

1 Defendant of her pregnancy and of the possibility of exercising her right to medical leave
2 under the FMLA in December 2010. On December 30, 2010, Plaintiff emailed Debbie
3 Baker, Defendant's Human Resources Director, and expressed that her greatest concern
4 with respect to the pregnancy was the possibility of Defendant's sales management team
5 "taking away any of [her] hard work over the last [two] years building a[] . . . pipeline,"
6 as certain account opportunities can "take anywhere" from a year to a year and a half to
7 realize a sale. Plaintiff sought to ensure "that [she would be] compensated for [her] work,
8 even if out of maternity leave," and to determine whether it was in her financial interest
9 to take FMLA leave.

10 Sometime "in or around January of 2011," Plaintiff informed Brad Bell,² her
11 immediate supervisor and the Vice President of Sales for the Retail Hardlines group, that
12 she was pregnant and had been given a due date of July 3, 2011. Bell was aware that
13 Plaintiff had "expressed her concerns" about commissions associated with accounts that
14 she had been working on "[b]oth in telephone communications, in person[,] and in
15 emails." By March 21, 2011, Plaintiff had yet to be informed by human resources or her
16 management team as to how, or if she would be paid for certain accounts if she took
17 FMLA leave. Plaintiff contacted Debbie Baker via email for an update on whether she
18 would retain certain accounts while on FMLA leave and if she would be eligible for any
19 kind of a commission. The following day, Plaintiff contacted Brad Bell and voiced
20 surprise at a recent "change in direction by [Human Resources]," as well as concern as to
21 the negative effect the change might have on her sales accounts. At this time, Plaintiff
22 openly entertained the notion of returning from FMLA leave early, and her
23 communications again concerned "commissions," how Defendant would "handle [her]
24 accounts," and whether she would return to work "with [the] same accounts and [the]
25 same earning potential."

26 By May 31, 2011, Plaintiff had not received information on how her "accounts
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28 ² Brad Bell became Plaintiff's direct supervisor in January 2011. Tom Jones was
the prior Vice President of Sales for the Retail Hardlines group.

1 w[ould] be managed” while she was out. On June 2, 2011, Plaintiff contacted Michael
2 Bridge, Defendant’s in-house General Counsel at the time, to determine whether there
3 had been “any progress on clarification” of Defendant’s maternity policy. Plaintiff had
4 not made a decision as to whether she would exercise her rights under the FMLA and was
5 concerned that certain accounts would be taken from her. Plaintiff informed Defendant
6 that her decision with respect to FMLA leave would be “based on the financial impact” it
7 would have on her, and she again expressed concern over how Defendant would handle
8 certain deals that she had invested an extended period of time in, including Sears Canada.
9 Bridge did not know why Defendant had not contacted Plaintiff directly, but told her that
10 “management and/or HR should be getting back to [her] to give [her] more clarity.”

11 Plaintiff decided to take FMLA leave on June 3, 2011, when her twins were born,
12 but was unsure as to how long she would remain on leave due to her inability to obtain
13 substantive responses to her inquiries. On June 13, 2011, Bryan Boylan, Defendant’s
14 Vice President of Human Resources, advised Plaintiff that “[Defendant’s] general policy
15 is that a sales account manager who is on leave of absence at the time a software license
16 deal closes shall not be entitled to any commission for that particular deal,” and that
17 Defendant would “not consider any exception to this policy” other than in “rare
18 circumstance[s]” not applicable to Plaintiff. A determination would then be made by
19 Defendant “as to whether it is necessary to assign another account manager to [certain]
20 accounts during the period of [Plaintiff’s] absence.” Sometime after this exchange,
21 Plaintiff called Brad Bell and left a voice mail seeking an update on her accounts.

22 On July 6, 2011—“a few weeks” after Plaintiff’s voicemail—Bell informed
23 Plaintiff that despite his efforts over the previous four weeks, and having “invested
24 significant time supporting” Plaintiff’s accounts, he had “no choice but to re-assign” the
25 Sears Canada account because it was “clear . . . that there [was] still significant work to
26 be done to bring Sears Canada . . . to closure.”³ Plaintiff inquired as to whether the
27 account would be returned at the conclusion of her FMLA leave, and emphasized the

28 ³ Two accounts were transferred by Bell. Only one is at issue here.

1 significant time she spent on the account over the previous eighteen months. Bell told
2 Plaintiff that when she returned to active work, Defendant would review the accounts that
3 were transferred, and if the accounts were still active, “determine if they should be
4 assigned back to [Plaintiff].” He further reaffirmed that Defendant did “not have any split
5 commissions arrangement.”

