

September 6, 2012

VIA FEDEX

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

SUPREME COURT
FILED

SEP - 7 2012

Frank A. McGuire Clerk

Re: Susan J. Peabody v. Time Warner Cable Inc.
No. S204804

Deputy

To The Honorable Supreme Court of California:

This firm represents Time Warner Cable Inc. ("TWC"). Pursuant to Rule 8.548(e)(1) of the California Rules of Court, please accept this letter as TWC's opposition to the acceptance of the certification request from the United States Court of Appeals for the Ninth Circuit.¹

The Ninth Circuit has requested that the Supreme Court of California answer the following question:

To satisfy California's compensation requirements, whether an employer can average an employee's commission payments over certain pay periods when it is equitable and reasonable to do so.

TWC submits that longstanding decisions of the California Supreme Court provide sufficient guidance to allow the Ninth Circuit to render a decision on the instant issue. Long ago, the Court instructed that federal law should guide the interpretation and application of California's labor legislation. That is, this Court frequently refers to "federal precedent in interpreting parallel language in state labor legislation." *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 616, 116 Cal. Rptr. 507 (1974); *Building Material & Constr. Teamsters' Union v. Farrell*, 41 Cal. 3d 651, 658, 224 Cal. Rptr. 688, 692 (1986) ("Federal decisions have frequently guided our interpretation of state labor legislation the language of which parallels that of federal statutes"). In keeping with this principle, California courts

¹ TWC sends the original and eight copies of this letter.

rely on federal authority when interpreting California wage and hour statutes and wage orders.

In fact, shortly after the Ninth Circuit certified the above question and after remand from this Court, the California Court of Appeal cited federal law in applying the commission-paid exemption at issue here and affirmed the dismissal of the plaintiff's state law overtime claim. *Muldrow v. Surrex Solutions Corp.*, No. D057955, 2012 WL 3711553, at *9, ___ Cal. Rptr. 3d ___ (Ct. App. Aug. 29, 2012). Similarly, in *Advanced Tech Sec. Services, Inc. v. Superior Court*, 163 Cal. App. 4th 700, 707-08, 77 Cal. Rptr. 3d 757, 762-63 (2008), the court, relying on *Fire Fighters Union*, applied the Fair Labor Standards Act ("FLSA") and its supporting regulations to find that the employer had not violated California Labor Code Section 510. Further, in *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal. App. 3d 16, 31, 38-42, 273 Cal. Rptr. 615, 622-23, 628-31 (1990), the court applied the FLSA, federal regulations and federal case law to interpret a California wage order "closely modeled after" the FLSA.

The California labor law at issue in the case before the Ninth Circuit -- the commission-paid exemption in Section 3(D) of IWC Wage Order 4-2001 -- not only parallels the federal commission-paid exemption found at 29 U.S.C. § 207(i), it is even broader because Section 3(D) is not limited to retail establishments. In this instance, federal law answers the certified question in the affirmative and establishes the common-sense approach of allocating commissions to weeks over which they were earned. Indeed, 29 C.F.R. § 778.120 specifically addresses and resolves the issue. This section - addressing "deferred commission payments not identifiable as earned in a particular week" - provides that:

For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

29 C.F.R. § 778.120(a)(1). *See also Schwind v. EW & Associates, Inc.*, 371 F. Supp. 2d 560, 567-68 (S.D.N.Y. 2005) (applying 29 C.F.R. § 778.120 and holding that employee was exempt from overtime provisions of FLSA under commissions paid exemption based on allocation of commission to each week).

Here, because the commissions paid to Peabody were calculated on a broadcast month consisting of a specific number of weeks (either 4 or 5 weeks), 29

C.F.R. § 778.120 provides the necessary guidance to answer the certified question. Other federal courts have taken similar approaches and have consistently held that commission payments should be allocated over the pay periods in which the commissions were earned. *See Cantu-Thacker v. Rover Oaks, Inc.*, Civil Action No. H-08-2109, 2009 WL 1883967, * 3 (S.D. Tex. June 30, 2009) (granting summary judgment to employer on federal commissions paid exemption because plaintiff would have had to have worked 91 hours per week to not make 1.5 times minimum wage).

Thus, because California courts look to federal law for guidance when interpreting similar state labor legislation and federal law has addressed the issue raised by the certified question, certification to this Court is not necessary. Accordingly, TWC respectfully requests that the Court decline to accept the certified question.

In the event this Court accepts the certified question, TWC proposes a slightly different wording of the question, as follows:

To satisfy California's compensation requirements, whether an employer can allocate an employee's commission payments to the pay periods for which they were earned.

The foregoing alternative wording substitutes the concept of "allocation" for "averaging" because "allocate" is the proper term under the facts of this case. TWC did not "average" Plaintiff's commission compensation; TWC merely allocated the commissions to the weeks over which they were earned. Peabody was paid commissions on a monthly basis based on a broadcast month, which consisted of exactly four or five weeks, depending on the month. For example, Peabody earned commissions of \$11,749.63 for the four weeks of the February broadcast month. In its analysis, TWC merely allocated the amount of \$2,937.41 to each of the four weeks in that broadcast month. TWC does not argue that commissions should be averaged -- that is, TWC does not argue that the approximate \$57,000 in commissions paid to Peabody during her 10 months with the Company should be averaged over the total number of weeks she worked during that 10 month period. Instead, TWC merely allocated a portion of each monthly commission to the four or five weeks of the broadcast month for which the commission was earned, which comports with the federal law on which

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California law is based. Accordingly, TWC requests that if this Court accepts the certified question, that it accept the alternative wording set forth above.

Respectfully,

A handwritten signature in cursive script, appearing to read "J. Scott Carr".

J. Scott Carr

California Bar No. 136706

JSC/spw

1 **PROOF OF SERVICE**

2 **SUPREME COURT OF THE STATE OF CALIFORNIA**
3 **NO. S204804**

4 I am employed in the County of Fulton, State of Georgia; I am over the age of 18 and not a
5 party to the within action; my business address is 999 Peachtree Street, NE, 26th Floor, Atlanta,
6 Georgia 30309.

7 On September 6, 2012, I served the foregoing document(s) described as Time Warner
8 Cable, Inc.'s Letter Opposing Acceptance of Certified Question on the interested parties to this
9 action by delivering a copy thereof in a sealed envelope addressed to each of said interested
10 parties at the following address(es): SEE ATTACHED LIST

11 **(BY MAIL)** I am readily familiar with the business practice for collection and processing of
12 correspondence for mailing with the United States Postal Service. This correspondence shall
13 be deposited with the United States Postal Service this same day in the ordinary course of
14 business at our Firm's office address in Los Angeles, California. Service made pursuant to
15 this paragraph, upon motion of a party served, shall be presumed invalid if the postal
16 cancellation date of postage meter date on the envelope is more than one day after the date of
17 deposit for mailing contained in this affidavit.

18 **(BY EMAIL SERVICE)** I caused such document to be delivered electronically via e-mail
19 to the e-mail address of the addressee(s) set forth in the attached service list.

20 **(BY OVERNIGHT DELIVERY)** I served the foregoing document by FedEx, an express
21 service carrier which provides overnight delivery, as follows: I placed true copies of the
22 foregoing document in sealed envelopes or packages designated by the express service
23 carrier, addressed to each interested party as set forth above, with fees for overnight delivery
24 paid or provided for.

25 **(BY FACSIMILE)** I caused the above-referenced document to be transmitted to the
26 interested parties via facsimile transmission to the fax number(s) as stated on the attached
27 service list.

28 (State) I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

Executed on September 6, 2012, at Atlanta, Georgia.


Bonnie Westenberger

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