

ROSALYN MUSKER, : SUPREME COURT OF NEW JERSEY
: DOCKET NO.: 089665
Plaintiff/Counterclaim Defendant, :
: CIVIL ACTION

v. :
: ON MOTION FOR LEAVE TO APPEAL

SUUCHI INC., SUUCHI RAMESH, :
MARK HERMAN, and BEN : APPELLATE DIVISION
ZUCKER, individually, and JANE : DOCKET NO. AM0841-23
AND JOHN DOES 1-10 and ABC :
CORPORATIONS 1-5; : SAT BELOW:

: Hon. Jack Sabatino, P.J.A.D.
Defendants/Counterclaimant. : Hon. Hany A. Mawla, J.A.D.
: Hon. Joseph L. Marczyk, J.A.D.

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SUPREME COURT
OF NEW JERSEY

: SUPERIOR COURT OF NEW JERSEY
: Docket No.: BER-L-005652-20
:
: SAT BELOW:
: Hon. Mary Thurber, J.S.C.

**BRIEF OF DEFENDANTS SUUCHI INC., SUUCHI RAMESH
AND MARK HERMAN IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO APPEAL**

**PIRO ZINNA CIFELLI PARIS
& GENITEMPO, LLC**

360 Passaic Avenue

Nutley, New Jersey 07110

Ph: 973-661-0710

Fax: 973-661-5157

Email: rgrodeck@pirozinnalaw.com

Attorney for Defendants/Counterclaimant

Of Counsel and on the Brief:
Richard A. Grodeck, Esq. (014321981)

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PRELIMINARY STATEMENT

With its June 24, 2024 decision the Appellate Division engaged in a process of careful statutory construction, reached its decision based upon the “distinctive factual situation” which was encountered with this case and interpreted the critical controversial language accordingly and then concluded that “the Legislature is of course free to consider the adoption of clarifying amendments to the statute”. See the Court’s opinion at 37 attached to plaintiff’s moving papers as Exhibit A.

With its decision the Court acknowledged that the exception to the Wage Payment Law in issue “should not be construed too broadly to swallow the rule” and acknowledged that in “many, perhaps most, instances a promised commission will qualify as ‘wages’ under the Wage Payment Law and not comprise a supplementary incentive”. Id. This case is the exception.

The Court’s focus was on the statutory definition of wages which appears in the Wage Payment Law. Specifically in issue were just twenty (20) words which served to exclude from the definition of wages “*any* form of supplementary incentives and bonuses ...” . N.J.S.A. 34:11-4.1. (Emphasis supplied).

The Court’s interpretation of the statute, which affirmed the opinion of the trial judge, was clear, focused and unassailable.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION CORRECTLY CONCLUDED THAT THE COMMISSION PAID BY DEFENDANTS ON THE SALE OF PERSONAL PROTECTION EQUIPMENT WAS A SUPPLEMENTARY INCENTIVE

A. Prior to March 2020 Suuchi, Inc. (“Suuchi”) had not been in the business of marketing Personal Injury Protection (“PPE”) equipment.

Suuchi’s core business is the operation of a software driven manufacturing platform which Suuchi calls the GRID. Apparel manufacturers are offered subscriptions to the GRID. Multi-year subscription packages are sold by the sales team who are paid pursuant to a tiered “compensation plan”. The more subscriptions that are sold the greater the rate of compensation. Since the GRID was fully built Suuchi’s costs were limited and the company could afford to pay commissions based on gross receipts. Pa563. Pa514.¹

In March 2020 Suuchi entered the immediately volatile PPE marketplace. Suuchi’s costs, chiefly those associated with purchasing product from Chinese vendors and the fees of the common carriers who transported the product to this

¹ The reference is to the appendix filed by appellant in support of its appeal to the Appellate Division.

country, were enormous, with prices “changing every few hours, virtually, because the market was so crazy . . .”. Pa539.

B. Suuchi immediately implements an incentive plan for marketing PPE.

On Monday, March 23, 2020, Mark Herman, Suuchi’s CFO, generated an email which set the terms for the PPE transactions. Product was to be obtained from China. Overhead would be significant. Commissions would be based on net revenue. He gave a simple example. “[I]f the order value is \$500,000.00 and our cost is \$400,000.00 then our markup or our fee for services provided would be \$100,000.00)”. Pa273-Pa274.

Herman concludes his email by emphasizing that this would be a great way to “max out on your commission rates ... [to] max out your commission tiers”. Pa274.

Suuchi Ramesh followed the Herman email with her own where she emphasized that the company would be “providing same commissions on these one time orders and not penalizing for not being ARR”. Pa273.

The Sales Compensation Plan (SCP) devised by Suuchi for subscription sales to the GRID anticipates terms of multiple years. Multi year subscription contracts result in annual recurring revenue or “ARR”. The rate for payment of the commissions resulting from those multi year sales increases as the ARR increases.

However “[c]ommissions on one year contracts ... [are] based on a maximum commission rate of 1.75%”. Pa157.

The sale of PPE does not produce ARR. Each sale is the product of a single purchase order. Those purchase orders are not multi year subscription contracts. Pa601-Pa602.

