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MEMORANDUM* OPINION OF THE NINTH CIRCUIT (APRIL 30, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCA GUILLEN, an Individual, on Behalf of Herself and All Others Similarly Situated,

Plaintiff-Appellant,

v.

DOLLAR TREE STORES, INC., a Virginia Corporation; DOES, 1-100, Inclusive,

Defendants-Appellees.

No. 17-56779

D.C. No. 2:15-cv-03813-MWF-PJW

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Submitted April 8, 2019**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: GRABER and BYBEE, Circuit Judges.,
and ARTERTON***, District Judge.

Plaintiff-Appellant Francisca Guillen brought this class action against her employer, Defendant-Appellee Dollar Tree Stores, Inc., claiming violations of California's statutory requirement that employers provide wage statements to their employees. At trial, the jury returned a verdict for Dollar Tree. Guillen challenges the district court's refusal to give her requested jury instruction, refusal to permit evidence of other employers' wage statement practices, and refusal to permit amendment of her complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. We review a district court's formulation of civil jury instructions for abuse of discretion, *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005), but we review de novo whether an instruction states the law correctly, *Clem v. Lomeli*, 566 F.3d 1177, 1180–81 (9th Cir. 2009). Because Guillen's requested instruction lacked legal basis, the district court did not abuse its discretion. *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014). Section 226(a) of the California Labor Code establishes requirements for employers furnishing and retaining copies of wage statements, but imposes no requirement governing how employees may access retained copies of past wage statements. *See* Cal. Lab. Code § 226(a). Those requirements are contained in separate provisions in section 226(b) and (c), violations of which were not claimed in this case. The 2006

*** The Honorable Janet Bond Arterton, United States District Judge for the District of Connecticut, sitting by designation.

Opinion Letter issued by California's Division of Labor Standards Enforcement, on which Guillen relies, similarly makes clear that section 226(a) imposes no such requirement on employers. *See Cal. Office of the State Labor Comm'r, Div. of Labor Standards Enf't*, Dep't of Indus. Relations, Opinion Letter on Electronic Itemized Wage Statements (July 6, 2006) (after discussion of what section 226(a) requires, noting that "[a]dditionally . . . the record keeping requirements of Labor Code section 226 and 1174 must be adhered to and the pay records must be retained by the employer for a period of at least three years and be accessible by employees and former employees." (emphasis added)).

2. Guillen also challenges the district court's preclusion of evidence of the methods used by similar employers to deliver wage statements to their employees. "A district court's evidentiary rulings are . . . reviewed for abuse of discretion, and the appellant is additionally required to establish that the error was prejudicial." *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). The district court excluded this evidence at trial under Federal Rule of Evidence 403, ruling that the "legal standard isn't that the company has to do the best method," "[i]t just has to have a sufficient method," and reasoning that the jury might wrongly infer from the comparison evidence that the applicable legal standard was "best practices." There is no legal authority requiring Dollar Tree to make its wage statements *as* accessible as similar businesses do, and the concern of the district court regarding jury confusion was well-founded. The district court's exclusion of that evidence thus was not an abuse of discretion.

3. Finally, Guillen argues that the district court abused its discretion by denying her leave to amend

the complaint to allow her to be substituted as class representative for the claimed violation of California's Private Attorney General Act ("PAGA"). "We review for abuse of discretion the district court's denial of a motion to amend a complaint." *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010). When the court-ordered deadline to amend has passed, motions for leave to amend are analyzed under the good cause standard of Federal Rule of Civil Procedure 16. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). The court-ordered deadline to add parties or amend pleadings was December 14, 2015. Guillen did not initiate her PAGA pre-filing administrative notice requirement until October 26, 2016, and did not seek leave to file her Third Amended Complaint until February 2017. Guillen contends that she could not seek this amendment until she had complied with PAGA's notice requirement but offers no explanation as to why she delayed fulfilling that requirement for almost a year after the deadline to add parties or amend pleadings. Given the passage of time and absence of any good cause explanation from Guillen for the delay, the district court did not abuse its discretion by denying leave to amend.

AFFIRMED.

JUDGMENT AFTER TRIAL
(NOVEMBER 15, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCA GUILLEN, an Individual, on Behalf of Herself and All Others Similarly Situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC., a Virginia Corporation,

Defendant.

