S204804

IN THE SUPREME COURT OF CALIFORNIA

SUSAN J. PEABODY, Plaintiff and Petitioner

v.

TIME WARNER CABLE, INC., Defendant and Respondent.

Pursuant to Request to Decide Question of California Law
Ninth Circuit No. 10-56846

PETITIONER'S BRIEF ON THE MERITS

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I. INTRODUCTION

To be exempt from payment of mandatory overtime wages under the so-called "commissioned sales" exemption of Wage Order Section 3(D) an employee's earnings must "exceed one and one-half (1 1/2) times the minimum wage," or $12.00 per hour. In most of Plaintiff-Petitioner's bi-weekly pay periods however she earned less than $8.55 per hour worked. This affirmative exemption defense is therefore only available to Plaintiff's employer, Time Warner Cable ("TWC"), to the extent that it is permitted to reallocate commission wages earned in later pay periods toward the prior substandard pay periods. Reallocating and averaging wages in this manner is also the only means by which TWC may avoid liability for non-payment of the base minimum wage of $8.00 per hour in all pay periods.

Under well-established principles of California wage law, however, an employee's seven-day workweek and bi-weekly pay period are the time periods over which these minimum compensation thresholds must be earned and paid, respectively. This creates a bright-line rule which may be easily assessed based on the statutorily required pay statements applicable to each individual pay period. Requiring compliance in each workweek and pay period is also consistent with the remedial goal of ensuring consistent, subsistence-level wage payments to employees. It is also consistent with the reporting provisions of the Labor Code which are calculated to allow employees, courts, and enforcement agencies to easily assess whether minimum labor standards have been satisfied in each pay period.

By contrast, assessing compliance according to an employer's after-the-fact allocation of earnings to prior pay periods is contrary to California law. This proposed rule would contravene the fundamental purpose of these remedial provisions by subjecting employees to uncertainty and the risk of extended periods of subminimum compensation. In addition, wage allocation would confuse the calculation of minimum wages by embroiling the parties in endless disputes over amorphous accrual accounting issues that would render the provisions impractical to enforce.

It is in this context that the United States Court of Appeals for the Ninth Circuit, has certified the question: "May an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?" As it applies to the claims at issue in this case, the answer must be "No."

II. QUESTION PRESENTED

In the context of compliance with the minimum wage thresholds established by Wage Order 4-2001, Sections 3(D) and 4(C): "May an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?"

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Plaintiff was employed by "Time Warner Cable" (TWC) as an Account Executive between July 15, 2008 and May 15, 2009. Plaintiff was a commissioned salesperson who was responsible for selling advertising time on TWC's various cable channels. (Excerpts of Record ("ER") at 121:3-5.)

As a condition of her employment Plaintiff was required to agree to TWC's standard commission policy, which she executed on July 15, 2008. Under this agreement, commissions would be guaranteed for the first three months of her employment and would thereafter be based on the amount of her "monthly billings" according to a stated commission schedule. (ER, 121:19-24.)

In addition to these periodic commission payments, Plaintiff received base pay calculated as $9.61 per hour for 40 hours per week. Plaintiff was not paid additional wages for hours worked in excess of eight per day or 40 per week. (ER, 122:15-25.) Plaintiff was paid just $769.23 in the majority of her bi-weekly pay periods and worked *at least* 45 hours per workweek. (ER, 118:8-22; 170). During weeks in which Plaintiff worked more than 48 hours and received only her weekly base pay, her hourly compensation for the week was below $8.00 per hour.

Although Plaintiff regularly worked more than eight hours per day and 40 hours per week she was never paid premium overtime pay under Labor Code §510. (ER, 122:21-25.) As an affirmative defense to this claim, TWC alleged that Plaintiff was

exempt from overtime throughout her employment under Section 3(D) of the applicable Wage Order. Based on the current California minimum wage of $8.00 per hour,[1] Section 3(D) thus mandates an enhanced minimum wage rate of $12.00 per hour. Plaintiff contended below that her overtime claim was not barred by the exemption because TWC had failed to pay her sufficient wages to claim the exemption in the majority of workweeks and pay periods.

Plaintiff received biweekly pay statements generated by TWC. However, these did not set forth her hours of work.

B. PROCEDURAL BACKGROUND

On July 31, 2009, Plaintiff Susan J. Peabody filed a Class Action Complaint in the Los Angeles Superior Court, captioned as Susan J. Peabody v. Time Warner, Inc. and Does 1-100, inclusive, Case No. BC418972 (the "Complaint").

