S204804

IN THE SUPREME COURT OF CALIFORNIA

SUSAN J. PEABODY, Plaintiff and Appellant,

vs.

TIME WARNER CABLE, INC., Defendant and Respondent.

SUPREME COURT
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Pursuant to Request to Decide Question of California Law

Ninth Circuit No. 10-56846

REPLY BRIEF OF APPELLANT-PETITIONER SUSAN J. PEABODY

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I. INTRODUCTION

TWC's proposed version of the law is utterly untenable as a rule of general application. TWC's proposal would result in a proliferation of arbitrary and artificial wage "allocation" schemes by employers and would impermissibly undermine contractual and statutory wage rates. In the end it would harm the integrity of the entire employment relationship itself as neither party could be sure which commission wages should be allocated to which hours of work. By contrast, the interpretive position espoused by the DLSE is clear, logical and comports with California law. The DLSE position is that "every workweek must stand alone for purposes of minimum wage and overtime computation" and that the Wage Order's minimum wage thresholds "must be satisfied in each workweek and paid in each pay period."

This Court should adopt the DLSE's interpretation as persuasive and consistent with California law. As a result, this Court should also answer the certified question in the negative by holding that: For purposes of meeting the minimum wage rate requirements of Wage Order Sections 3(D) and 4(B), each workweek and pay period must stand alone, and an employer is therefore precluded from meeting these minimum wage rates by reallocating or averaging commission payments which are due and payable in later pay periods.

II. ARGUMENT

A. The Interpretive Guidance of The DLSE, Whose Authority TWC Concedes, Prohibits the Re-Allocation of Wages Between Workweeks and Pay Periods.

TWC repeatedly acknowledges the authority of the Enforcement Policies and Interpretations Manual issued by the Labor Commissioner's enforcement arm, the Division of Labor Standards Enforcement ("DLSE").[1]

Having itself advocated for the authoritative nature of the DLSE's interpretative guidance TWC can hardly dispute that the Manual's guidance should not be followed in this case. In that regard, the DLSE's interpretive guidance concerning the elements of the Wage Order Section 3(D) exemption could hardly be clearer. As the DLSE explains:

> It is important to note that certain requirements must be met in order to comply with California law and meet the [Section 3(D)] exemption criteria:

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[1] See e.g., Opposition Br. at p. 24 (citing the DLSE Manual as authority for "look[ing] to federal law when applying the commissions paid exemption.");

1. In order to comply with the requirements of the exemption and of L.C. § 204, for each workweek in the pay period the earnings of the employee, whether actual commissions or a guaranteed draw for the workweek against commissions to be earned within such work week, must exceed 1 .5 times the minimum wage for each hour worked during the pay period.

2. As stated above, ***the payment of the earnings of more than 1.5 times the minimum wage for each hour worked must be made in each pay period. Therefore, it is not permissible to defer any part of the wages due for one period until payment of the wages due for a later period.***

3. ***Compliance with the requirements of the exemption is determined on a workweek basis. The minimum compensation component of the exemption must be satisfied in each workweek and paid in each pay period.***[2]

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[2] DLSE Manual § Section 50.6.1.

Section 50.6.4.1 of the DLSE Manual provides that the employer is permitted to pay the applicable minimum wage rate of $12.00 for "each hour worked" in the workweek by means of a "guaranteed draw." But this "guaranteed draw" provision merely amplifies the requirement that each workweek and pay period must stand alone, with no allocation or averaging of wages between these time periods.

> To satisfy the exemption, however, for each workweek the employee must be paid a guaranteed draw that exceeds 1.5 times the minimum wage and that can be recovered only from commissions earned in that workweek and not from commissions earned in future workweeks. This is so because ***every workweek must stand alone for purposes of minimum wage and overtime computation.***[3]

As noted in Peabody's Opening Brief, the DLSE's administrative interpretation of its own Wage Order is entitled to deference and is, in any event, well-reasoned and manifestly correct. TWC has not challenged the reasoning or authority of the DLSE Interpretations cited above. As a result, TWC can hardly contend that this court should not endorse the DLSE's interpretation that California

[3] DLSE Manual Section 50.6.4 (Emphasis added).

law prohibits TWC's from attempting to cure sub-minimum pay periods by re-allocating commission wages paid in above-minimum pay periods.

