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**United States District Court  
Central District of California**

YURIRIA DIAZ, as an individual and on  
behalf of others similarly situated,

Plaintiffs,

v.

MACY'S WEST STORES, INC. dba  
Macy's, an Ohio corporation, and DOES  
1-50, inclusive

Defendants.

Case № 8:19-cv-00303-ODW (MAAx)

**AMENDED ORDER GRANTING  
MOTION TO DISMISS [20]**

**I. INTRODUCTION**

Before the Court is Defendant Macy's West Stores, Inc. dba Macy's ("Macy's") Motion to Dismiss for failure to state a claim and failure to exhaust administrative requirements. (Mot. to Dismiss ("Mot."), ECF No. 20.)<sup>1</sup> For the following reasons, Macy's Motion is **GRANTED**.

**II. BACKGROUND**

On November 20, 2018, Plaintiff Yuriria Diaz—a former retail worker—filed this wage and hour action in the Superior Court of California, on behalf of herself and

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<sup>1</sup> Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 others similarly situated, against her former employer, Macy's. (Notice of Removal  
2 ("Notice") Ex. A ("Compl."), ECF No. 1-1.) On January 22, 2019, Diaz amended her  
3 complaint in the state court proceedings. (See Notice 3, Ex. H ("First Am. Compl."),  
4 ECF No. 1-8.) On February 14, 2019, Macy's removed this action to federal court.  
5 (See Notice, ECF No. 1).

6 On May 6, 2019, the parties filed their Joint Rule 26(f) Report. (See Joint  
7 Report, ECF No. 13.) Therein, the parties explained that the parties' arbitration  
8 agreement requires arbitration of Diaz's individual employment-related claims and  
9 precludes her from proceeding with litigation on a class-wide basis. (Joint Report 3.)  
10 As a result, Diaz sought leave to amend her complaint to dismiss her class and  
11 individual California Labor Code ("Labor Code") claims, and allege only a  
12 representative claim under the Private Attorneys General Act ("PAGA"), Labor Code  
13 section 2698 *et seq.* (Joint Report 3.) The Joint Report, signed and submitted by  
14 Diaz's counsel, stated that Diaz would "not renew her individual claims under the  
15 California Labor Code . . . in this or any other forum" if granted leave to amend.  
16 (Joint Report 3.) The following week, on May 10, 2019, the parties stipulated to  
17 allow Diaz to file a Second Amended Complaint ("SAC"). (Joint Stip. to Am., ECF  
18 No. 17.) The Court granted the stipulation and Diaz filed the operative SAC on May  
19 13, 2019. (SAC, ECF No. 19.)

20 In the SAC, Diaz alleges a single PAGA cause of action premised on various  
21 Labor Code violations, which include: (1) failure to maintain records and provide  
22 accurate itemized wage statements in violation of Labor Code sections 226, 1198, and  
23 Wage Order 7, section 7; (2) failure to pay minimum wages and proper overtime  
24 wages in violation of Labor Code sections 510, 1194, 1198, and Wage Order 7,  
25 section 3; (3) failure to reimburse for all necessary expenditures or losses in violation  
26 of Labor Code section 2802; (4) failure to pay all wages upon termination in violation  
27 of Labor Code section 203; and (5) failure to provide suitable seating in violation of  
28 Wage Order 7, section 14. (SAC ¶ 31(a)–(f).)

1           Macy’s moves to dismiss Diaz’s SAC for lack of standing and failure to exhaust  
2 administrative requirements. (Mot. 10–11.)

### 3                               **III.   LEGAL STANDARD**

4           A court may dismiss a complaint under Federal Rule of Civil Procedure  
5 (“Rule”) 12(b)(6) for lack of a cognizable legal theory or insufficient facts pleaded to  
6 support an otherwise cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901  
7 F.2d 696, 699 (9th Cir. 1988). To survive a dismissal motion, a complaint need only  
8 satisfy the minimal notice pleading requirements of Rule 8(a)(2)—a short and plain  
9 statement of the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The  
10 factual “allegations must be enough to raise a right to relief above the speculative  
11 level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, the complaint  
12 must “contain sufficient factual matter, accepted as true, to state a claim to relief that  
13 is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal  
14 quotation marks omitted).

15           Whether a complaint satisfies the plausibility standard is a “context-specific  
16 task that requires the reviewing court to draw on its judicial experience and common  
17 sense.” *Id.* at 679. A court must construe all “factual allegations set forth in the  
18 complaint . . . as true and . . . in the light most favorable” to the plaintiff. *Lee v. City*  
19 *of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). However, a court need not blindly  
20 accept conclusory allegations, unwarranted deductions of fact, and unreasonable  
21 inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

22           Where a district court grants a motion to dismiss, it should generally provide  
23 leave to amend unless it is clear the complaint could not be saved by any amendment.  
24 *See* Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d  
25 1025, 1031 (9th Cir. 2008). Leave to amend may be denied when “the court  
26 determines that the allegation of other facts consistent with the challenged pleading  
27 could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture*  
28 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Thus, leave to amend “is properly

1 denied . . . if amendment would be futile.” *Carrico v. City and Cty. of San Francisco*,  
2 656 F.3d 1002, 1008 (9th Cir. 2011).

