

ROSALYN MUSKER,  
Plaintiff/Counterclaim Defendant,

v.

SUUCHI, INC., SUUCHI  
RAMESH, MARK HERMAN and  
BEN ZUCKER, individually, and  
JANE AND JOHN DOES 1-10 and  
ABC CORPORATIONS 1-5;

Defendants/Counterclaimant,

SUPREME COURT OF NEW JERSEY  
DOCKET NO.:

CIVIL ACTION

**ON MOTION FOR LEAVE TO APPEAL:**  
APPELLATE DIVISION  
DOCKET NO. A-0841-23

SAT BELOW:  
Hon. Jack Sabatino, P.J.A.D.  
Hon. Hany A. Mawla, J.A.D.  
Hon. Joseph L. Marczyk, J.A.D.

SUPERIOR COURT OF NEW JERSEY  
Docket No.: BER-L-005652-20

SAT BELOW:  
Hon. Mary Thurber, J.S.C.

RECEIVED  
APPELLATE DIVISION

JUL 11 2024

SUPERIOR COURT  
OF NEW JERSEY

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**PLAINTIFF/APPELLANT'S BRIEF IN SUPPORT OF  
MOTION FOR LEAVE TO APPEAL**

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JUL 12 2024

SUPREME COURT  
OF NEW JERSEY

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Dated: July 10, 2024

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## PRELIMINARY STATEMENT

This Supreme Court's November 17, 2023 remand to the Appellate Division ("the Court") set forth one directive: *to determine whether the commission structure at issue falls under the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.* ("NJWPL"). (emphasis added). Instead, the Court's June 24, 2024 Opinion (see Exhibit 1) gravely erred when it found that Plaintiff's commissions earned for her 2020 sale of Personal Protective Equipment ("PPE") to New York State ("NYS") were supplementary in nature, rather than wages which fall under the protection of the NJWPL.

In March 2020, at the onset of the COVID-19 pandemic, Plaintiff generated sales of \$32,898,948.13 of PPE to NYS on behalf of her employer, Defendant Suuchi, Inc. ("Suuchi"). According to Suuchi's published tiered commission structure for all salespeople set forth in the January 2020 Sales Compensation Plan ("SCP"), Ms. Musker would have earned approximately \$1,315,957.93 in commissions. The Court ruled that Musker met the first two elements of the statutory definition(s) of the NJWPL to qualify as commissions, but not the third. Rather than looking to the NJWPL and Defendants' January 2020 SCP (Pa155- Pa163), the Court's ill-considered reasoning relied on Defendants' March 23, 2020 emails and erroneously concluded that these emails

“altered the compensation structure for the specific and impromptu purposes of promoting sales of PPE”. Exhibit 1 at 34. This reliance on the March 23, 2020 emails had no basis in law or fact and was contradictory to the Court’s subsequent statement, in which it noted that Defendants’ March 23, 2020 emails announced that the company “will be recording the [PPE] deals on a net basis as opposed to [a] gross [basis], which we *have done historically on our PaaS [Platform as a Service] deals*”. (Pa273-Pa274). There simply was nothing “new” about the compensation structure itself; commissions on PPE sales were to be recorded the same as Suuchi had done in the past for PaaS deals, as noted in the January 2020 SCP. The Court specifically highlighted that the Wage Payment Law is a remedial statute that should be liberally construed to effectuate its remedial purpose. However, the Court promptly disregarded this mandate. Rather, this ruling has provided employers the ability to deprive employees, particularly Ms. Musker, of their rightfully earned wages in contradiction to the tenets of the 2019 Amendments to the Wage Theft Act.

