not applicable because there has been no adjudication of plaintiff's dismissed claims for violations of Labor Code sections 221 and 1194 and because plaintiff dismissed those claims without prejudice.

*Rupert v. Jones* (9th Cir. 2012) 474 Fed. Appx. 660 is irrelevant. It is an unpublished memorandum decision that does not explain the claims at issue.

Moreover, the Labor Code causes of action and the PAGA claim do not involve the same primary right. Fry's argues that the primary right at issue is the right to be paid all wages due and owing and that the PAGA penalties are only another remedy additional to those provided for the underlying Labor Code violations. However, a PAGA claim is not a dispute between an employer and an employee arising out of their contractual relationship, but rather is a dispute between an employer and the state that the employer has violated the Labor Code. *Iskanian*,

*supra*, 59 Cal.4th at pp. 386-387. Plaintiff's PAGA claim involves the government's right to enforce the labor laws on behalf of all employees, but plaintiff's dismissed causes of action for violations of Labor Code sections 221 and 1194 involve plaintiff's individual right to back pay.

**III. Conclusion**

For these reasons, the motion for judgment on the pleadings is denied. The Court asks the parties to be prepared to discuss at the August 28, 2015 case management conference (1) when to set the motion to compel interrogatories that was previously taken off calendar, (2) what discovery is needed to get the case ready for trial, and (3) when the case will be ready for trial. The Court will discuss with the parties any other matters they appropriately wish to raise at that case management conference.

Date: August 10, 2015

Hon. Barry Goode
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