TWC admits that it failed to pay Peabody $12.00 per hour for each hour worked by Peabody in all of her pay periods. Sections 50.6.1 and 50.6.4.1 of the DLSE Manual unequivocally provide that this fact is necessarily fatal to TWC's exemption defense in each of these sub-standard pay periods.

The same analysis applies to those pay periods in which, based on the number of hours worked, Peabody's meager weekly base pay failed to satisfy the minimum $8.00 per hour threshold of Wage Order Section 4(B).[4]

B. Commissions Are Not Exempted From California's Prohibition Against Averaging or Re-Allocating Wages Between Workweeks and Pay Periods.

A consistent theme of TWC's briefing is that commission wages are somehow "special" and fundamentally different from hourly wages for purposes of assessing compliance with Wage Order Sections 3(D) and 4(B).

[4] See DLSE Manual Section 44.2-44.2.1.

TWC argues, for example, that the prohibition on shifting/averaging/reallocating wages between time periods to meet statutory wage obligations should not apply to commissions. (Oppo at 32-33.) Nothing in the Labor Code or Wage Orders supports the contention that some forms of "wages" are subject to a different standard. Indeed, this same argument was persuasively rejected in the recent California Appellate opinion of *Gonzalez v. Downtown LA Motors.*[5]

In *Downtown LA Motors* the employer paid flat rates to its mechanics for specified repair jobs. The pay plan, however, did not provide separate compensate for non-repair work. As here, the employer argued that because the flat rate compensation was not paid on an hourly basis it could be reallocated toward hours in which no compensation was paid. The Court emphatically rejected this argument as "contrary to the plain language of the wage order."

> ***By its terms, Wage Order No. 4 does not allow any variance in its application based on the manner of compensation.***
> Subdivision 1 of the wage order states that subject to exceptions that are not applicable here: "This order shall apply to all persons employed in professional, technical, clerical,

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[5] *Gonzalez v. Downtown LA Motors,* 215 Cal.App.4th 36, 2013 WL 1316514 (2013).

> mechanical, and similar occupations *whether paid on a time, piece rate, commission, or other basis*." [Citation.] ***Subdivision 4(B) similarly requires uniform application of the minimum wage requirements regardless of how an employee is paid***: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, *whether the remuneration is measured by time, piece, commission, or otherwise.*" [Citation.] That DTLA compensated its technicians on a piece-rate basis is not a valid ground for varying either the application or interpretation of the wage order.[6]

The *Downtown LA Motors* Court thus determined on the merits that that the pay plan violated Section 4(B) because it purported to maintain the minimum wage rate of $8.00 per hour only by re-allocating some of the repair time compensation toward time periods when no repair work was being done.

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[6] *Gonzalez v. Downtown LA Motors, supra,* 215 Cal.App.4th at __, 2013 WL 1316514 at *7 (Emphasis added).

The same analysis applies here. The only way that TWC can purport to maintain the minimum wage rates required by Sections 3(D) and 4(B), is by reallocating and averaging wages between pay periods. It is immaterial that the wages being reallocated between time periods are paid as commissions. The Wage Order "does not allow any variance in its application based on the manner of compensation." Thus, TWC's pay plan is no more permissible than the reallocation plans rejected in *Armenta v. Osmose* and *Gonzalez v. Downtown LA Motors*.

C. Contractual Commission Terms Cannot Alter The Labor Code's Prohibition Against Reallocating or Averaging Wages Between Pay Periods And Workweeks.

TWC notes that California law allows parties to contractually define the point at which commissions are earned. But this hardly supports TWC's conclusion that California law must therefore permit commission wages to be reallocated to prior sub-minimum pay periods in order to bring them into compliance.

As a matter of contract law, parties may agree to all manner of commission, incentive, or profit-sharing plans whose qualifying criteria might require weeks, months, or even years to perfect. But such private contract arrangements cannot supersede the minimum wage rate standards of the Labor Code and Wage Order. Indeed, by statute, the protective minimum compensation rates applicable to each

separate workweek and pay periods cannot be affected by "any agreement to work for a lesser wage."[7]

Labor Code § 204 states that "All wages, other than [certain inapplicable exceptions], earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." No exception is provided for "commissions."

The parties' contract may, of course, define certain timing requirements or conditions precedent to the vesting of a commission. But once the commission wages have been definitively "earned" under the terms of the contract they are subject to generally applicable Labor Code and Wage Order provisions respecting the payment of wages, including Labor Code §§ 221-223 and § 204. Indeed, the DLSE Enforcement Manual specifically provides that "Wages must be paid according to a regularly-set schedule" and that "The Legislature has established the general guidelines for payment in Labor Code § 204." (DLSE Man. at 5.2.)