Case No.: CV-15-3813-MWF (PJWx)

Before: The Hon. Michael W. FITZGERALD, United States District Judge.

This action came on regularly for jury trial between November 2, 2017, and November 7, 2017, in Courtroom 5A of this United States District Court. Plaintiffs were Francisca Guillen, on behalf of herself and a certified Class of all others similarly situated. Plaintiffs were represented by Matthew J. Matern, Esq., Mikael H. Stahle, Esq., and Joshua D. Boxer, Esq., of Matern Law Group, PC. Defendant Dollar Tree Stores, Inc. was represented by Lindbergh Porter, Esq., of Littler Mendelson, P.C., and Elena R. Baca, Esq., and Ryan D. Derry, Esq., of Paul Hastings LLP.

A jury of eight persons was regularly empaneled and sworn. One juror was excused with the consent of the parties. Witnesses were sworn and testified and exhibits were admitted into evidence. After hearing the evidence and arguments of counsel, seven members of the jury were duly instructed by the Court and the cause was submitted to the jury. The jury deliberated and thereafter returned a special verdict as follows:

> Question 1
>
> Did Francisca Guillen and the Class not retain easy access to their electronic wage statements?
>
> NO
>
> If you answered "YES" to Question 1, please proceed to Question 2. If you answered "NO" to Question 1, please [have your foreperson sign and return the verdict form].

Now, therefore, pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that final judgment in this action be entered as follows:

1. As to the Claim for Relief for violation of California Labor Code section 226, judgment is entered in favor of Defendant Dollar Tree Stores, Inc., and against Plaintiff Francisca Guillen and each member of the Class.
2. Plaintiff Francisca Guillen and the Class shall take nothing on their claim by their Complaint.
3. Pursuant to Federal Rule of Civil Procedure 23(c)(3)(B), the Court hereby describes the members of the Class to whom the Federal

Rule of Civil Procedure 23(c)(2) notice was directed and who did not request exclusion. The Class as certified is defined as:

> "All persons employed in one or more of Dollar Tree's retail stores in California at any time on or after April 2, 2014, who received their wages via direct deposit or Pay Card and who have not entered into an arbitration agreement with Dollar Tree."

Excluded from this definition are all Class Members who requested exclusion and the portions of certain Class Members' claims that were released by the settlement in *Stafford v. Dollar Tree Stores*, Solano County Superior Court Case No. FCS043461.

4. As the prevailing party, Defendant Dollar Tree Stores, Inc. is to recover from Plaintiff Francisca Guillen its costs of suit as provided by law.

5. Now that the matter has been tried to conclusion, the website established to provide notice (www.DTclassaction.com) should be removed from the Internet within 7 days.

/s/ Michael W. Fitzgerald
United States District Judge

Dated: November 15, 2017.

REDACTED VERDICT FORM
(NOVEMBER 7, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCA GUILLEN, an Individual, on Behalf of Herself and All Others Similarly Situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC., a Virginia Corporation,

Defendant.

Case No.: CV-15-3813-MWF (PJWx)

Before: The Hon. Michael W. FITZGERALD, United States District Judge.

We, the jury in the above-captioned case, answer the questions submitted to us as follows

1. Did Francisca Guillen and the Class not retain easy access to their electronic wage statements?

- NO

If you answered "YES" to Question 1, please proceed to Question 2. If you answered "NO" to Question 1, please proceed to the end of this form and sign and date it.

2. Was Dollar Tree's failure to provide easy access to electronic wage statements knowing and intentional?

_____ YES _____ NO

If you answered "YES" to Question 2, please proceed to Question 3. If you answered "NO" to Question 2, please proceed to the end of this form and sign and date it.

3. Did Francisca Guillen and each Class Member suffer a resulting injury?

_____ YES _____ NO

If you answered "YES" to Question 3, please proceed to Question 4 on the next page. I) you answered "NO" to Question 3, please proceed to the end of this form and sign and date it.

4. How many times between April 2, 2014, and August 31, 2017, did Dollar Tree violate California law with respect to the provision of wage statements to members of the Class?