Plaintiff's Complaint was filed on behalf of a putative class of similarly situated current and former employees of TWC who had held the position of "Account Executive." The Complaint alleges five causes of action for: (1) failure to pay earned commissions; (2) failure to pay minimum wage for all hours worked pursuant to the applicable Wage Order and Labor Code § 1194(a); (3) failure to pay earned overtime

[1] Labor Code § 1182.12 provides that "on or after January 1, 2008, the minimum wage for all industries shall be not less than eight dollars ($8.00) per hour."

wages under Labor Code § 510; (4) failure to timely pay wages under Labor Code §§ 201-201; (5) failure to provide accurate itemized wage statements under Labor Code §226(a).2

On September 4, 2009, Defendant TWC removed the action to federal court under the under the Class Action Fairness ("CAFA"), 28 U.S.C. §1331(d). The case was initially assigned to Hon. Dean D. Pregerson but was transferred to Hon. Andrew J. Guillford.[3]

Defendant TWC stipulated to decide its dispositive motion for summary judgment prior to determination of class certification,[4] and filed its motion on July 19, 2010. The hearing was held on November 1, 2010 and the Court granted TWC's motion in its entirety by order of that same date. Final judgment was entered on November 9, 2010 and Plaintiff timely filed notice of the present appeal on November 29, 2010.

The matter was argued and submitted to the Ninth Circuit on July 11, 2012. By order of August 17, 2012 (Docket 32-1), the Ninth Circuit upheld the grant of summary judgment as to Plaintiff's claim for unpaid commissions on the following grounds:

> Under California law, "contractual terms must be met before an employee is entitled to a commission." *Steinhebel v. Los Angeles Times Commc'n*, 126 Cal.App. 4th 696, 705 (2005). Here, Peabody admitted that under the terms of her contract, she was not entitled to any commissions until the

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[2] See Complaint, Clerk's Transcript ("CT") at Docket #1, Exhibit A.

[3] CT at Docket #15.

[4] CT, Docket #23.

> advertising aired, regardless of when the customer paid. Therefore, TWC was entitled to pay Peabody under the new commission rate for advertising that aired after the rate changed, and Peabody's argument that TWC retroactively reduced her compensation is unavailing. There is also no evidence that TWC changed the commission rate in bad faith.[5]

The Ninth Circuit observed, however, that the remaining issues would be resolved by the answer to the certified question of California law being referred to this Court.[6]

IV. SUMMARY OF ARGUMENT

California law mandates that minimum wage thresholds must be earned in each applicable workweek and must be paid in the next applicable pay period. California Labor Code section 204 mandates the use of a bi-weekly pay period. Sections 221-223 also prohibit employers from deducting wages from one pay period and reallocating them toward another. Commission wages are not exempted from these requirements. To the contrary, commissions are specifically identified as just another form of "wages" to which the protections of the Labor Code apply with full force.

The net result is that employers cannot, consistent with California law, allocate commission wages paid in one pay period to satisfy minimum obligations which were due in another, earlier pay period. This conclusion is supported by the plain language of the minimum wage thresholds contained in Sections 3(D) and 4(B) of the Wage Order. It

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[5] Memorandum of Disposition, Ninth Circuit Docket #32-1, at p. 2.

[6] Memorandum of Disposition, Ninth Circuit Docket #32-1, at p. 2-3.

is also consistent with the avowed remedial purpose of the provisions and with the DLSE's own administrative interpretation.

The federal Fair Labor Standards Act ("FLSA") is substantially less protective and has no provisions analogous to Labor Code sections 204, 221-223. Thus, it provides no support for wage averaging or allocation of commissions under California law. Nevertheless, the result in this case would still be the same under the FLSA, which also requires that applicable minimum wage requirements must be earned in each workweek and paid out at each established pay period utilized by the employer. Where, as in this case, there is no dispute that a bi-weekly pay period was utilized, FLSA authorities do not permit the allocation of commissions from above-minimum pay period to below-minimum pay periods.

This Court should clarify that California law requires the minimum wage thresholds set forth in Wage Order Section 3(D) and 4(B) must be satisfied within each workweek and pay period, rather than by allocating commissions from other pay periods.

V. LEGAL ARGUMENT

A. California Law Does Not Permit Employers To Average or Allocate Wages Earned in Separate Pay Periods To Achieve Compliance With Minimum Wage Thresholds

1. The California Labor Code and Wage Orders Require Timely and Consistent Compliance With Minimum Labor Standards.

The California Labor Code and Wage Orders represent a coherent scheme which establishes minimum rates of straight time and overtime compensation, protects wages earned from any source from deductions and offsets, and requires that all such earned wages must be paid promptly and regularly.

For example, Labor Code Section 204(a) requires that "All wages . . . earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance as regular paydays." Labor Code Section 212 prohibits an employer from paying earned wages in any form other than an immediately negotiable paycheck. And Sections 221-223 prohibit employers from deducting from amounts due in future pay periods in order to satisfy current minimum wage or overtime payments.[7]

This body of law articulates "a clear public policy that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers."[8] Moreover, "Because of the economic position of the average worker and, in

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[7] DLSE Man. ¶50.6.1, sections 1-3.