6 On July 14, 2011, Defendant transferred the Sears Canada account to Bill
7 Wortham due to Plaintiff’s absence on FMLA leave. Plaintiff returned to active work on
8 August 22, 2011. The Sears Canada account remained with Wortham and Plaintiff was
9 advised “that this decision [was] final,” it was made “in accordance with [Defendant’s]
10 policy” and was “not subject to negotiation.” Plaintiff did not receive any commission
11 when Sears Canada closed on March 31, 2012.

12 The foregoing findings were based on stipulated facts, documentary evidence
13 submitted into the record and credible testimony at trial from February 29, 2016, to
14 March 9, 2016.

15 16 **II. Analysis and Conclusions of Law**

17 **A. Liquidated Damages Under the FMLA**

18 Under the FMLA, a successful plaintiff is presumptively entitled to an award of
19 liquidated damages equal to the amount of employment benefits denied or lost to her by
20 reason of the defendant’s FMLA violation, including interest. Title 29 U.S.C. §
21 2617(a)(1)(A)(i)-(iii) (2012). However, “if an employer who has violated [the FMLA]
22 proves to the satisfaction of the [C]ourt that the act or omission [that violated the FMLA]
23 was in good faith and that the employer had reasonable grounds for believing that the act
24 or omission was not a violation of [the FMLA],” the Court may, in its discretion, reduce
25 the amount of liability to the jury’s award of lost employment benefits plus interest. 29
26 U.S.C. § 2617(a)(1)(A)(iii).

27 In determining whether a defendant acted in good faith and had reasonable
28 grounds for believing its actions were not violative of the FMLA, a court must make

1 specific, explicit findings and explain its reasoning. *Traxler v. Multnomah Cnty.*, 596
2 F.3d 1007, 1015-16 (9th Cir. 2010). It is the “employer’s burden . . . to establish that it
3 had ‘an honest intention to ascertain and follow the dictates of the Act’⁴ and that it had
4 ‘reasonable grounds for believing that its conduct complied with the Act.’”⁵ *Local 246*
5 *Util. Workers*, 83 F.3d at 298 (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d. Cir.
6 1982)).

7 Defendant argues Plaintiff is not entitled to liquidated damages because Defendant
8 routinely consulted with Human Resources and legal counsel to ensure that it adhered to
9 the FMLA with respect to Plaintiff’s pregnancy, and that it was forced to react to
10 Plaintiff’s FMLA leave “without the benefit of any on-point statute or regulation, DOL
11 opinion letter or other formal or informal guidance, or prior decisional law.” Coupled
12 with the fact that Plaintiff enjoyed a full eleven weeks of FMLA leave and was returned
13 to the same position with the same base salary and commission structure, Defendant
14 contends that it acted in good faith.

15 Having reviewed the record, the Court finds dispositive Plaintiff’s repeated
16 inability to obtain reasonable information from Defendant with respect to retention of
17 certain account opportunities and her eligibility for commissions. Plaintiff first expressed
18 concern over these issues to Defendant’s Human Resources Director as early as
19 December 30, 2010. Over the next six months, Plaintiff continued to inquire about these

21 ⁴ “Good faith is an honest intention to ascertain what the [FLMA] requires and to
22 act in accordance with it.”⁴ *Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d
23 292, 298 (9th Cir. 1996) (quoting *EEOC v. First Citizens Bank*, 758 F.2d 397, 403 (9th
24 Cir. 1985)).

25 ⁵ *Arban v. West Publ’g Corp.*, 345 F.3d 390, 408 (6th Cir. 2003) (citation omitted)
26 (noting that the Sixth Circuit has “turned to the Fair Labor Standards Act (FLSA) . . . for
27 guidance in interpreting the FMLA,” as “[t]he legislative history of the FMLA reveals
28 that Congress intended the remedial provisions of the FMLA to mirror those in the
FLSA”); *Singer v. City of Waco, Tex.*, 324 F.3d 813, 823 (5th Cir. 2003) (turning to the
FLSA to interpret the remedial provisions in the FMLA).

1 two interlinked issues with both human resources and sales management. On more than
2 one occasion, Plaintiff informed Defendant that the length of her FMLA leave, and
3 whether she would take FMLA leave at all, was dependent upon the information she
4 received in response to her inquiries, and the personal financial impact that Defendant's
5 policies would have.

