

April 3, 2017

**VIA FEDERAL EXPRESS**

Tani G. Cantil-Sakauye, Chief Justice  
and Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: Amicus Curiae Letter from National Retail Federation in Support of Petition for Review  
*Macy's West Stores, Inc. DBA Macy's and Macy's Inc. v. Superior Court of California  
for the County of San Bernadino (Amber Garcia, Real Party in Interest), after decision by  
the Court of Appeal, Fourth Appellate District, Division Two, Case No. E067711*

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the National Retail Federation respectfully submits this amicus curiae letter in support of the Petition for Review filed by Petitioner Macy's West Stores, Inc. d/b/a Macy's and Macy's Inc. on March 13, 2017 regarding the decision by the Court of Appeal, Fourth Appellate District, Division Two, Case No. E067711.

1. Interest of Amicus Curiae

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

The NRF has an interest in this action because the Superior Court's grant of summary adjudication on January 5, 2017 and the Court of Appeal's Order Denying Petition for Writ of

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Mandate in E067711 concern an issue of great significance to its members and to the retail industry as a whole. That issue is whether it is actually possible for employers to comply with California wage statement law when compensating their employees on a commission-based system. Many of NRF's members do include commissions as part of their compensation programs and the Superior Court's order brings the entire system in question.

2. The Writ Should Have Been Granted

The issue before the trial court was whether the retail employer violated the law by reporting advance commission pay on wage statements when it was paid without confirming in a second wage statement that these amounts were earned 180 days later. The trial court granted summary adjudication in favor of the plaintiff even though there was no change between the amount of advanced commissions reported on the wage statements and the amount of commissions actually "earned" when the 180 day return policy expired. Writ review is necessary because the ruling threatens to upend the ability of any employer to compensate employees in part via the laudable practice of advance commission payments.

Like many employers throughout California, the Petitioners engaged in the practice of making advanced commission payments to their employees, agreeing not to seek the return of any such payments if a sale failed to become final, and instead charging back any such future return against future advance commission payments. Such a system benefits the employee and has been repeatedly approved by the California courts. *Steinhebel v. Los Angeles Times Communications* (2005) 126 Cal.App.4<sup>th</sup> 696; *Prachasaisoradej v. Ralphs Grocery Co.* (2007) 42 Cal.4<sup>th</sup> 217.

The trial court's order threatens to derail advanced commission systems throughout the state, calling into question the ability of employers to make, and employees to receive, advance commission payments. This Court should either review the trial court's ruling now or send the case back to the appellate court with instructions to do so rather than waiting until after the completion of the trial because the Superior Court ruling affects all California employers who pay their employees commissions in order to encourage good performance and reward success. The trial is on damages alone so the underlying legal issue will not be fully presented because of the current posture of the case. Indeed, as is so often the case when such expensive PAGA litigation heads to trial, the case may be settled rather than tried thus leaving the incorrect decision by the trial court in place. The use of advanced commission systems by employers in California would no doubt disappear as a result, much to the detriment of the employees who currently benefit from such systems. The trial court's unprecedented ruling undermines the long-established and legally-encouraged advance commission payment system, which rewards employees' efforts by making additional compensation immediately available to employees. Requiring employers who offer advance commission payments to account for them under a parallel reporting system would create a costly administrative nightmare under any circumstances and it is unknown whether employers'

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payroll providers are even capable of providing such “shadow accounting” of commissions. At the very least, it would be a disincentive for employers to use the commendable advance commission payment systems that have become a mainstay in California with the blessing of California courts.

Further, the court’s ruling threatens to impose significant liability on retailers and other employers for adopting the advance commission plans the California courts previously have found reflect good public policy. Unless reviewed by this Court or returned to the appellate court, the trial court’s order likely will lead to a proliferation of PAGA representative actions alleging the premature reporting of advance commission payments.<sup>1</sup> Each wage statement for each pay period for each commissioned employee would be subject to scrutiny under such PAGA actions; the administrative costs alone for such litigation would be enormous. Interlocutory review is necessary so that a timely, definitive ruling can be issued, giving employers needed guidance about whether, and under what circumstances, advanced commission payment systems can comply with California’s wage statement requirements. Waiting to appeal the court’s ultimate ruling after entry of a final judgment under these circumstances is not an adequate remedy at law. *Starbucks Corporation v. Superior Court* (2008) 168 Cal.App.4<sup>th</sup> 1436; *See’s Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4<sup>th</sup> 889.