[8] *Id.*

particular, his family, it is essential to the public welfare that he receive his pay' promptly." [9] Thus, "Public policy has long favored the full and prompt payment of wages due an employee." [10]

Thus the remedial wage protections afforded by this integrated statutory scheme "are to be liberally construed with an eye to promoting such protection" while any purported exemptions are to be narrowly construed.[11]

2. The FLSA Provides No Support For Retroactively Reallocating Commission Wages Between Workweeks and Pay Periods.

The FLSA and its implementing regulations have no application to the calculation of the applicable minimum wage rate of an employee under California law. As the Court explained in *Armenta v. Osmose, Inc.* "A review of our labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally." [12] In particular, "[f]ederal law provides no analogous provisions to sections 221-223," which prohibit the very reallocation advocated by TWC.[13] Section 221 provides that "It shall be unlawful for any employer to collect or receive from an

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[9] *Gould v. Maryland Sound Industries, Inc.*, 31 Cal.App.4th 1137, 1147 (1995) (quoting authority (internal citations and punctuation omitted).

[10] Id.

[11] *Ramirez v. Yosemite Water Company, Inc.*, 20 Cal.4th 785, 794 (1999).

[12] *Armenta, supra,* at 323, 324.

[13] *Armenta, supra,* at 323, 324.

employee any part of wages theretofore paid by said employer to said employee." Section 223 provides that "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."[14]

TWC would have California adopt certain federal regulations pertaining to wage averaging under the FLSA and incorporate them into the Labor Code and Wage Orders. However, the Legislature and IWC know how to incorporate select federal regulations when doing so is consistent with the purpose of California law.[15] The Legislature's conscious decision not to incorporate federal regulations elected not to do so in connection with the averaging or allocation of commission wages.

In any event, fundamental differences between state and federal law preclude the application of these federal authorities in this case, however. To begin with, Section 7(i) of the FLSA is restricted to "retail or service establishments." This definition excludes *inter alia* "Advertising agencies," "Broadcasting companies," and "Telegraph and cable

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[14] "[S]ection 223 was enacted to address the problem of employers taking secret deductions or 'kickbacks' from their employees. [Citations.]" *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1205 (2008). A violation occurs where the employer pays the wage required by a statute or contract but secretly deducts or reallocates a portion of the wage toward some other purpose which amounts to requiring the employee to pay back a portion of the wages otherwise earned for a particular time period. As explained in *Cintas,* the underpayment of wages is generally a secret being kept from "applicable enforcement authorities," not from the employees. *Id.*

[15] *See e.g.*, Wage Order 4-2001, Section 1(A)(1)(e) ("The activities constituting exempt work . . . shall be construed in the same manner such terms are construed in the following regulations under the Fair Labor Standards Act . . .")

companies."[16] TWC presented no evidence establishing that it meets the narrow "retail concept" necessary to qualify for the exemption. (ER, 106:7-11.)

But most significantly, unlike the Labor Code, "the FLSA does not require that an employer utilize a pay period of any specific duration."[17] Thus, in the rare circumstance when no regular pay period has been established by the parties, a District Court is permitted under the FLSA to supply its own "reasonable and equitable" method for determining the appropriate time period over which to allocate commission income.[18]

By contrast, such gap-filling judicial discretion cannot apply where, as here: (i) a two-week pay period is already mandated by statute[19]; (ii) there is no dispute that the parties actually utilized such a two-week pay period; and (iii) TWC adamantly denies that any commission wages were actually "earned" during the sub-minimum pay periods.

In any event, even if the FLSA were applicable by analogy, it would still lend no support to any scheme to allocate commissions across workweeks. For example, in the 2005 Maryland District case of *Rogers v. Savings First Mortgage*, the court held that under the FLSA "a commission payment can only be allocated over the semi-monthly pay period in which it is received." As the Court explained:

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[16] *See* 29 CFR § 779.317 (providing "a partial list of establishments to which the retail concept does not apply.")

[17] *Rogers v. Savings First Mortgage, LLC,* 362 F.Supp 2d 624 (2005)

[18] *See* 29 C.F.R. § 778.119 and 778.120.

[19] Labor Code § 204.

> The FLSA takes as its standard a single workweek consisting of seven consecutive days. While there is no requirement that compensation be paid weekly, the minimum wage provisions of the FLSA apply on a workweek basis. Thus, in order to meet the requirements of the FLSA's minimum wage provisions, an employee compensated wholly or in part on a commission basis must be paid an amount not less than the statutory minimum wage for all hours worked in each workweek without regard to his sales productivity. Furthermore, this amount must be paid to him free and clear (i.e. finally and unconditionally) *on the payday for that week.*[20]

Applying these fundamental FLSA principles the Court rejected the argument that a loan broker employer could "stretch the allocation of commissions over the average period of time that Defendants contend it takes to process a loan."[21]

> While Defendants are correct that the FLSA does not require that an employer utilize a pay period of any specific duration . . . the cases are clear that, ***once a pay period is established, it cannot be retroactively modified to escape FLSA liability.***[22]

In *Marshall v. Sam Dell's Dodge Corp.,* the court addressed a pay plan in which sales employees received a fixed weekly base pay plus commissions. In those weeks in which they received only the base pay and worked a large number of hours this resulted in a sub-minimum wage rate.[23] As here, the defendant argued for a rule that "if total

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[20] *Rogers v. Savings First Mortgage, LLC,* 362 F.Supp.2d 624, 631 (D.Md. 2005) (internal punctuation and citations omitted.)