Additionally, the Appellate Division’s factual conclusions are inconsistent with party admissions (March 2020 emails) that these were, in fact, commissions. The simple question is how can commissions *not* be classified as wages. Commissions earned on PPE deals were incorporated into the January

2020 SCP as noted in the March 2020 emails. These are commissions, plain and simple.

The January 2020 SCP which applied to *all* salespeople at the Company, set forth how and when commissions on sales would be paid (including the sale of PPE products). Suuchi sales reps were incentivized to sell *every* category of products sold by Defendant Suuchi, Inc., not only PPE. As commissions on all sales were governed by the January 2020 SCP, the commissions on sales of PPE were promised, and thus qualify as wages under the NJWPL. The Court 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” (emphasis added). Exhibit 1 at 37.

All commission plans incentivize salespeople to sell more products. The Court’s ruling undermines the very purpose of the 2019 Wage Theft Act amendment to the NJWPL. Many (if not most) commission-based sales plans are “tiered” by nature. If tiered commissions are deemed “supplementary incentives”, many New Jersey employees will no longer be afforded the protections of the NJWPL, and employers will be empowered to engage in wage theft by withholding their employees’ rightfully earned wages, as occurred in this matter.

## **PROCEDURAL HISTORY**

Plaintiff/Appellant Rosalyn Musker (“Plaintiff” or “Musker”), filed her Complaint in this action on September 28, 2020, alleging, *inter alia*, that Defendants failed to pay commissions owed to Ms. Musker, in violation of the New Jersey Wage Payment Law (“NJWPL”), N.J.S.A. 34:11-4.1 *et seq.* Plaintiff was responsible for \$32,868,948.13 in PPE sales to New York State commencing in March 2020 through June 2020, for which she has only received \$100,000 to date. (Pa 155-163, Pa172). On April 27, 2023, Plaintiff filed her Motion for Summary Judgment on Liability Only. (Pa102). Plaintiff commenced the sale of PPE in the total amount of \$32,868,948.13 million dollars to NYS in March 2020 through June 2020. Suuchi, Inc. was paid in full by July 2020 (revenue received). Musker has only received \$100,000 of the amount due her under Suuchi’s commissions schedule. (Pa172).

On August 10, 2023, the Trial Court denied Plaintiff’s Motion for Summary Judgment and granted Defendants’ Cross Motions for Summary Judgment, dismissing all claims against the individual Defendants, and declaring that commissions in a tier-based structure are incentive payments rather wages, and are therefore not covered under the NJWPL.

Plaintiff filed her Motion for Leave to Appeal to the Appellate Division on August 28, 2023, Docket Number AM-000678-22, M-006975-22. On September 6, 2023, Defendants Suuchi, Inc., Suuchi Ramesh and Mark Herman filed their Opposition to Plaintiff's Motion for Leave to Appeal. On September 7, 2023, Alan H. Schorr, Esq. of the National Employment Lawyers Association, New Jersey ("NELA-NJ") filed an amicus curiae brief on behalf of Plaintiff Musker. On September 14, 2023, the Appellate Division denied Plaintiff's Motion for leave to file an interlocutory appeal of the Trial Court's August 10, 2023 decision.

On September 19, 2023 Plaintiff Musker filed her Motion for Leave to Appeal to the Supreme Court, Docket Number 000678-22. On September 22, 2023, Mr. Schorr of NELA-NJ filed an amicus curiae brief on behalf of Plaintiff Musker. On September 29, 2023, Defendants Suuchi, Inc., Suuchi Ramesh and Mark Herman filed their Opposition to Plaintiff's Motion for Leave to Appeal to the New Jersey Supreme Court. On November 14, 2023, the Supreme Court filed an Order granting Plaintiff's Motion for leave to file an appeal and remanded the matter to the Appellate Division for consideration on a narrow issue: whether the commission structure at issue falls within the Wage Payment Law (Pa992-Pa993). All parties and amicus filed their respective briefs with the

Appellate Division, Docket Number A-000841-23. Oral argument took place on April 22, 2024 and the Court rendered its Opinion on June 24, 2024.

This Appeal is now necessary to address the Appellate Division's Opinion which erroneously found that Ms. Musker's commissions on her PPE sales to NYS were supplementary in nature, rather than wages protected by the NJWPL. Most importantly, the Court did not address the very issue remanded by the Supreme Court.