_____

Please have the Foreperson sign and date this verdict form. Please notify the clerk through the bailiff that you have reached a verdict.

Signed [redacted]_____
Foreperson

Dated: November 7, 2017.

DOCKET ENTRY 198: COURT ORDER DENYING PROPOSED JURY INSTRUCTION NO. 64 (OCTOBER 27, 2017)

10/27/2017

198 ORDER by Judge Michael W. Fitzgerald. For the guidance of counsel in preparing for trial: It is the intention of the Court not to include the lack of 3 years of electronic statements at the register as a basis for liability. This putative basis for violating section 226(a) will not be included in the Final Pretrial Order. The Court will not give Proposed Jury Instruction No. 64 to the jury. It is not that this putative basis would violate due process, amend the pleadings, or is beyond the scope of notice to the class. Rather, section 226(a), even as construed by the 2006 DSLE Letter, simply does not, as a matter of law, impose that requirement on employers. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (cw) TEXT ONLY ENTRY (Entered: 10/27/2017)

CIVIL MINUTE ORDER OF THE DISTRICT COURT OF CALIFORNIA ON MOTION IN LIMINE (OCTOBER 3, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CURTIS PATTON

v.

DOLLAR TREE STORES, INC.

Case No. CV-15-3813-MWF

Civil Minutes–General

Before: The Hon. Michael W. FITZGERALD, United States District Judge.

Proceedings (In Chambers):
Order Re: Motions in Limine
[133] [134] [135] [136] [137]

Before the Court are five Motions in Limine filed by Defendant Dollar Tree Stores, Inc. (Docket Nos. 133-137). The Court held a hearing on October 3, 2017.

The Court rules as follows:

- Motion in Limine #1 is DENIED as unnecessary. The DLSE Opinion Letters pertain to legal standards, not evidence of factual matters to be excluded or admitted at trial.

- Motion in Limine #2 is GRANTED insofar as Plaintiff and Mr. Lietzow may not testify to other employers' wage statement programs and no evidence of the prevalence of direct deposit may be introduced. However, the Court declines to decide at this time whether Mr. Maravilla and Ms. Sullivan may testify, as it hopes the parties will come to an agreement regarding their testimony in the course of discussing an overall deal regarding their witness lists. If they should testify, the Court will separately decide if any testimony they might provide regarding other employers' wage statement programs is admissible.
- Motion in Limine #3 is GRANTED. Plaintiff does not oppose the Motion. Evidence of Defendant's size and financial resources (and those of its counsel) is excluded as irrelevant and prejudicial.
- Motion in Limine #4 is DENIED. Evidence of potential costs or cost savings associated with implementation of the electronic pay program is relevant.
- Motion in Limine #5 is DENIED without prejudice. The Court agrees with the spirit of the Motion, that opening statements must be different from closing arguments. The precise use of the words "easily accessible", however, will be determined by the instructions that the Court will read to the jury at the beginning of the trial and before the opening statements.

The Court further orders the parties to meet-and-confer to try to reach agreement on outstanding disputes

regarding the exhibit and witness lists, and to try to submit a Joint Report regarding the status of those disputes by October 16, 2017. The remaining disputes will be decided at the continued Pretrial Conference.

I. Motion in Limine #1 to Exclude Testimony, Evidence, Comment or Argument Regarding the Opinion Letters Issued by the Division of Labor Standards Enforcement; or, in the Alternative, to Allow the Testimony of Robert A. Jones

Through its first Motion in Limine, Defendant requests, pursuant to Federal Rules of Evidence 801, 402, and 403, that the Court exclude testimony, comment, or argument regarding a July 6, 2006 Division of Labor Standards Enforcement ("DLSE") Opinion Letter authored by Robert A. Jones, as well as two other withdrawn DLSE opinion letters. (Mot. #1 at 1). In the alternative, Defendant In the alternative, Defendant requests that if the Court allows the 2006 DLSE letter, it also allow Robert A. Jones to testify at trial even though Defendant did not include Mr. Jones in its Rule 26 disclosures until August 22, 2017. (*Id.* at 2). Defendants argue that the letters are inadmissible hearsay, irrelevant, and prejudicial. (*Id.* at 1). Plaintiff argue only that the Motion should be rejected as "an attempt to argue the law governing wage statements, rather than a request to exclude evidence of factual matters," and that a "motion in limine is not the proper place to hold that debate." (Opposition to Motion in Limine re: Opinion Letters and Robert Jones ("Opposition #1") at 2 (Docket No. 149)).