TWC's cited authority does not support its reallocation argument. For example, Section 5.2.5 of the DLSE Manual merely points out that commissions are not normally due and payable until it can be determined whether the employee has satisfied all of the

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[7] Labor Code § 1194; See also Labor Code § 206.5 ("A release required or executed in violation of the provisions of this section shall be null and void.").

required contract terms for payment.[8] Likewise, the 1993 DLSE Opinion Letter cited by TWC merely states that, aside from car salesmen, "the commissions of other salespersons are left to the conditions of the contract of employment."[9] The opinion letter merely concludes that "This office will not attempt to give an opinion regarding whether the conditions precedent your client places on the 'earning' of the commission would be valid."[10]

In any event, it is pointless for TWC to argue that the DLSE has impliedly endorsed the reallocation of commission wages as a method of complying with Wage Order Sections 3(D) or 4(B). This is because, as noted above, the DLSE Enforcement Manual itself, at Sections 50.6.1 and 50.6.4, *explicitly and unambiguously* reject TWC's position and instead require the exact opposite result – i.e., that ***The minimum compensation component of the exemption must be satisfied in each workweek and paid in each pay period.***

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[8] See DLSE Man. 5.2.5 ("In some instances commission wages are not ascertainable at the time of a sale or transaction and must be calculated based on later developments (*i.e.*, receipt of payment, shipping, etc.). Commission wages are due and payable when they are reasonably calculable."

[9] March 8, 1993 DLSE Opinion Letter, at p. 3.

[10] *See Id.* at p. 4 ("This office will not attempt to give an opinion regarding whether the conditions precedent your client places on the 'earning' of the commission would be valid.").

D. TWC's Citation to FLSA Authorities and "Regular Rate" Cases Are An Irrelevant Distraction.

1. The Very Authority Cited By TWC Rejects FLSA Wage Averaging.

TWC argues at length that federal law should apply in this case. In particular, TWC argues that the DLSE Manual is authoritative and approves reliance on federal decisions construing Section 7(i) of the FLSA. This argument is a mere distraction. The cited DLSE provision is clear, however, that such reliance on federal law is only appropriate "[t]o the extent not inconsistent with California overtime law and policy." However, "A review of [California] labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally." And, in the present context, "Federal law provides no analogous provisions to sections 221-223," which prohibit the very reallocation advocated by TWC. Federal law is therefore plainly inapplicable to the question at bar.

Indeed, as noted in Section II(A), supra, the same DLSE Manual relied upon by TWC directs that under California law "every workweek must stand alone for purposes of minimum wage and overtime computation" and that as a result "The minimum compensation component of the [Section 3(D)] exemption must be satisfied in each workweek and paid in each pay period." Having acknowledged the authority of the DLSE's interpretative guidance TWC cannot be heard to argue that federal law may contradict it.

Furthermore, as explained in Peabody's Opening Brief, even under the FLSA the federal regulations and authorities cited by TWC would only apply in the unusual circumstance – not present here – in which the parties had never established a specific pay period for earned wages. Because California law is more protective and materially different in prohibiting wage averaging, regulations and case law decided under the FLSA carry no weight as support for such a rule in the present case.

2. Determining an Employee's "Regular Rate" For Purposes of Calculating the *Amount* of His *Additional* Overtime Premium Is Irrelevant to the Present Dispute.

TWC spends a significant portion of its brief arguing that averaging or allocating wages between pay periods is not only permissible, but "required." TWC is referring, however, to the calculation of an employee's "regular rate" for purposes of fixing the premium rate due by statute for his overtime hours. For example, if an employee's hourly compensation is retroactively increased from $10.00 to $12.00, the employee will receive the increased compensation for all hours worked in the past. In addition, however, this increase in his straight-time or "regular rate" will also necessarily increase his premium rate for any overtime hours during this same time period from $15.00 to $18.00 (assuming a time and-one-half overtime rate).