### **STATEMENT OF FACTS**

Plaintiff was hired in the role of Senior Enterprise Sales Manager in or around February 2020. Defendant Suuchi, Inc. defined how and when commissions would be paid to their salespeople as illustrated in the January 1, 2020 SCP. (Pa155-Pa163). As a result of the pandemic, and prior to Musker's NYS sale, Defendant Suuchi, Inc. reduced all employee salaries, and reduced Ms. Musker's salary from \$80,000 to \$17,500. This contradicts the Court's statement that "In that sales position, plaintiff maintained her \$80,000 annual salary." Exhibit 1 at 9. It was only *after* Musker's sale of PPE to NYS, that all salaries, including those of the individual Defendants, were reinstated.

Throughout the period Ms. Musker sold PPE to NYS, the January 2020 SCP remained the governing document by which sales commissions would be paid to the Suuchi, Inc. sales team. (Pa155-163).



The January 2020 SCP was the compensation plan in force and in effect at the time of the COVID -19 pandemic which began in or around March 9, 2020. The Defendants' January 2020 SCP set forth the commission structure. (Pa156) It establishes the contractually agreed upon commission that would be payable based on sales made and the revenue received resulting from a sale. When a salesperson sells more product, Defendant Suuchi, Inc. earns more revenue, and the salesperson earns more in commissions. Once the revenue is received, the commissions are due and are wages, which fall under the protection of the NJWPL.

Sales Classification	Enterprise
Annual Base Salary	\$80,000
Quota-ARR	\$2,916,667

#### Commissions PaaS

	Quota \$	% of Quota	Commission Rate	Commission \$ At Top of Tier
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%	

In the Court's *one* acknowledgement of the Supreme Court's remand question, they concluded that based "on these concepts, we conclude that the tiered commissions delineated in the SPC [sic] and payable within specified pay periods are not bonuses, except for the so-called year-end "bonus commission." (emphasis added). Exhibit 1 at 28.

On March 23, 2020, after Plaintiff's sale of PPE to NYS had already commenced, Defendant Herman "announced" to the sales team via email,(the first of the two emails upon which the Court relied), that PPE sales would be paid on 4% of net rather than 4% of gross sales. This was done without obtaining the informed, signed waiver as required in Section 12 of the SCP. This modification to the terms of the SCP applied to the entire sales team, which included Plaintiff. Thus, Defendant Suuchi, Inc. retroactively changed the commission structure. In an email to the Sales Team dated March 23, 2020, at 8:26 pm, Defendant Herman announced:

All,

**As we discussed today in our update meeting for all PPE deals we will be recording these deals on a net basis as opposed to gross which we have done historically on our PaaS deals.** This is being done as the nature of our services are different and accordingly our markup for our services is our revenue. For example, if the order value is \$500,000 and our cost is \$400,000 then our markup or our fee for services provided would be \$100,000. **Sales commission will be calculated using our revenue which in this example would be \$100,000 times the respective tier rate per your**

**commission agreement.** Commission payments for PPE orders will be based on cash receipts and **will be made the month after the cash is received.** (Pa273-Pa274). (emphasis added).

As admitted and acknowledged in this email, once the sale is made, and the revenue received, a “**commission**” is payable in the month following receipt of the revenue. The email did not usurp the January 2020 SCP, which remained in effect, (there has never been any dispute about that), and Defendant Herman explicitly informed the sales team that “**Sales commission will be calculated using our revenue which in this example would be \$100,000 times the respective tier rate per your commission agreement.**” There was nothing “supplementary” or “incentive” regarding these payments. The payments were always commissions earned by salespersons (i.e., wages).

Minutes later, on the same date, Ms. Ramesh sent a reply email regarding the treatment of PPE commissions further demonstrating that they were subject to the January 2020 SCP. Annually recurring revenue (“ARR”) at the top tier of the SCP pays 4% of gross sales:

Hi all,

We are providing same commissions on these one-time orders and not penalizing for not being ARR. Thanks, Suuchi. (Pa317-Pa319).