The Court agrees with Plaintiff. In the Court's prior Orders denying summary judgment, the Court applied the 2006 DLSE Opinion Letter's conditions on the use

of electronic wage statements in considering Plaintiffs claims. (*See* "Order re Motion for Summary Judgement ("Order 1") at 5-8 (Docket No. 104); Order Denying Motion for Judgment on the Pleadings (Docket No. 129)). The Court views the 2006 DLSE Opinion Letter as both the only California authority that explicitly authorizes the use of electronic wage statements, and as a helpful interpretation (in an area with sparse authority) of how those electronic wage statements can be used. The Court does not anticipate the DLSE Letters being presented to the jury—indeed, it does not know what a jury would do with the letters—and therefore sees no need for an order excluding testimony, comment, or argument related to the letters, or permitting testimony from Mr. Jones on the letters. Rather, the Opinion Letter as authority will be reflected in the jury instructions.

Defendant's Motion in Limine #1 is DENIED as unnecessary.

II. Motion in Limine #2 to Exclude Evidence and Argument Related to Other Employers' Wage Statement Programs and Statistics Related to Mobile Banking and Direct Deposit and to Exclude Undisclosed Witnesses

Through its second Motion in Limine, Defendant requests that, pursuant to Rules 602, 402, and 403, the Court exclude all testimony and evidence of other employers' wage statement programs as well as statistics related to the prevalence of mobile banking and direct deposit. (Mot. #2 at 1). Defendant also requests the Court exclude witnesses Julie Sullivan and Armando Maravilla, who were not disclosed pursuant to Rule

26. (*Id.*). Defendant argues that Plaintiff failed to disclose any witness qualified to testify to other employers' wage statement programs or the prevalence of online banking and direct deposit. (*Id.* at 2). Ms. Sullivan and Mr. Maravilla, Defendant argues, were disclosed too late to testify at all, including as to their experiences with their employers' pay systems. (*Id.* at 3). Defendant argues that regardless of Plaintiffs disclosures, any evidence related to these matters is irrelevant and prejudicial. (*Id.* at 4-6).

Plaintiff responds that this evidence is relevant to the factfinder's determination of whether Defendant's conduct is reasonable, and that Defendant was on notice of Ms. Sullivan and Mr. Maravilla's potential testimony since well before the discovery cutoff date because they provided declarations in support of Plaintiffs Opposition to Summary Judgment. (Opposition to Motion in Limine ("Opposition #2") at 2-3 (Docket No. 150)).

The Court is persuaded that, to some extent, testimony regarding other employers' wage statement programs would be relevant to the issue of whether reasonable Dollar Tree employees who had personal experience working for other employers found Dollar Tree's wage statement program to be "easily accessible." However, as Defendant points out, there are several obstacles to introducing this evidence: (1) Plaintiff has no basis from which to testify to other employers' programs because she worked for Dollar Tree during the operative time; (2) Plaintiffs expert, Eric R. Lietzow, never disclosed opinions on other employers' programs and may not be qualified to do so, and therefore may not testify to them; and (3) Julie Sullivan and Armando Maravilla were not properly disclosed to Defendant.

The same obstacles are present with respect to evidence of statistics on the prevalence of direct deposits.

At the hearing, the parties explained that a dispute has arisen as to whether each side has timely disclosed witnesses, including whether Plaintiff timely disclosed Ms. Sullivan and Mr. Maravilla. The Court has instructed the parties to meet and confer in attempts to resolve the dispute prior to the continued Pretrial Conference Hearing, and the Court hopes the parties will reach an agreement between themselves. Therefore, the Court declines to rule at this time regarding whether Ms. Sullivan and Mr. Maravilla were timely disclosed. If Ms. Sullivan and Mr. Maravilla do testify, the relevance of any testimony they may offer on other employers' wage statement programs will be determined at a later time. The Court now understands that neither Ms. Sullivan nor Mr. Maravilla was ever employed by Dollar Tree.