Such a retroactive calculation of an employee's "regular rate" has nothing to do with the wage "allocation" or averaging at issue here. To begin with, the calculation and payment of overtime wages based on the employee's "regular rate" is done exclusively for the benefit of the employee. The duty to calculate and pay these wages is mandated by a Labor Code § 510(a), and is entirely separate and apart from the statutory duties to timely pay minimum wage thresholds. Moreover, the "regular rate" calculation has nothing to do with California's prohibition against wage averaging or deduction under Labor Code §§ 221-223. This is because no earned compensation is ever deducted from the employee in calculating his regular rate. Rather, the employee retains all of his additional straight-time compensation and in addition receives a separate increase in his overtime premium for each overtime hour worked in the applicable time period.

Any discussion of the "regular rate" calculation is therefore yet another red herring with no application to the certified question.

E. TWC's Proposal To Reallocate and Average Peabody's Commissions Across Arbitrarily Designated Workweeks Is Contrary To California Law and Common Sense.

As discussed, California law – and in particular Labor Code § 204 and §§221-223 – prohibit employers from meeting contractual or statutory pay rates by reallocating or averaging wages across different workweeks and pay periods. TWC's proposal for reallocating and

averaging Peabody's commissions perfectly illustrates why the prohibition applies here.

TWC's contention is that it paid Peabody $12.00 per hour for all hours that she worked in every work week and pay period. It arrives at this conclusion by proposing that it may "allocate[] each monthly commission payment to the four or five weeks of the broadcast month for which that commission was earned."[11]

As a specific example of its proposal, TWE points to a commission payment of $11,749.63 made in early 2009.[12] According to the contemporaneous wage statement issued by TWC, this payment was for wages earned during the pay period of March 6, 2009 to March 19, 2009.[13] In its brief, however, TWC proposes that this March 19, 2009 payment should be reallocated and averaged across a different set of workweeks as follows:

> Peabody earned commissions of $11,749.63 for the four weeks of the February broadcast month. TWC then, as required by California and federal law, allocated the amount of $2,937.41 (1/4 of the commissions earned in that broadcast month) to each of the four weeks in that broadcast month.[14]

[11] Respondent's Br. at 32.

[12] Id. at 31-32.

[13] ER, 118:8-22; 170.

[14] Respondent's Br. at 31-32.

As explained in greater detail below, any attempt to shoehorn its wage averaging proposal into the well-settled requirements of California contract law and Labor Code provisions is futile. TWC's proposal is useful however as an illustration of why California law cannot be construed to permit employers to unilaterally engage in arbitrary and self-serving "allocations" of their employees' wages.

1. <u>TWC's Proposed Allocation and Averaging Is Inconsistent With The Parties' Commission Contract.</u>

TWC's proposed "allocation" is not being represented as a part of the parties' actual commission agreement or contemporaneous dealings. Rather, it is an after-the-fact rationalization by TWC to excuse the sub-standard wage rates paid in a majority of Peabody's pay periods.

TWC acknowledges that the terms by which commissions are earned is defined by the parties' contract.[15] However, TWC presented no evidence (nor could it) that the parties' commission agreement provides for this *pro rata* averaging of wages between prior workweeks. TWC's wage averaging proposal is thus *prima facie* invalid where, as here, there is no evidence of any express or implied mutual agreement to deem Peabody's commissions to have been earned in this fashion. And this ignores for the moment that such an agreement would be unenforceable in any event. (See Section C, *ante*).

Likewise, Labor Code § 226(a), requires TWC to issue accurate, itemized wage statements for each pay period listing, *inter alia,* the "net

[15] Respondent's Br. at 23.

wages earned" and "the inclusive dates of the period for which the employee is paid." TWC's contemporaneous pay statement to Peabody represent that the $11,749.63 commission payment is earned in the current pay period. TWC did not purport to claim in its pay statements that these wages had been earned on a *pro rata* basis over prior workweeks.

Thus, TWC's proposed version of the law is inconsistent with the rule that the accrual and earning of commission wages is determined by the parties' contract, not by an arbitrary post-hoc allocation by the employer.

2. TWC's Proposed Allocation and Averaging Does Not Compensate Peabody's Actual Hours Worked At The Applicable Minimum Wage Rate.

Furthermore, even if TWC's wage averaging proposal reflected the parties' actual agreement (which it does not), it is still plainly contrary to both the letter and purpose of the Labor Code. The express purpose of the minimum wage rate thresholds established by Wage Order Sections 3(D) and 4(B) are to ensure that minimum rates of pay are made for the actual hours worked by the employee.[16]

By contrast, TWC's proposed *pro rata* averaging of Peabody's commissions over prior workweeks has no logical nexus to the hours of work that Peabody actually performed to earn these wages. It is

[16] *Armenta v. Osmose, supra;* DLSE Man. §§ *50.6.1; 50.6.4.*

entirely artificial and contrary to California law to arbitrarily assign a commission payment to hours of work that had no connection to the generation of the commission.