The impetus for Suuchi’s changing of the payment of commissions from a gross to net basis, was the size of Ms. Musker’s NYS sale of PPE. Defendants

knew that the sale would be huge, and they wanted to minimize the potential commissions they would have to pay Ms. Musker. Musker's PPE sale amounted to \$32,868,948.13. Based on this sale, Plaintiff immediately exceeded the top tier in quota dollars resulting in her commissions being paid at a rate of 4.00% of gross. In the present matter, the tiers played no role; by the time Ms. Musker made her first PPE sale in March 2020 to NYS, amounting to \$5,430,000, she already met and far exceeded the highest tier of \$2,917,668.

The Court errantly determined that because Defendants encouraged the sales team to use PPE sales as a "great way" to "max out" their compensation, and that "[c]ommitment, perseverance, gumption and hustle shall be rewarded," (Exhibit1 at 35), that Defendants could permissibly "convert" commissions (protected by the NJWPL) into "one off" supplementary incentive payments not covered by the law. This is totally without any basis in law. All salespersons must "hustle" to earn commissions. Giving a pep talk does not and should not suddenly alter commissions protected under the NJWPL to incentive payments without protection.

In a misguided interpretation of Ms. Ramesh's email, the Court decided that since PPE sales were "one time only" they did not generate ARR and thus, were not commissions. This flies in the face of the admissions made by the

Defendants that PPE commissions would be paid on sales. Defendant Ramesh's March 23, 2020 email to the sales team specified that commissions earned on *PPE will not be penalized for not being ARR*. Defendants admitted in its March 23, 2020 emails that: a) these were promised commissions, b) the PPE product was being treated as commissions – here, a new commission rate was set for the sale of PPE pursuant to Defendant's January 2020 SCP; and c) there would be no penalty to the salespersons because PPE orders were not ARR.

In yet another anomaly, the Court found that “the commission percentages on plaintiff's SCP were expressly tied to plaintiff attaining her assigned ‘Quota-ARR’ on eligible sales.” Yet, the Court also held that “[T]he PPE sales were not eligible sales under the categories of revenue enumerated in the SCP.” (emphasis added). Exhibit 1 at 34. Again, both of Defendants' March 23, 2020 emails (which are party admissions) run contradictory to the Court's findings. Defendants informed the sales team that “for all PPE deals we will be recording these deals *on a net basis as opposed to gross which we have done historically on our PaaS deals*” (Pa 273, Pa 274), and “*We are providing same commissions on these one-time orders and not penalizing for not being ARR*”, all referring to the SCP. (Pa 317-Pa 319). The Court's labelling this a “special program” is also misguided and overlooks these indisputable admissions by

Defendants. Defendant Herman coupled PPE commissionable sales with PaaS sales in his March 23, 2020 email. Exhibit 1 at 12. The SCP (and the March 2023 emails) did not make any reference or exceptions where in the event a new product is only sold once, commissions suddenly become supplemental in nature. It should also be noted that during the relevant period and through the second quarter of 2020, Defendant Suuchi, Inc. viewed PPE as a potentially viable product for continued sales – not the “one off” presumed by the Court. (Pa 314, Pa 412-Pa415). While the Court is using the two March 2020 emails to bolster its argument, the emails stand in stark contrast to the findings of the Court. The emails clearly illustrate that Defendants intended to pay commissions on PPE sales consistent with the January 2020 SCP. The Defendants’ email illustrated that Defendants understood its salespersons were being paid commissions on sales of PPE, not that they were being treated as supplementary incentives.

### **LEGAL ARGUMENT**

I. **The Appellate Division Erred When It Ruled that the Commissions Defendants Offered on the Sale of PPE were “Supplementary Incentives” As Distinct From Ordinary Commissions Which are Protected Under the NJWPL**

The Appellate Division Opinion erroneously relied on the March 23, 2020 communications regarding the PPE sale rather than the NJWPL statute itself.