6 Defendant did not promulgate any written policy concerning the possible transfer
7 of accounts or how commissions would be addressed for accounts that were ultimately
8 transferred. Defendant contends that this is due to the fact that Plaintiff's case presented a
9 first-time issue for Defendant; she was the first saleswoman in the company's history to
10 take maternity leave under the FMLA, which caused Defendant to adjust as the situation
11 unfolded. The Court acknowledges this reality, but finds it an insufficient rationale to
12 excuse Defendant's months-long failure to provide Plaintiff with information significant
13 to her determination of whether to exercise her statutory rights.

14 Additionally, beyond a failure to promulgate a written policy, Defendant never
15 told Plaintiff of its policy regarding the aforementioned issues until ten days after she
16 commenced FMLA leave.⁶ Plaintiff learned of the at-issue policies on June 13, 2011,
17 when she was informed by Bryan Boylan that Defendant did not award split
18 commissions, and that "a determination w[ould] be made by management as to whether it
19 is necessary to assign another account manager to [her] accounts during the period of
20 [her] absence." The Court appreciates the volatile nature of national software sales,⁷ but
21 finds Defendant's policy—belatedly disclosed to Plaintiff—to be insufficiently clear and
22 objective. Defendant's position, essentially, was that it may transfer her accounts, it may
23 not, it would provide no timeline, it would provide no objective metrics upon which to
24 base the determination, it would provide no opportunity for Plaintiff to return early to

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26 ⁶ Plaintiff took leave on June 3, 2011. The fact that Plaintiff's delivery occurred
27 one month earlier than her initial delivery date is inconsequential. Plaintiff had expressed
28 concern over how her accounts would be managed and how commissions would be
awarded as early as December 30, 2010.

⁷ Brad Bell testified that Defendant's "sales cycles . . . and opportunities can
change on a dime," rendering advance judgments useless.

1 avoid having accounts the transferred,⁸ and it would not permit Plaintiff to receive any
2 commission on the affected accounts.

3 Plaintiff then learned from Brad Bell that certain accounts would be transferred on
4 July 6, 2011, “a few weeks” after inquiring as to their status. Bell had “no choice but to
5 re-assign” Sears Canada because it became “clear over the last few weeks that there is
6 still significant work to be done to bring Sears Canada . . . to closure.” On July 8, 2011,
7 Plaintiff was told that after she returned to work, Defendant would “review these
8 accounts, if still active, and determine if they should be assigned back to [her].”
9 Defendant’s policy again lacks clarity and objectivity, and offered Plaintiff no control
10 over retention of these accounts. The Court acknowledges Bell’s efforts and the
11 “significant time” he invested in Plaintiff’s accounts in order to avoid the scenario that
12 ultimately led to this litigation. But the issue is not the efforts of individual employees on
13 an ad-hoc basis working to avoid a less-favorable outcome for an employee out on
14 federally protected leave. Rather, the Court’s concern is with Defendant’s inability to
15 proffer reasonable information in a timely manner, as well as the ultimate issuance of
16 policies that—due to lack of clarity—gave Plaintiff no ability to retain certain accounts
17 and forced her into a position of having to weigh statutorily protected leave against
18 possible professional setbacks.

19 In sum, Plaintiff communicated to Defendant that the exercise of her rights under
20 the FMLA was dependent upon information she received for two specific questions: (1)
21 the possible transfer of certain accounts; and (2) her eligibility for commissions.
22 Defendant maintained no written policy on either issue, and failed to promulgate a
23 written policy in a timely manner when Plaintiff sought clarification seven months in
24 advance of her due date.⁹ Defendant then failed to concretely answer Plaintiff’s repeated

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26 ⁸ Although Defendant told Plaintiff that she could return at “any time,” the record
27 does not establish that Defendant gave Plaintiff any idea or timeline of when she would
28 need to return in order to avoid the loss of certain sales accounts.

⁹ When Plaintiff first sought this information from Defendant, her due date was
July 3, 2011.

1 inquiries on the aforementioned issues, and forced Plaintiff to exercise her statutory
2 rights without sufficient knowledge as to the consequences that it would entail. Finally,
3 Defendant belatedly disseminated a policy to Plaintiff that excised certain opportunities
4 from Plaintiff's portfolio based on internal metrics that provided no opportunity for her to
5 terminate her FMLA leave and return to work early, as she informed Defendant she
6 would. Defendant's policy essentially forced Plaintiff to either forego her statutory rights
7 or guess as to the professional consequences, an untenable position that is "willfully
8 indifferent to the FMLA" and not "in good faith."¹⁰ *Gressett v. Cent. Ariz. Water*
9 *Conservation Dist.*, No. CV-12-00185-PHX-JAT, 2015 U.S. Dist. LEXIS 42806, at *8
10 (D. Ariz. Mar. 31, 2015) (citation omitted).