[21] *Rogers, supra,* at 630.

[22] *Rogers, supra,* at 631 (emphasis added).

[23] *Marshall v. Sam Dell's Dodge Corp.,* 451 F.Supp. 294, 301 (ND N.Y. 1978).

payments in any month exceed the minimum wage for the hours worked during that entire month, they be found in compliance with the Act, even though payments below the minimum were made in any of the weeks of that month."[24] The Court rejected this proposal as contrary to the requirement that wage allocation across multiple established pay periods is contrary to the FLSA. In other words, "Having established the week as the applicable pay period, defendants cannot now argue that any other time period measures compliance with the Act." [25]

Thus, nothing in the FLSA would authorize the allocation of commissions between one pay period and another in this case. Moreover, California law (unlike the FLSA) affirmatively requires the use of a bi-weekly pay period, and this is the pay period which was utilized in fact by TWC. As a matter of law, therefore, TWC cannot be permitted to average or allocate commissions from one pay period to another in order to achieve compliance with California minimum wage thresholds.

3. California Employers Cannot Count Prospective Commissions As "Wages" Until They Are Earned and Paid

Labor Code Section 200 defines "wages" as "all amounts for labor performed by employees ... whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." "Commission wages are

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[24] *Marshall, supra,* 451 F.Supp. at 301.

[25] *Marshall, supra,* 451 F.Supp. at 302.

compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."[26]

"The right of a salesperson or any other person to a commission depends on the terms of the contract for compensation."[27] Whether a mere expectation has ripened into an earned "wage" is thus determined by applying "fundamental contract principles to determine whether a salesperson has, or has not, earned a commission."[28] Only when all contractual terms have been satisfied can it be said that the resulting "[s]ales commissions are wages."[29]

In *Steinhebel v. LA Times Communications*, the plaintiff worked under an agreement "which specified that commissions were payable only on commissionable sales, that is, subscriptions that were verified sales and were kept by the customer for at least 28 days."[30] The Court held that money advanced by the employer in expectation of such commissions did not constitute the payment of a "wage" within the meaning of the

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[26] Labor Code section 204.1.

[27] *Koehl v. Verio, Inc.*, 142 Cal.App4th 1313, 1330 (2006), citing *Steinhebel v. LA Times Communications*, 126 Cal.App.4th 696, 705 (2005).

[28] *Koehl v. Verio, Inc.*, 142 Cal.App4th 1313, 1331 (2006).

[29] *DeLeon v. Verizon Wireless, LLC,* 207 Cal.App.4th 800, 808 (2012).

[30] *Steinhebel v. LA Times Communications*, 126 Cal.App.4th 696, 705 (2005)

Labor Code. [31] As another court has explained, such "commission advances are not wages."[32]

In short, as a matter of California law, a monetary advance which is subject to a future chargeback cannot constitute a "wage" within the meaning of the Labor Code. It follows therefore that a mere unvested expectation of future commission payments unaccompanied by any monetary advance certainly cannot constitute a "wage" for purposes of the Labor Code.

In the present case, Plaintiff also brought a claim against TWC for unpaid wages on the ground that TWC had unilaterally reduced her agreed-upon commission rate after she had obtained a vested right to commissions for sales made in January and February of 2009. TWC argued, however, that "The 2008 Plan provided TWE with the express right to change the terms of the Plan, stating that it 'is subject to review or change at any time in accordance with company policy.'"[33] And that the 2008 Plan also expressly provided that: "Nothing set forth herein or otherwise shall be construed as a guarantee of any compensation or a limitation of the Company's continued right to alter or reset such compensation or the method by which it is calculated."[34]

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[31] *Steinhebel, supra,* 126 Cal.App.4th at 705.

[32] *DeLeon, supra,* 207 Cal.App.4th at 8818.

[33] TWC Answering Br. at p. 39 (emphasis added), citing ER at 253, 219:20–220:2.

[34] TWC Answering Br. at p. 39, citing ER at 253-254,214:25 – 215:11

Thus under TWC's commission plan performing labor, booking a sale, and even obtaining payment from the client do not result in any earned wage. Instead, TWC has purported to retain the contractual right to change or rescind any prospective commission payment at-will at any time before it is actually earned and paid.