(Pa273-Pa274, Pa317-Pa319). Commissions that are based on a deterministic formula, whether gross or net, tiered or not, are not discretionary and therefore not incentives. Any payment made by an employer that is directly related to the work performed by that employee should fall within the statutory parameter of "Wages" under the NJWPL. The Court's Opinion acknowledged that "the Supreme Court has declared the Wage Payment Law "is a remedial statute that should be 'liberally construed' to effectuate its remedial purpose". Hargrove v. Sleepy's, LLC, 220 N.J. 289, 303 (2015). Exhibit 1 at 3. The 2019 Amendment to the Wage Theft Act specifically addresses that it is remedial in nature and should be liberally construed but the Court, rather than avail itself of the remedial nature, instead narrowly construed it. Despite the clear evidence and Defendants' own party admissions in the March 23, 2020 emails that these are commissions, the Court failed to apply the statute in its findings.

The Appellate Division made factual conclusions inconsistent with party admissions made by Defendants Suuchi and Herman in those 2020 emails. The Defendants' emails showed that the PPE product was clearly included under the then current January 2020 SCP and treated like PaaS products currently included in the SCP. The commissionable PPE was also "not going to be penalized for not being ARR". There was nothing "supplementary or "discretionary" as to

whether payments would be made for sales of PPE. These were commissions and thus, wages payable pursuant to the NJWPL.

**a) The Appellate Division's Use Of The Phrase "Above and Beyond" to Mean Supplementary Incentives is Ill-Considered**

The Opinion misconstrued the phrase "**above and beyond**", with specific reference to Musker's earnings. The Court held that: "Accordingly construing these two words in conjunction, 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." Exhibit 1 at 29. Yet, the Court contradicted itself in the next sentence: "The mere fact that compensation generally functions inherently as an incentive to an employee to come to work and perform assigned tasks *is not enough* to make it a "supplementary" incentive." Id. This is exactly the Plaintiff's argument; that the commissions she earned are her wages, not supplementary incentives. The commissions earned on sales of PPE were not "perks" and Defendants admitted in emails that they were commissions. Plaintiff was not receiving a supplementary incentive "above and beyond" monetary payments owed for her services (her sale of PPE). Rather, Plaintiff, as well as the rest of the sales team would be receiving commissions on 4% of the net sales (in line with sales of



PaaS), rather than the usual and customary 4% commissions on gross sales, resulting in *less* commission to be paid. See (Pa273-Pa274). Exhibit 1 at 29.

**b. The Appellate Division Erred When it Ruled that Plaintiff Only Met Two of Three Elements Required To Satisfy The NJWPL**

In its Opinion, the Court interpreted the statutory elements of the NJWPL to determine whether Plaintiff's commissions met those criteria and would therefore be covered under the law. Exhibit 1 at 23. To ascertain whether the compensation at issue qualified as "wages," the Court broke down the statutory definition of that term into the following three elements:

1. "The direct monetary compensation for labor or services rendered by an employee;"
2. "Where the amount is determined on a time, task, piece, or commission basis;"
3. **"Excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto."**

**N.J.S.A. 34:11-4.1.**

The Court properly found the first two elements were satisfied in Musker's case. It concluded that Musker provided her labor to generate the PPE sales and was thereby seeking "direct monetary compensation," and the sales

agreement between Musker and Suuchi promised commissions to be earned by generating sales.

The Court then turned to the last element, whether the compensation at issue qualifies as a “supplementary incentive.” It first noted that because Suuchi had a tiered commission structure (where salespeople could earn higher commissions based upon selling more), commissions were then calculated “independently” from the salesperson’s salary and were therefore “paid in addition” to salaries, rendering them supplementary in nature. When commissions are calculated month to month based on a salesperson’s production, they are by their very nature calculated independently of any salary provided, based on what the salesperson sold that month. Many salespeople are paid a base salary plus commissions; it does not render their commissions “supplementary” in nature.