#### 3 IV. REQUEST FOR JUDICIAL NOTICE

4 As a preliminary matter, both parties request that the Court take judicial notice  
5 of various documents. (*See* Macy’s Req. Judicial Notice (“RJN”), ECF No. 21; Diaz  
6 RJN, ECF No. 22-1.) Although a court is generally limited to the pleadings in ruling  
7 on a Rule 12(b)(6) motion, it may consider documents incorporated by reference in  
8 the complaint or properly subject to judicial notice without converting the motion into  
9 one for summary judgment. *Lee*, 250 F.3d at 688–89. The Court may take judicial  
10 notice of “fact[s] . . . not subject to reasonable dispute” because they are “generally  
11 known within the trial court’s territorial jurisdiction” or “can be accurately and readily  
12 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.  
13 Evid. 201. The Court may take judicial notice of “matters of public record” that are  
14 not “subject to reasonable dispute.” *Lee*, 250 F.3d at 689.

15 Macy’s requests the Court judicially notice (1) the parties’ Joint Rule 26(f)  
16 Report, and (2) Diaz’s PAGA Notice. (Macy’s RJN ¶¶ 1–2.) The Court **DENIES**  
17 Macy’s request as to the Joint Rule 26(f) Report in the present matter, as the Court  
18 need not take judicial notice to consider the record in this matter. The Court  
19 **GRANTS** Macy’s request as to Diaz’s PAGA Notice, which is incorporated by  
20 reference in the SAC and not subject to reasonable dispute. (*See* SAC ¶ 33.)

21 Diaz requests the Court judicially notice (1) a redline version of the parties’  
22 Joint Rule 26(f) Report, (2) the parties’ Joint Rule 26(f) Report as filed, (3) Diaz’s  
23 original and a redline version of the parties’ Joint Stipulation to allow the SAC, (4) the  
24 Joint Stipulation as filed, (5) Diaz’s SAC as filed, and (6) Diaz’s PAGA Notice.  
25 (Diaz RJN ¶¶ 1–3.) Macy’s objects to the redline versions of documents. (Macy’s  
26 Objs. to Diaz’s RJN 1, ECF No. 24.) The Court **DENIES** Diaz’s request as to the  
27 Joint Rule 26(f) Report, Joint Stipulation, and SAC because the Court need not take  
28 judicial notice to consider the record in this matter. The Court **DENIES** Diaz’s

1 request as to the redline versions of the Joint Rule 26(f) Report and Joint Stipulation,  
2 as they are not matters of public record free from reasonable dispute or otherwise  
3 properly subject to judicial notice under Federal Rule of Evidence 201. Finally, the  
4 Court **DENIES** as moot Diaz’s request as to the PAGA Notice because the Court  
5 granted Macy’s request for judicial notice of the same document.

## 6 **V. DISCUSSION**

7 Macy’s moves to dismiss Diaz’s PAGA claim as premised on Labor Code  
8 violations on the grounds that Diaz cannot establish Article III standing for a PAGA  
9 representative action. (Mot. 10, 12–22.) Macy’s also moves to dismiss Diaz’s PAGA  
10 claim premised on section 14 of Wage Order 7-2001 (suitable seating claim) on the  
11 grounds that Diaz failed to exhaust administrative requirements. (Mot. 10–11, 22–25.)

### 12 **A. Standing**

13 Macy’s contends Diaz does not qualify as an aggrieved employee and lacks  
14 standing to bring PAGA claims because she effectively dismissed her predicate claims  
15 with prejudice by amending her complaint to delete those claims and vowing to not  
16 renew them. (Mot. 10, 16–21.) Macy’s contends the dismissal of those underlying  
17 claims relinquished Diaz’s standing because she no longer has an injury—viable  
18 Labor Code Claims—as required to be an aggrieved employee. (Mot. 18; Reply 3,  
19 ECF No. 23.)

20 PAGA authorizes an *aggrieved employee* to bring a civil action on behalf of  
21 herself and others to recover civil penalties for Labor Code violations. *See* Cal. Lab.  
22 Code § 2699. An aggrieved employee is “any person who was employed by the  
23 alleged violator and against whom one or more of the alleged violations was  
24 committed.” *Id.* PAGA is simply an enforcement mechanism; it does not create any  
25 new substantive rights or legal obligations. *Julian v. Glenair, Inc.*, 17 Cal. App. 5th  
26 853, 871 (2017) (quoting *Amalgamated Transit Union, Local 1756, AFL-CIO v.*  
27 *Superior Court*, 46 Cal. 4th 993, 1003 (2009)). Consequently, once violations  
28 underlying a PAGA claim are dismissed with prejudice and an employee can no

1 longer maintain a viable Labor Code-based claim, the employee is no longer an  
2 “aggrieved employee” and lacks Article III standing to maintain a PAGA claim. *Kim*  
3 *v. Reins Int’l Cal., Inc.*, 18 Cal. App. 5th 1052, 1056, 1058–59 (2017).