Therefore, Defendant's Motion in Limine #2 is GRANTED in part. It is GRANTED insofar as Plaintiff and Mr. Lietzow may not testify to other employers' wage statement programs and no evidence of the prevalence of direct deposit may be introduced.

III. Motion in Limine #3 to Exclude Testimony, Evidence, Comment or Argument Regarding the Size and Resources of Dollar Tree and Its Counsel

Through its third Motion in Limine, Defendant seeks, pursuant to Rules 404, 402, and 403, evidence and argument relating to Dollar Tree's size and financial resources (and the size and resources of its counsel). (Mot. #3 at 1). Defendant argues such evidence is impermissible "character-like" evidence barred

by Rule 404(a), and that it is irrelevant and prejudicial. (*Id.* at 1-3). Plaintiff does not oppose this motion.

The Court agrees that evidence regarding Defendant's size and financial resources (or those of its counsel) is irrelevant to the question of whether Defendant has met its obligations with respect to furnishing wage statement information, and that any potential probative value would be outweighed by its prejudicial effect. Moreover, Plaintiff does not oppose this Motion. Accordingly, Defendant's Motion in Limine #3 is GRANTED.

IV. Motion in Limine #4 to Exclude Testimony, Evidence, Comment or Argument Regarding Costs or Savings Associated with Dollar Tree's Implementation of Electronic Pay

Through its fourth Motion in Limine, Defendant requests that, pursuant to Rules 402 and 403, the Court exclude evidence of Defendant's alleged cost savings related to shifting to an electronic pay program. Defendant argues that this evidence is irrelevant because implementation of an electronic pay program and implementation of an electronic wage statement program are two different things, and that any alleged cost savings are irrelevant to the claims at issue. (Mot. #4 at 2). Defendant also argues that such evidence will be misleading and prejudicial. (*Id.* at 3). At the hearing, Defendant emphasized that no evidence on this issue has yet been elicited.

Plaintiff opposes the Motion, arguing that evidence of cost savings associated with implementation of direct deposit is relevant to the claim that Defendant precludes class members from electing to continue to receive hard-copy wage statements, as is required

by law. (Opposition to Motion in Limine re: Costs or Savings Associated with Implementation of Electronic Pay ("Opposition #4") at 1-2 (Docket No. 151)).

The Court finds that evidence of any costs or cost savings related to implementation of the electronic pay program is relevant. As Plaintiff explains, once an employee elects direct deposit, he or she loses the option to receive traditional hard-copy wage statements. To the extent cost savings might potentially motivate Defendant to encourage employees to opt for the electronic pay program and therefore lose the right to receive hard-copy wage statements, evidence of those costs or cost savings is relevant.

As the Court explained at the hearing, the Court does not perceive why this evidence would be unduly prejudicial. To the extent the evidence on this issue turns out to be sparse or undeveloped, it is for the jury to decide how much weight to assign to it.

Accordingly, Defendant's Motion in Limine #4 is DENIED.

V. Motion in Limine #5 to Exclude Comment or Argument During Opening Statement of Legal Matters, Particularly "Easily Accessible"

Through its fifth Motion in Limine, Defendant requests that this Court exclude comment or argument during opening statements of legal matters, particularly any arguments echoing the "easily accessible" language contained in the 2006 DLSE Opinion Letter. (Mot. #5 at 1).

Defendant argues that opening statements are strictly for outlining the factual issues and evidence in the case, not for setting for the applicable law. (*Id.*).

Plaintiff opposes the Motion, arguing that the question of whether a reasonable employee has "easy access" to his or her wage statement information is one of fact, and that Plaintiff will present evidence in this regard. (Opposition to Motion in Limine re: Comment or Argument During Opening Statement Regarding "Easily Accessible" ("Opposition #5") at 2-3 (Docket No. 152)). The Opposition does not reference opening statements at all, and in fact is comprised of nearly verbatim language from Plaintiffs Opposition #2.