The Suuchi sales force was encouraged, *i.e.*, **incentivized**, to sell PPE. Commission rates on PPE sales would increase pursuant to the SCP tiers in spite of the fact that these “one time orders”, as referenced by Ms. Ramesh, which would otherwise yield a flat commission rate of 1.75%, do not produce ARR. This is a point which must be emphasized. The PPE sales were “one time orders”. Under the SCP plaintiff would have been entitled to a flat commission of 1.75%. The Commission Plan for PPE sales developed by Mr. Herman described a graduated structure which, once again, incentivized sales.

The structure for calculating commissions pursuant to the SCP is as follows:

Commissions PaaS

	<u>Quota Dollars</u>	<u>Percent of Quota</u>	<u>Commission Rate</u>	<u>Commission \$ at Top of Tier</u>
Commission – Tier 1	\$729,167	1% - 25%	1.75%	\$12,760
Commission – Tier 2	\$729,167	26% - 50%	2.25%	\$16,406
Commission – Tier 3	\$729,167	51% - 75%	2.75%	\$20,052
Commission – Tier 4	\$729,167	76% - 100%	3.25%	\$23,698
Commission – Tier 5	\$2,917,668 Plus	101% Plus	4.00%	
Total commissions at plan				\$72,917

Commissions SaaS

Commissions at stated PaaS tier (see table above) and full quota relief
Target contractual term of five (5) years and no less than three (3) years

Additional commission above tier rates above:

Three (3) year term 0.250%

Four (4) year term 0.375%

Five (5) year term 0.500%

Professionals services 2.000%

3PL Services

Commissions at stated PaaS tier (see table above) based on 50% of ARR

Commission relief of 50% of ARR

Contract term same PaaS agreement less six (6) months

C. Given what the Appellate Division appropriately described as this “distinctive factual situation” the Court correctly concluded that the commission plan described by Mr. Herman was a supplementary incentive.

The Court acknowledged its responsibility “to effectuate the Legislature’s intent”, W.S. v. Hildieth, 252 NJ 506, 518-519 (2023), and to do so by reading statutory language “in accordance with its ‘ordinary meaning and significance and ... in context with related provisions so as to give sense to the legislation as a whole’”. Sayuan v. Sch. Dist. of W.N.Y., 256 NJ 369, 378 (2024).

The Court proceeded, in what can only be described as pain staking fashion, to break down the controversial statutory language. Popular and law dictionaries

were consulted for purposes of isolating the definition of simple terms, such as the word “direct”, in order to mine meaning. And then the Court focused on the twenty words in issue, the exception to the statutory definition of wages.

The Court reached the following conclusions:

- The PPE commissions were calculated “independently” of salaries;
- The tiered commissions are not bonuses;
- The PPE commission are supplementary incentives;

The Court’s analysis is flawless. Appellant’s argument that the analysis was deficient is incomprehensible. The court considered the “ordinary meaning” of the term “incentive” and, again with resort to the dictionary, defined the term to mean that which has a “tendency to incite to determination or action”. See Appellate decision at 29.

The Court then decisively held that:

... the term supplementary incentive should be interpreted to mean additional compensation or perks that can motivate employees to take action beneficial to the employer, above and beyond the monetary payments directly owed to them for their labor or services.

Id.

Appellant challenges the court’s analysis by resort to rhetoric at the expense of analysis. The effort fails.

The “distinctive factual” circumstances of this very unique case, a situation driven by a once in a millennium pandemic, *requires* the result reached by the Appellate Division. PPE was not Suuchi’s core product. A unique plan was quickly devised and implemented to encourage, motivate and, yes, *incentivize* effort.

The Court worked with the language created by the legislature to reach the correct result. The Court interprets the law as written. The Court does not legislate. If the legislature intended a different result “clarifying amendments” can be adopted. Appellate opinion at 37.

POINT II

AFTER FOUR YEARS OF LITIGATION APPELLANT STILL DOES NOT UNDERSTAND THE SCP

With her brief the appellant contends that the appellate court “overlooked the obvious – one time sales of a product (not ‘annual recurring revenue’) were never excluded under the SCP”. Pb 20. One time sales were not excluded. However the commission was limited to just 1.75%.

The point of the PPE compensation plan, as Ms. Ramesh emphasized was to make payment “on these one time orders” in accordance with the tiers established by the SCP even though the one time deals did not produce annual recurring revenue.

The PPE plan was a brand new plan designed to incentivize effort.

CONCLUSION

This case derived from a unique set of facts and its application is limited to this discrete scenario. It bears emphasis that the party's relationship broke down over the appellant's demand that she be paid 4% of the gross sales. Mark Herman's email to the sales force could not have been more clear; commissions would be based on net revenue. His email included a simple example. A five hundred thousand dollar sale that costs four hundred thousand dollars to complete yields one hundred thousand in net revenue.

Appellant's insistence back in May 2020 that she be paid 4% of gross is why this case has remained unresolved. Having lost that argument she now contends she was the victim of wage theft. Appellant argues for equity, but how could an equitable result be based on sanctions applied to a figure she rejected four years ago?

Respectfully Submitted,



Richard A. Grodeck

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