4 Rule 15(a) allows a plaintiff to amend a complaint to dismiss less than all  
5 claims if the opposing party gives written consent or the court grants leave to amend.  
6 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 (9th Cir. 1988). If the amended  
7 pleading does not reallege claims from the original pleading that were voluntarily  
8 dismissed, those claims are waived. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th  
9 Cir. 2012). A party’s dismissal of claims and avowal on the record not to bring them  
10 again functions as a dismissal with prejudice. *Star Fabrics v. Monroe & Main, Inc.*,  
11 No. CV 14-7125-MWF (Ex), 2015 WL 12811249, \*5 (C.D. Cal. Jan. 30, 2015); *see*  
12 *also Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist.*, Nos. 09-cv-2324 JLS  
13 (CAB), 09-cv-2334 JLS (CAB), 2011 WL 6182423, \*12 (S.D. Cal. Dec. 13, 2011)  
14 (citing *Campbell v. Altec Indus.*, 605 F.3d 839, 841 n.1 (11th Cir. 2010)).

15 Diaz asserts that she maintains standing as an aggrieved employee because the  
16 Labor Code violations she suffered were neither settled nor dismissed with prejudice.  
17 (Opp’n to Mot. (“Opp’n”) 6, ECF No. 22.) However, she informed the Court that, if  
18 granted leave to amend, she would “dismiss[] her class and individual Labor Code  
19 claims . . . [and] not renew [them] in this or any other forum.” (Joint Report 3.) The  
20 Court granted Diaz leave to file a SAC, the only condition to her avowal, and Diaz’s  
21 subsequent SAC omitted all class and individual Labor Code claims. Accordingly,  
22 Diaz’s Labor Code claims have been dismissed with prejudice.

23 Diaz argues that Rule 41 applies such that any dismissal must be without  
24 prejudice. (Opp’n 9–10.) However, voluntary dismissal under Rule 41 may not be  
25 used to dismiss fewer than all claims against a single defendant. *See Ethridge*, 861  
26 F.2d at 1392. In circumstances such as this, where fewer than all claims are  
27 dismissed, Rule 15—not Rule 41—governs. *Id.* As such, Diaz’s exclusion of the  
28 original individual and class claims from the SAC, together with her avowal to not

1 bring them again, effectuated a dismissal of those claims with prejudice.  
2 Consequently, Diaz is no longer an aggrieved employee and lacks Article III standing  
3 to bring the PAGA claim.

4 Accordingly, Macy's Motion to Dismiss Diaz's PAGA claim premised on Labor  
5 Code violations is **GRANTED**. As no amendment could remedy this deficiency, the  
6 Court does not grant leave to amend.

7 **B. Suitable Seating Wage Order Claim**

8 Macy's argues Diaz is barred from proceeding with the suitable seating PAGA  
9 claim premised on Wage Order 7 because Diaz failed to satisfy the notice  
10 requirements of Labor Code section 2699.3. (Mot. 22.) However, the Court finds  
11 Diaz's suitable seating claim fails for other, more fundamental reasons.

12 "PAGA does not create a private right of action to directly enforce a wage order  
13 promulgated by the [Industrial Welfare Commission]." *Flowers v. Los Angeles Cty.*  
14 *Metro Transp. Auth.*, 243 Cal. App. 4th 66, 86 (2015). Instead, an employee may  
15 enforce a wage order "only by bringing a claim under the Labor Code." *Nunez v.*  
16 *Nevell Grp.*, 35 Cal. App. 5th 838, 846 (2019) (citing *Flowers*, 243 Cal. App. 4th at  
17 74, 86). As discussed above, Diaz has no viable Labor Code claims. As such, she has  
18 no basis through which to enforce the wage order. Accordingly, Diaz's suitable  
19 seating claim must fail with her Labor Code claims.

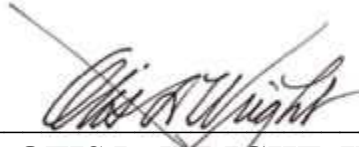
20 For this reason, Macy's Motion to Dismiss Diaz's suitable seating PAGA claim  
21 premised on Wage Order 7 is **GRANTED**. As above, no amendment could remedy  
22 this deficiency, so the Court does not grant leave to amend.

1 **VI. CONCLUSION**

2 For the reasons discussed above, the Court **GRANTS** Macy's Motion to  
3 Dismiss without leave to amend. (ECF No. 20.) The Court will issue judgment.  
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5 **IT IS SO ORDERED.**

6  
7 December 6, 2019

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10 **OTIS D. WRIGHT, II**  
11 **UNITED STATES DISTRICT JUDGE**  
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