The issues involved here are plainly of widespread public interest because the trial court’s order undermines the ability of employers to offer the types of advance commission plans that California appellate courts have encouraged as beneficial arrangements. Indeed, even if the Court does not consider the significant danger the trial court’s ruling poses to the advanced commission systems long utilized by California employers, the issues here would still be of widespread public interest, justifying writ review, because of the thousands of employees and hundreds of thousands of wage statements implicated by this representative PAGA action.

### 3. Conclusion

The trial court’s grant of summary adjudication creates an untenable legal and administrative situation for California employers generally and retailers in particular, with negative consequences for California employees and the California economy. Accordingly, the NRF asks that this Court grant the Petition for Review requested by the Petitioner herein and either resolve the issues on the merits or transfer the matter back to the appellate court with direction to

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<sup>1</sup> NRF notes the Petitioners’ argument that there is no private right of action under PAGA to challenge the pay periods on the wage statements. However, absent appellate review of that issue, the proliferation of PAGA actions like this one will likely continue.

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decide the merits.

Sincerely,

A handwritten signature in blue ink, appearing to read "Pat Costello" with a circular mark at the end.

Patricia Costello Slovak  
Matthew W. Callahan  
On behalf of National Retail Federation,  
as amicus curiae

cc: Mariano-Florentino Cuéllar, Associate Justice (via FedEx)  
Carol A. Corrigan, Associate Justice (via FedEx)  
Goodwin H. Liu, Associate Justice (via FedEx)  
Leondra R. Kruger, Associate Justice (via FedEx)  
Kathryn M. Werdegar, Associate Justice (via FedEx)  
Ming W. Chin, Associate Justice (via FedEx)

PCS/nb

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action; my business address is One Market, Spear Street Tower, San Francisco, California 94105.

On April 3, 2017, I served the following document(s), described as **AMICUS CURIAE LETTER FROM NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITION FOR REVIEW**, on the interested parties in this action, addressed below, as follows:

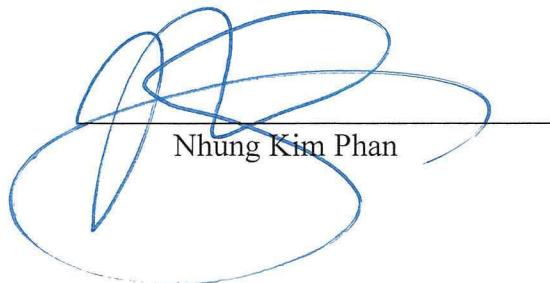
**SEE ATTACHED SERVICE LIST**

**FEDERAL EXPRESS:** By placing the document(s) listed above in a sealed Federal Express envelope, addressed and affixing a pre-paid air bill addressed to the party indicated below. I am readily familiar with the practice of Federal Express at my place of business to collect and process correspondence and documents for overnight delivery (pursuant to C.C.P. § 1013)

**U.S. MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Schiff Hardin, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 3, 2017, at San Francisco, California.

  
Nhung Kim Phan

**SERVICE LIST**

<p>Tani G. Cantil-Sakauye, Chief Justice and Honorable Associate Justices Supreme Court of California 350 McAllister Street San Francisco, CA 94102</p>	<p><b><u>Filed via FEDERAL EXPRESS</u></b> <b><i>Original and 8 copies</i></b></p>
<p>Clerk of California Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501</p>	<p><i>Case No. #E067711</i> <u>(U.S. Mail)</u></p>
<p>Clerk of the Superior Court Superior Court of California County of San Bernardino Civil Division 247 West Third Street San Bernardino, CA 92415-0210</p>	<p><i>Case No. CIVDS1516007</i> <u>(U.S. Mail)</u></p>
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