The Court agrees with Defendant that opening statements are strictly for outlining facts and evidence to be presented at trial. And, as discussed above, the 2006 DLSE Opinion Letter provides legal guidance on providing electronic wage statements. However, the Court intends to pre-instruct the jury on the elements of the claim(s). Some slight reference to being "easily accessible" will probably be permitted, just as a plaintiff in a Fourth Amendment case would be allowed to state once or twice in opening statement that the use of force was not reasonable. Defendant is correct, however, that there must be a difference between the opening statements and closing arguments.

Accordingly, Motion in Limine #5 is DENIED without prejudice.

**BENCH RULING ON MOTION IN LIMINE,
TRANSCRIPT OF PROCEEDINGS
RELEVANT EXCERPT
(OCTOBER 23, 2017)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CURTIS PATTON, ET AL.,

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,

Defendants.

No. CV-15-3813 (PJWx)

Before: Hon. Michael W. FITZGERALD,
United States District Judge.

[October 23, 2017 Transcript, p. 20]

THE COURT: The exhibits, I'm glad you've made some headway on that. That is something that we can discuss later, especially if some broader issues might resolve that one way or the other.

In regard to the witnesses, Robert Jones is not going to testify. In fact, I cannot think of any witness who I have had proffered in my time on the bench that I would be less likely to allow to

testify, and to have argument about this would just waste everybody's time. He's-it's a legal matter. And to the extent that the jury instructions should read thus and so, then I don't even know if then it would be appropriate, but at least Dollar Tree can try, but it's certainly not going to get such that testimony in front of the jury. I might as well just take a copy of the Constitution and rip the Seventh Amendment right out of it as let him testify.

Let's talk about Mr. Lietzow. To the extent that there is a timeliness issue, as I intend to try to be consistent here and overlook that, I think that given he will testify and he can testify to anything on which he has been deposed, the real issue here is whether there is this new issue of liability, and I'll discuss that separately.

Mr. Maravilla should not testify. That is not because of timeliness issues, but rather I think that his testimony, while it may or may not be admissible under 401 and 402, it is certainly inadmissible under 403 and 404(b). You know, it isn't so much here, the jury is going to have defined for it what accessible is, and it's up to them to then decide whether it's-that what Dollar Tree did meets that standard. There is a certain risk that the jury could feel that what is best practices or not is really what is governing here, and the fact that somebody else chose to do something in a certain way in and of itself is not particularly helpful on whether the legal standard that does apply was met in this case consistently to employees who form the class.

RELEVANT STATUTORY PROVISIONS

California Labor Code § 226.

Itemized Statements; Contents; Inspection and Copying of Records; Compliance with Inspection Requests; Violations; Injunctive Relief; Limitation of Application and Liability; Exception to Showing Total Hours Worked

(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services

employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.

(b) An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by subdivision (a) shall afford current and former employees the right to inspect or receive a copy of records pertaining to their employment, upon reasonable request to the employer. The employer may take reasonable steps to ensure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

(c) An employer who receives a written or oral request to inspect or receive a copy of records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. A violation of this subdivision is an infraction. Impossibility of performance, not caused by or a result of a violation of law, shall be an affirmative defense for an employer in any action alleging a violation of this subdivision. An employer

may designate the person to whom a request under this subdivision will be made.

(d) This section does not apply to any employer of a person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e)

(1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2)

(A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily

determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

(C) For purposes of this paragraph, "promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

(3) For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

(f) A failure by an employer to permit a current or former employee to inspect or receive a copy of records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar ($750) penalty from the employer.

(g) The listing by an employer of the name and address of the legal entity that secured the services of the employer in the itemized statement required by subdivision (a) shall not create any liability on the part of that legal entity.

(h) An employee may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees.

(i) This section does not apply to the state, to any city, county, city and county, district, or to any other governmental entity, except that if the state or a city, county, city and county, district, or other governmental entity furnishes its employees with a check, draft, or voucher paying the employee's wages, the state or a city, county, city and county, district, or other governmental entity shall use no more than the last four digits of the employee's social security

number or shall use an employee identification number other than the social security number on the itemized statement provided with the check, draft, or voucher.

(j) An itemized wage statement furnished by an employer pursuant to subdivision (a) shall not be required to show total hours worked by the employee if any of the following apply:

(1) The employee's compensation is solely based on salary and the employee is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission.