The Ninth Circuit ultimately agreed with TWC, finding that that "under the terms of her contract, [Plaintiff] was not entitled to any commissions until the advertising aired, regardless of when the customer paid."[35] As a result, Plaintiff did not earn any commission "wages" until months after she had performed the labor. Having successfully argued that commissions are not "wages" prior to their payment by the employer, TWC cannot be heard to argue that it is nevertheless entitled to apply such non-wages as a credit toward meeting its minimum wage obligation in prior workweeks. Thus, as a matter of *res judicata*, Plaintiff was not paid any commission "wages" within the definition of the Labor Code during the bi-weekly pay periods in which she received nothing more than her sub-minimum base pay of $384.62 per week (i.e., $769.23 for the entire two week period).

4. The Proposed Wage Allocation Rule Would Lead to Unworkable and Absurd Results.

Any rule which would assess compliance with minimum wage thresholds after-the-fact by averaging commission income over the entire period "for which" the commissions were supposedly earned would be utterly unworkable in practice.

[35] October 17, 2012 Memorandum of Disposition, Ninth Circuit Dkt. #32-1, at p. 2.

For example, if a commission were payable based on an employee's total sales performance over the course of a year the employee could be required to work uncompensated overtime for that entire time period while earning no income. Only when the employer has finally awarded year-end commissions and allocated that compensation to prior workweeks would it be possible to retrospectively determine whether the employee had received minimum wage or had been properly classified as overtime-exempt throughout the course of the preceding year.

This backward-looking allocation technique would thus deny employees any consistent or secure source of subsistence income. It would also allow the employer to manipulate the employee's exempt status through its allocation of discretionary commission payments. Finally, wage allocation would needlessly complicate the assessment of minimum wage and exempt status by embroiling the parties and courts in abstract accounting debates over which payments should be allocated to which prior time periods.

All of this would frustrate the purposes of the minimum wage thresholds contained in the Wage Orders – i.e., creating a stable, guaranteed level of subsistence compensation for the employee. Indeed, "even the better paid salesman with a family would be hard pressed if he were obliged to suffer a few weeks at less than minimum wages."[36] And this is the "precise danger" that statutory minimum labor standards were enacted to guard

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[36] *Marshall v. Sam Dell's Dodge Corp.,* 451 F.Supp. 294, 302 (ND N.Y. 1978).

against.[37] An employee cannot eat promises of "deferred" commissions. The interest of the employee is to obtain current wages that he can use for living.

For example, The DLSE-endorsed rule for assessing compliance with the minimum wage standard of Section 3(D) is that each workweek and pay period must include minimum wages equal to $12.00 per hour. This is simple, easy to comply with, and accomplishes the goals of the statute. TWC could have easily complied by simply increasing its account executive's hourly wage to $12.00 or by establishing a guaranteed, non-refundable draw against anticipated future commissions.

Rather than adopt one of these simple measures TWC chose to motivate its sales force with the prospect of sub-standard compensation in the event that they failed to perform. This is exactly what the minimum wage component of the exemption is intended to prevent. It is thus entirely proper that TWC should be denied the benefit of the exemption defense during pay periods in which it paid sub-standard wages.

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[37] *Ibid.*

B. TWC Cannot Allocate or Average Commissions to Avoid Liability For The Claims In This Case.

1. The Minimum Wage Rate Specified By Wage Order Section 4(B) Must Be Earned In Every Workweeks and Paid In Each Pay Periods

Under the California Labor Code employers must meet their statutory wage obligations through the straight-forward payment of money wages, which are accrued over the shortest time period applicable, and paid out no less frequently than each bi-weekly pay day. By contrast, employers may not satisfy minimum compensation standards by redistributing, reallocating, or "averaging" wages across time periods – e.g., through techniques that might tend to disfavor the employee, result in delayed payment, or be subject to manipulation through accounting gimmickry.

For example, in the 2005 California Appellate decision in *Armenta v. Osmose*,[38] the plaintiffs were employed as lineman and "were paid hourly wages ranging between $9.08 to $20" for time designated as "productive." However, they were paid no further compensation for the hours they worked in excess of these "productive" hours.[39] As the *Armenta* Court explained, it would be inconsistent with the statutory prohibition against

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[38] *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314 (2005).

[39] *Armenta, supra,* 135 Cal.App.4th at 462-63. "Productive time" included all time spent directly maintaining poles and lines. "Non-productive" time included "taking the truck to be serviced and waiting for it, washing it, cleaning it out at the end of the day, discarding trash at the end of the day, repairing tools needed for field work, or for their time driving to and from the job site." (Id. at 318.)

making deductions or offsets from earned wages to permit "wage averaging" for purposes of minimum wage compliance.

In particular, Labor Code "Sections 221, 222, and 223 articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation."[40] The minimum hourly threshold must be satisfied for each hour worked in the pay period. In other words, wages paid for "productive" hours may not be reallocated to "non-productive" hours when assessing whether the minimum wage rate had been met for such "non-productive" work time.[41] This same rule against reallocation of wages has also been applied to compensation paid pursuant to piece-rate or sales commission plans.[42]

TWC argues that commissions are somehow special and must be treated differently from other wages when measuring compliance with a minimum wage threshold. But the Labor Code authorizes no such special treatment. "Commissions" are designated as merely one of many variants of "wages" which

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[40] *Armenta, supra,* at 323, 324.