For example, TWC's commissions were paid based on the date that radio commercials were aired -- not on the date that Peabody performed the labor that generated the commission. Thus, the $11,749.63 commission payment in March 2009 was likely based on sales made in January which, in turn, were based on sales efforts performed in November or December of 2008. By the same token, the work performed by Peabody in February 2009 presumably had nothing to do with generating the $11,749.63 sales commission which TWC would allocate to those workweeks.

It is therefore incorrect to assert that labor performed by Peabody in February is the same labor "for which" the $11,749.63 commission is being paid. TWC's proposal to average this commission payment across all hours worked by Peabody in February 2009 is therefore improper "wage averaging."

Under Wage Order Section 4(B) and 3(A), Peabody was entitled to a minimum compensation rate of $8.00 and $12.00, respectively, for each hour worked in every pay period. By deducting a portion of the $11,749.63 contractually earned in March 2009 and averaging it across the four workweeks in February TWC has necessarily deducted from the wages contractually earned by Peabody in the March 6-March 19 pay period. As the Court explained in

Downtown LA Motors, "Averaging piece-rate wages over total hours worked results in underpayment of employee wages required 'by contract' under Labor Code section 223, as well as an improper collection of wages paid to an employee under Labor Code Section 221."[17]

TWC's proposed rule is that employers should be allowed to unilaterally "allocate" commission wages across prior workweeks as necessary to meet the minimum wage thresholds of Wage Order Sections 3(D) and 4(B). As demonstrated this result is plainly contrary to the letter and spirit of California law.

III. CONCLUSION

TWC's proposed version of the law is utterly untenable as a rule of general application. TWC's proposal would result in a proliferation of arbitrary and artificial wage "allocation" schemes by employers and would impermissibly undermine contractual and statutory wage rates. In the end it would harm the integrity of the entire employment relationship itself as neither party could be sure which commission wages should be allocated to which hours of work. By contrast, the interpretive position espoused by the DLSE is clear, logical and comports with California law. The DLSE position is that "every workweek must stand alone for purposes of minimum wage and overtime computation" and that the Wage Order's minimum wage

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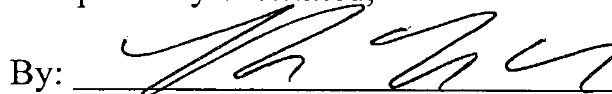
[17] *Gonzalez v. Downtown LA Motors, supra,* 215 Cal.App.4th at __, 2013 WL 1316514 at *8 (2013).

thresholds "must be satisfied in each workweek and paid in each pay period."

This Court should adopt the DLSE's interpretation as persuasive and consistent with California law. As a result, this Court should also answer the certified question in the negative by holding that: For purposes of meeting the minimum wage rate requirements of Wage Order Sections 3(D) and 4(B), each workweek and pay period must stand alone, and an employer is therefore precluded from meeting these minimum wage rates by reallocating or averaging commission payments which are due and payable in later pay periods.

Respectfully submitted,

Dated: May 2, 2013 By: 

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Pursuant to California Rules of Court 8.2084(c)(1), the foregoing Reply Brief of Appellate-Petitioner Susan J. Peabody contains 4,190 words (including footnotes, but excluding the table and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

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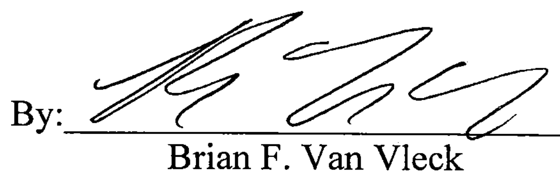
By: 

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6310 San Vicente Blvd., Suite 430, Los Angeles, California 90048. On May 2, 2013, I served the foregoing document described as: **REPLY BRIEF OF APPELLATE-PETIONER SUSAN J. PEABODY** on the interested party below, using the following means:

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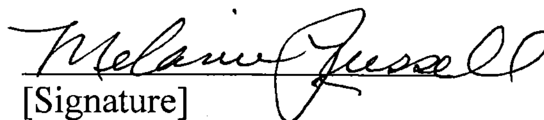
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