(2) The employee is exempt from the payment of minimum wage and overtime under any of the following:

(A) The exemption for persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission.

(B) The exemption for outside salespersons provided in any applicable order of the Industrial Welfare Commission.

(C) The overtime exemption for computer software professionals paid on a salaried basis provided in Section 515.5.

(D) The exemption for individuals who are the parent, spouse, child, or legally adopted child of the employer provided in any applicable order of the Industrial Welfare Commission.

(E) The exemption for participants, director, and staff of a live-in alternative to incarceration

rehabilitation program with special focus on substance abusers provided in Section 8002 of the Penal Code.

(F) The exemption for any crew member employed on a commercial passenger fishing boat licensed pursuant to Article 5 (commencing with Section 7920) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code provided in any applicable order of the Industrial Welfare Commission.

(G) The exemption for any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.

TRANSCRIPT OF JURY INSTRUCTIONS
RELEVANT EXCERPTS
(NOVEMBER 7, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CURTIS PATTON, an Individual, on Behalf of Himself and All Others Similarly Situated; FRANCISCA GUILLEN, an Individual, on Behalf of Herself and All Others Similarly Situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC., a Virginia Corporation; and DOES 1 through 100, Inclusive,

Defendants.

No. 2:15-cv-03813-MWF-PJW

Before: Hon. Michael W. FITZGERALD, United States District Judge.

[November 7, 2017 Transcript, p. 563]

MS. BACA: Good morning, Your Honor, Elena Baca for Dollar Tree Stores.

THE COURT: All seven of you are here. I will now instruct you on the law.

Instruction number 1, the duties of the jury: Members of the jury, now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case. A copy of these instructions for each of you will be sent with you to the jury room when you deliberate.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be. It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you, whether you agree with the law or not.

And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others. They are all important.

Instruction number 2, the claims: Plaintiff Francisca Guillen brings this lawsuit against defendant Dollar Tree Stores Incorporated, which will afterwards be referred to as "Dollar Tree," and I will refer to the plaintiffs as "Francisca Guillen and the class." She brings this lawsuit on behalf of herself and on behalf of a class of the other—of other Dollar Tree store employees, which we have referred to as "the class."

California law requires that employees get a wage statement or pay stub. Employees can be paid by

direct deposit instead of receiving a paper check and wage statement if certain requirements are met. Francisca Guillen, as the plaintiff, contends that Dollar Tree, as the defendant, knowingly and intentionally failed to comply with the requirements of California law regarding the provision of wage statements to Francisca Guillen and the class. Francisca Guillen has the burden of proving this claim. She seeks to prove multiple violations for herself and the class from Dollar Tree.

Dollar Tree denies this claim. Dollar Tree contends that at all times it complied with California law regarding the provision of wage statements. Dollar Tree further denies that Francisca Guillen and the class have suffered any injury from any alleged violations. Dollar Tree further denies that Francisca Guillen and the class can prove multiple violations.

Instruction number 3, the burden of proof which is the preponderance of the evidence: Francisca Guillen and the class have the burden of proof on their claims. The burden of proof in this case is by a preponderance of the evidence. When the party has the burden of proof on a claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. You should base your decision on all of the evidence regardless of which party presented it.

Instruction number 4, what is evidence: The evidence you are to consider in deciding what the facts are consists of, one, the sworn testimony of

any witness, and, two, the exhibits that are admitted into evidence.

Instruction number 5, what is not evidence: In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you. I will now list four things.

One, arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Two, questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the Rules of Evidence. You should not be influenced by the objection or by the Court's ruling on it.

Three, testimony that has been excluded or stricken or that you have been instructed to disregard is not evidence and must not be considered.

Four, anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Instruction number 6, direct and circumstantial evidence: Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as

testimony by a witness about what that witness personally saw or heard or did.

Circumstantial evidence is proof of one or more facts from which you could find another fact. You could consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence. By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night.

However, other evidence such as a turned on garden hose may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or circumstantial evidence, you should give every piece of evidence whatever weight you think it deserves.

Instruction number 7, the party having power to produce better evidence: You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

Instruction number 8, corporations receiving fair treatment: All parties are equal before the law,

and a corporation is entitled to the same fair and conscientious consideration by you as any party.