[41] *Id.*

[42] *Ontiveros v. Zamora,* 2009 WL 425962 at WL *2 (E.D. Cal. 2009) (no reallocation of wages permitted as to a pay plan in which "a mechanic would be paid a fixed amount per type of automotive repair he completed based on the estimated time it would take to perform that repair, regardless of how much time it actually took him."); *Cardenas v. McLane Foodservices, Inc.,* 796 F.Supp.2d 1246, 1253 (2011) (no reallocation of wages permitted as to pay plan "based on the number of cases of product delivered, the number of miles driven on a delivery route, and the number of delivery stops."); *Balasanyan v. Nordstrom, Inc.,* 2012 WL 6675169, WL * 1 (S.D. Cal. 2012) (no reallocation of commission wages permitted as between selling and non-selling hours).

are subject to all of the general provisions of Labor Code §§ 200-243 governing the timely payment of wages.[43]

Likewise "commissions" are specifically identified in Section 4(B) of the Wage Order as a form of compensation which may only be credited toward an employer's minimum wage obligation in the same pay period in which they are actually paid. Section 4(B) provides: "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." [44]

There is simply no room to argue that the Wage Order or Labor Code may be interpreted as allowing employers to satisfy minimum wage standards with a mere unvested expectation of future commission, or an *ex post facto* reallocation of such future payments.

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[43] See Labor Code § 200 ("As used in this article: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, **commission basis**, or other method of calculation.") (emphasis added).

[44] Wage Order 4-2001, Section 4(B) (Emphasis added).

2. **The Minimum Wage Rate Specified By Section 3(D) Must Be Earned In Each Workweek and Paid in Each Pay Period for Which The Exemption Defense Is Claimed.**

a. **Full Payment of Required Wages Within Each Pay Period Is Consistent With the Remedial Nature of California's Overtime Obligation.**

Paying employees on a commissioned basis has obvious benefits for an employer -- i.e., no matter how many hours an employee works he must actually succeed in generating sales in order to receive compensation. The flip-side of this bargain, however, is that commissions (especially for big ticket items) are often unpredictable and variable. This may present a special hardship for commissioned sales employees who may endure extended "cold streaks" without significant commission income. During these periods it may be difficult for the employee to maintain a sufficient baseline compensation to support his or her family.

"The Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees."[45] Thus, Section 3(D)'s minimum wage requirement mitigates the unpredictable nature of commission income by requiring the employer, as a precondition for avoiding premium overtime pay, to guarantee a consistent level of subsistence compensation.

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[45] *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal.App.4th 1109, 1119 (1995), citing *Kerr's Catering v. Dept. of Indus. Rel.*, 57 Cal.2d 319, 329 (1962).

Achieving minimum wage thresholds by averaging wages across established pay periods is prohibited under both the Labor Code and FLSA. As the U.S. Supreme Court has noted, "Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date."[46] This is especially true in light of TWC's contention that it reserves the power to reduce or cancel commission payments at any time before they are paid. TWC can hardly take credit for a commission which it claims was not yet "earned," vested, or accrued during the sub-minimum pay periods.

Here, for example, TWC could easily have ensured compliance by simply guaranteeing its employees $12.00 in hourly compensation apart from any earned commissions. Many employers provide such minimum base compensation as a refundable "advance" or "draw" against future commissions. Instead, TWC elected to keep its sales force motivated by providing a guaranteed base rate of pay that was well below the guaranteed hourly rate required by Section 3(D). Nothing in the statutory scheme can be interpreted as encouraging this policy.

b. Full Payment of Required Wages Within Each Pay Period Is Consistent with Related Provisions of The California Labor Code.

[46] *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707-08 (1945).

Labor Code Section 204(a) requires that "All wages . . . earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance as regular paydays." Labor Code Section 212 prohibits an employer from paying earned wages in any form other than an immediately negotiable paycheck. And Sections 221-223 prohibit employers from deducting from amounts due in future pay periods in order to satisfy current minimum wage or overtime payments. By necessity, the 150% of minimum wage threshold required under Wage Order 3(D) must therefore be "paid in each pay period."[47]

In *Armenta v. Osmose,* the Court rejected the proposition that the payment of sub-minimum compensation for certain hours of work could be cured by reallocating the wages paid for more highly compensated hours. As the Court explained, this was contrary to California law because Labor Code "Sections 221, 222, and 223 articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." [48]

This same analysis is fully applicable to the derivative minimum wage threshold of Wage Order Section 3(D). Indeed, by expressly referencing and incorporating the minimum wage scheme described in Section 4(B) of the same Wage Order the IWC presumably intended to incorporate the methods and standards used for calculating the

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[47] DLSE Man. ¶50.6.1, sections 1-3.