11 For these reasons, the Court concludes that Defendant has not proved by a
12 preponderance of the evidence that its actions were in good faith and that it had
13 reasonable grounds for believing its actions did not violate the FMLA. The Court will
14 therefore award liquidated damages for Plaintiff and against Defendant in amount
15 authorized by 29 U.S.C. § 2617 (a)(1)(A)(iii), \$114,618.

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17 **B. Prejudgment Interest**

18 "Title VII authorizes prejudgment interest as part of the . . . remedy in suits against
19 private employers." *Loeffler v. Frank*, 486 U.S. 549, 557 (1998). Similarly, "[u]nder the
20 FMLA, an employer 'shall be liable' for the pre-judgment interest on the amount of 'any
21 wages, salary, employment benefits, or other compensation denied or lost to an employee
22 by reason of the FMLA violation.'" *Eichenberger v. Falcon Air Express Inc.*, No. CV-14-
23 00168-PHX-DGC, 2015 U.S. Dist. LEXIS 85665, at *20 (D. Ariz. July 1, 2015) (quoting

24 _____
25 ¹⁰ Nothing in the Court's Order should be construed as a determination of whether
26 certain actions by the Defendant constitute a violation of the FMLA. That issue was
27 submitted to the jury, which returned a verdict finding that Defendant had interfered with
28 Plaintiff's rights under the FMLA. The Court's analysis in this Order is confined entirely
to a determination of whether Defendant has shown by a preponderance of the evidence
that its actions were in good faith and that it had reasonable grounds to believe its actions
did not violate the FMLA for the purpose of determining whether Plaintiff is entitled to
liquidated damages under 29 U.S.C. § 2617 (a)(1)(A)(iii).

1 Dotson v. Pfizer, Inc., 558 F.3d 284, 301 (4th Cir. 2009)). Any “award of liquidated
2 damages under the FMLA must also include prejudgment interest.” Id. (citing Dotson,
3 558 F.3d at 301).

4 The Ninth Circuit has established that “the measure of interest rates prescribed for
5 post-judgment interest in 28 U.S.C. [§] 1961(a) is . . . appropriate for fixing the rate for
6 pre-judgment interest in cases . . . where prejudgment interest may be awarded.”¹¹ W.
7 Pac. Fisheries, Inc., 730 F.2d at 1289; see also Van Asdale v. Int’l Game Tech, 763 F.3d
8 1089, 1093 (9th Cir. 2014) (citation omitted). The Ninth Circuit has also found that this
9 interest rate is appropriate “with respect to pre-judgment interest in Title VII back pay
10 cases.” Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 837 (9th Cir. 1984).

11 Accordingly, Plaintiff is entitled to prejudgment interest “calculated at the
12 prevailing rate” set forth in 28 U.S.C. § 1961 on the \$114,618 lost wages award as well
13 as the \$114,618 liquidated damages award. The Court hereby awards \$872.46 in
14 prejudgment on the lost wages award, and \$872.46 in prejudgment interest on the
15 liquidated damages award, for a total of \$1,744.92.¹²

16 17 **III. Conclusion**

18 Based on the foregoing,

19 **IT IS ORDERED** that Plaintiff is awarded liquidated damages in the amount of
20 \$114,618 pursuant to 29 U.S.C. § 2617(a)(1)(A)(iii), bringing the total damages award
21 for Plaintiff and against Defendant to \$229,236.

22 **IT IS FURTHER ORDERED** that Plaintiff is entitled to \$872.46 in prejudgment
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24 ¹¹ “Substantial evidence” establishing that “the equities of th[is] particular case
25 require a different rate” does not exist in this case. W. Pac. Fisheries, Inc. v. SS President
Grant, 730 F.2d 1280, 1289 (9th Cir. 2012).

26 ¹² Plaintiff’s proposing findings included a calculation of prejudgment interest on
27 Plaintiff’s damages that total \$872.46 calculated over a four-year period at the rate of
28 .019% per annum. Defendant has not objected to this calculation and the Court, having
reviewed 28 U.S.C. § 1961 and applicable authorities, believes the calculation to be
correct. Accordingly, the Court accepts Plaintiff’s proposed calculation of prejudgment
interest.

1 interest on the lost wages award, and \$872.46 in prejudgment interest on the liquidated
2 damages award, for a total of \$1,744.92.

3 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
4 judgment in favor of Plaintiff and against Defendant in the amount of \$230,980.92, with
5 post-judgment interest to accrue at the applicable federal rate.

6 Dated this 31st day of March, 2016.

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James A. Teilborg
Senior United States District Judge