Instruction number 9, ruling on objections: There are Rules of Evidence that control what can be received into evidence. When a lawyer asked a question or offered an exhibit into evidence and a lawyer on the other side thought that it was not permitted by the Rules of Evidence, that lawyer may have objected. If I overruled the objection, the question was answered or the exhibit was received. If I sustained the objection, the question was not answered, or the exhibit was not received. Whenever I sustained an objection to a question, you must ignore the question and must not guess what the answer might have been. Sometimes I may have ordered that evidence be stricken from the record, and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the stricken evidence for any purpose.

Instruction number 10, credibility of witnesses: In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says or part of it or none of it.

In considering the testimony of any witness, you may take into account, and I will now read eight things: One, the opportunity and ability of the witness to see or hear or know the things testified to.

Two, the witness's memory.

Three, the witness's manner while testifying.

Four, the witness's interest in the outcome of the case, if any.

Five, the witness's bias or prejudice, if any.

Six, whether other evidence contradicted the witness's testimony.

Seven, the reasonableness of the witness's testimony in light of all the evidence.

And, eight, any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event, but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things, but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were and how much weight you think their testimony deserves.

Instruction number 11, no transcript and the use of notes: During deliberations, you will not have a transcript of the trial testimony. Whether or not you took notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Ladies and gentlemen, let me just add something here. If you really need to have a portion of the testimony reread, then you can request that by sending a note out of the jury room. But let me just tell you, it's a big deal. It's not as if there, we could send in like a rough transcript from Ms. Diaz's notes into you. What has to happen is that you have to come back into court, and the testimony has to be reread.

And unless you ask for something really narrow and both sides and I can agree on what you should hear, then the Court of Appeals expects you to hear the entire testimony of that witness. So I don't want to hide anything from you. You do have the right to have a portion of the testimony reread, but I would just urge you not to make that request lightly, especially since the trial has been so short. I'm sure between all seven of you, you will have a good sense as of what the testimony was.

Instruction number 12, depositions: During the trial, you received deposition testimony that was read from the deposition transcript. A deposition is the testimony of a person taken before trial. At a deposition, the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was

presented to you in the same way as you consider testimony given in court. Do not place any significance on the behavior or the tone of voice on the person who read the questions or answers in court.

Instruction number 13, expert opinion: You have heard from Eric Lietzow who testified to opinions and the reasons for these opinions. This opinion testimony is allowed because of the education or experience of this witness. Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reason given for the opinion, and all the other evidence in the case.

Instruction number 14, charts and summaries: Certain charts, summaries, and videos not received in evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts, summaries, or videos and determine the facts from the underlying evidence.

Instruction number 15, evidence in electronic form: Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer, and accessory equipment will be available to you in the jury room.

Jury instruction number 16, the violation of California law, the essential elements: California law requires employers to furnish wage statements to employees, though the law does not require that a wage statement itself be in any particular size, shape, or form. An employer may provide electronic wage statements instead of paper wage statements, but only if employees have easy access to the electronic wage statements. Therefore, in order to prove a violation of California law, Francisca Guillen must prove on behalf of the class each of the following elements by a preponderance of the evidence, and I will now read three elements:

One, having chosen not to receive paper checks and paper wage statements, employees did not retain easy access to the electronic wage statements.

Two, Dollar Tree's failure to provide easy access was knowing and intentional.

And, three, each class member suffered a resulting injury.

The term, quote, easy access, close quote, does not have any special legal meaning. You should use your ordinary understanding of these words.

The term, quote, knowing and intentional, close quote, does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. You may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with the law.

As to, quote, injury, close quote, you are not required to determine that Francisca Guillen or members of the class suffered a physical injury or money damages. If you find that Francisca Guillen has proven the other two elements, you may deem that she and the class were injured.

Instruction number 17, the number of violations: If you determine that Dollar Tree has violated California law, then you must calculate the number of violations for Francisca Guillen and the class for the period between April 2, 2014, and August 31, 2017, as reflected in the information provided in Exhibit 119. Exhibit 119, that was the long list of transactions with the, you know, letters on the side.

All right. Ladies and gentlemen, let's stand up and stretch for a moment.

[. . .]