[48] *Armenta, supra,* at 323, 324.

base minimum wage.[49]

By the same token, the incorporation of a multiple of the standard minimum wage rate by Section 3(A) evinces a purpose to ensure minimum compensation for "each hour worked," and is equally incompatible with any attempt to "average" compensation over time periods greater than one hour.

Moreover, wage averaging and reallocation have also been rejected as a means to compensate overtime hours. For example, under California law, amounts paid as a fixed weekly salary are deemed as compensation for only 40 hours of work per week.[50] Employer therefore may not reallocate any portion of such salary payments toward their statutory obligation to pay premium compensation for overtime hours.[51]

Similarly, as premium overtime pay under Labor Code section 510 is calculated based on qualified hours worked within a given workday or workweek, the employee's status as exempt or non-exempt must be independently determinable on a daily or weekly basis. The employer must therefore bear the burden of establishing all elements of an

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[49] *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 370 (2008) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.")

[50] Labor Code Section 515(d) (providing that weekly salary is only deemed to compensate for 40 hours per week for purposes of calculating overtime pay); *Skyline Homes v. Department of Industrial Relations,* 165 Cal.App.3d 239, 250 (1985) (rejecting employer's allocation of fixed salary across all hours worked in "fluctuating workweek" for purposes of calculating premium overtime compensation due); *accord Arechiga v. Dolores Press, Inc.,* 192 Cal.App. 4th 567 (2011) (Weekly salary may not be allocated to overtime hours in the absence of "explicit mutual wage agreement").

[51] Id.

applicable exemption at least within each workweek. For example, in *Gomez v. Lincare,* the California Court of Appeal held that the employer was required to establish the applicable Wage Order overtime exemption in that case "on each and every workday" on which the exemption was being claimed.[52] In the 2011 opinion in *Marlo v. UPS,* the Ninth Circuit held that California's white collar overtime exemptions were properly determined on a "week-by-week" basis.[53]

In short, every aspect of the No California court, however, has ever suggested that the determination of an employee's exempt status may be deferred for weeks or months in order to await the calculation and allocation of contingent future payments.

a. Full Payment of Required Wages Within Each Pay Period Is Consistent With the Persuasive Interpretation of the Division of Labor Standards Enforcement.

The Industrial Welfare Commission (IWC) is empowered to issue Wage Orders regulating wages, work hours, and working conditions with respect to various industries and occupations.[54] The Department of Industrial Relations, Division of Labor Standards

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[52] *Gomez v. Lincare,* 173 Cal.App.4th 508, 518 (2009) ("Lincare was required to present evidence showing that each plaintiff drove a vehicle containing hazardous materials for some period of time on each and every workday.")

[53] *Marlo v. UPS,* 639 F.3d 942, 948 (9th Cir. 2011) ("Nor, contrary to Marlo's assertion, did the district court err in requiring a week-by-week determination of exempt status.")

[54] See Labor Code §§ 70-74, 1173, 1178, 1178.5, 1182.

Enforcement ("DLSE"), is the agency charged with enforcing California's labor laws, including the IWC wage orders. [55] The DLSE has consistently maintained a long-standing interpretation of the Section 3(D) Commissioned Sales Exemption, which is published at Section 50.6.1 of its Enforcement Manual.[56] According to the DLSE's interpretive guidance, the required wage rate of 1.5 times the minimum wage necessary to invoke the exemption must accrue "for each hour worked during the pay period," and "must be satisfied in each workweek and paid in each pay period."[57]

When construing a legislative enactment the DLSE's interpretation is entitled to "consideration and respect."[58] Moreover, "A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another."[59] The Section 3(D) exemption is not a legislative enactment but purely a creature of the IWC's exercise of its own statutory and constitutional authority to regulate conditions of employment through

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[55] See Labor Code §§ 61, 95, 98-98.8, 1193.5.

[56] Van Vleck Decl., Exh. F.

[57] DLSE Man. ¶50.6.1, sections 1-3 (emphasis added).

[58] *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105, n. 7 (2007), citing *Yamaha Corp. of America v. State Bd. Of Equalization,* 19 Cal.4th 1, 7-8 (1998).

[59] *Yamaha Corp. of America v. State Bd. Of Equalization,* 19 Cal.4th 1, 12-13 (1998).

appropriate Wage Orders.[60] When the Legislature codified California's daily overtime requirement in 1999, it also specifically codified the IWC's authority to "review, retain, or eliminate any [preexisting] exemption."[61] As this Court explained in *Lujan v. Southern California Edison,* deference to the administrative interpretation of the DLSE Manual is thus appropriate as an exercise of the IWC's authority to interpret its own provisions.[62]

In any event, the DLSE interpretation is in accord with the plain language of the provision, the manifest purpose of the minimum wage threshold at issue, and the public policies animating the right to overtime. As a result, the interpretation of the DLSE manual should be independently adopted by this court.

3. TWC's Deficient Wage Statements Cannot Be Cured By Reallocating Commission Payments.

Labor Code section 226(a) requires employers to provide accurate itemized pay statements that include specific categories of information for the benefit of

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[60] *See Martinez v. Combs,* 49 Cal.4th 35, 64 (2010) ("The Legislature has delegated to the IWC broad authority over wages, hours and working conditions.")

[61] Labor Code section 515(b)(2).

[62] *See Lujan v. Southern California Edison,* 96 Cal.App.4th 1200, 1211-1212 (2002) ("We agree with the trial court that we should defer to respondent's interpretation of its wage order in calculating the amount of 'regular pay.'"), citing *Yamaha Corp. of America, supra,* 19 Cal.4th at 12-13; *See also Auer v. Robinson,* 519 U.S. 452 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is ... controlling unless 'plainly erroneous or inconsistent with the regulation.'")

employees.

For example, Section 226(a)(2) requires wage statements listing "total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime . . ."[63] Plaintiff was paid primarily by commissions and thus was not paid "solely based on a salary." Under the unambiguous language of the statute she was therefore legally entitled to receive biweekly statements of her "total hours worked."[64]

TWC advocates an interpretation in which the phrase "whose compensation is solely based on salary" is disregarded so that a finding of exempt status alone will obviate the need to track and report hours worked. This construction is contrary to the plain language of the statute. It also violates the cardinal rule of statutory construction directing courts to "accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose" and that a "construction making some words surplusage is to be avoided."[65]

Moreover, TWC's also violates the manifest purpose of the requirement to

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[63] Labor Code Section 226(a)(2).

[64] Wage Order 4-2001, Section 7(A)(5) mandates that TWC "shall keep accurate information" regarding Plaintiff's "Total hours worked in the payroll period and applicable rates of pay."

[65] *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1386-1387 (1987).

record and report such wage and hour data – namely, to provide employees and enforcement agencies with the information necessary to ascertain whether required wages have been fully paid in accordance with law.[66]

The present case is a perfect illustration. TWC is claiming that it need not provide a record of "hours worked" to Plaintiff because she is exempt from overtime under Section 3(D). This exemption, however, is necessarily based on TEC's calculation of the number of "hours worked" – i.e., whether her compensation divided by her hours worked is equal to 150% of the minimum wage. Under this Catch-22 scenario, Plaintiff would not be entitled to a record of her hours worked because she is exempt, but could not disprove the exemption without a record of her hours worked.

The plain language of the statute anticipates and negates this absurdity. If an employer wishes to assert that a commissioned employee (who by definition is not paid on salary alone), qualifies for the Section 3(D) exemption, it cannot also refuse to provide the record of "hours worked" necessary to establish the exemption.

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[66] *Jaimez v. Daios,* 181 Cal.App.4th 1286, 1306 (2010), citing *Wang v. Chinese Daily News, Inc.,* 435 F.Supp.2d 1042, 1050 (C.D. Cal. 2006) ("The purpose of the requirement [of Section 226(a)] is that employees need not engage in the discovery and mathematical computations to analyze the very information that California law requires.").

4. TWC Cannot Avoid "Waiting Time" Penalties By Allocating Commission Payments.

The term "willful" within the meaning of Section 203 merely means "the employer intentionally failed or refused to perform an action which was required to be done."[67] TWC argues however that any claim for late payment penalties is negated because Plaintiff supposedly submitted no evidence of "willful" non-payment. But the whole premise of Defendant's motion for summary judgment and the present appeal is that TWC paid Plaintiff exactly as it intended in accordance with its standard policies. Thus, to the extent that Plaintiff's claims for non-payment of minimum wage and overtime are viable, her derivative claim for late payment penalties necessarily survives as well.

VI. CONCLUSION

California law is clear in mandating that minimum wage thresholds must be earned in each applicable workweek and must be paid in the next applicable pay period. California Labor Code section 204 mandates the use of a bi-weekly pay period. Sections 221-223 also prohibit employers from deducting wages from one pay period and reallocating them toward another. Commission wages are not exempted from these requirements. Thus, the Court should answer "No" to the certified question of whether

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[67] *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 781 (2002).

an employer may reallocate commission wages from above-minimum pay periods to below-minimum pay periods in order to comply with the minimum wage thresholds of Wage Order Sections 3(D) and 4(B).

Dated: January 7, 2013

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CERTFICATION OF WORD COUNT

Pursuant to California Rules of Appellate Procedure, Rule 8.204 (c)(1), counsel hereby certifies that the present brief contains 7,495 words, including footnotes and excluding tables of content and authority.

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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 January 7. 2013, I served the foregoing document described as: **PETITIONER'S BRIEF ON THE MERITS** on the interested party below, using the following means:

J. Scott Carr
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26th Floor
Atlanta, Georgia 30309

☒ BY UNITED STATES MAIL I enclosed the document in a sealed envelope or package addressed to the respective address of the party stated above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 7, 2013, at Los Angeles, California.

Jeremy Rogers
[Print Name]

[Signature]