The Court analyzed the third segment of the statutory definition of wages and whether they "excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto". The Appellate Division found this last “segment” to be questionable and engaged in an analysis of what the terms “supplementary” and “incentives” mean. In its Opinion, the Court stated that “Despite the statute's vagueness of

phrasing, the tiered scale within the SCP establishes that commissions at Suuchi are calculated “independently” from a salesperson's salaries, if any. As such, they are manifestly “paid in addition” to salaries.” However, by the very nature of most commission plans, commissions will always be calculated independently of wages each month, because they are mostly dependent upon how much a salesperson sells each month, which is of course variable. It is axiomatic that “commissions” are routinely calculated independently of salary and are still considered wages. This should be the case here. Given the Court’s logic, any commissions in addition to any base salary is now a supplementary incentive. As well, the Court noted that the “the SCP the company created individually for plaintiff at the outset of her employment in January 2020 did not, by its terms, make the revenue on PPE sales eligible for a sales commission” Exhibit 1 at 36. This is markedly contrary to the facts. As noted above, the SCP was never created individually for the Plaintiff at the outset of her employment. The March 2020 emails upon which the Appellate Division so heavily relied, informed the entire Sales Team as to exactly how and when PPE commission would be payable under the SCP.

This conclusion was not produced with a liberal interpretation of the NJWPL in mind – a remedial statute. The Court’s finding would create an

absurd result inconsistent with intent of the NJWPL and the October 2019 amendments thereto. The inequity of these facts is palpable in that the Defendants have been paid in full and Ms. Musker has not.

There is nothing equitable about this narrowly construed decision, as this Court has overlooked the evidence, as did the lower Court. Defendant Suuchi, Inc., in its January 2020 SCP, and Defendants Herman/Ramesh, in their March 23, 2020 party admissions, clearly stated commissions will be paid on all sales and, therefore, those commissions must be protected under the NJWPL.

The Court referenced Sluka v. Landau Uniforms, Inc., 383 F. Supp. 2d 649 (D.N.J. 2005) which is the only published opinion that is instructive as to what is and is not a supplementary incentive, bonus, or commission. Like Sluka, Defendant Suuchi, Inc. provided Plaintiff with an Employment Agreement (the SCP) providing an annual base salary, commissions to be paid upon selling of products, as well as bonuses for exceptional performance. The January 2020 SCP had a specific provision that allowed for bonuses upon attaining 110% of quota. (Pa248). Defendants allege that because Plaintiff was paid a salary, any commissions paid to her can only be a supplementary incentive. However, in Sluka the employee was compensated in three ways: (1) a base salary of \$60,000; (2) a monthly one-percent commission on all net sales to his accounts;

and (3) two year-end payments, comprised of a two-percent commission on net sales from new customers generated by the plaintiff, as well as a two-percent commission on the Plaintiff's year-over-year increase in net sales. *Id.* at 652. *There was no dispute in the case that both the salary and the monthly one-percent commission on all net sales to his accounts constituted wages under the NJWPL.* The court, however, ruled that the two year-end payments were not commissions under the NJWPL because they were essentially bonuses, paid all at once at the end of the year, and were in addition to the plaintiff's base salary and regular monthly commission on all net sales. *Id.* at 656. Musker's monthly commission payments in this case are clearly distinguishable from the third category of compensation of two year-end payments in Sluka and are analogous to the second category of compensation at issue in that case. Despite this, the Court dismissed the guidance of Sluka, and instead concluded that "The SCP the company created individually for plaintiff at the outset of her employment in January 2020 did not, by its terms, make the revenue on PPE sales eligible for a sales commission. *Plaintiff's right to obtain commissions under the SCP was limited*—in the absence of an alteration of the company's policies—to sales that *generated ARR*". Exhibit 1 at 33. This statement is contradictory to the Herman/Suuchi emails upon which the Court so heavily relied which informed

the Sales Team how and when commissions would be paid for PPE sales pursuant to the SCP and PaaS sales under the SCP.

The Court overlooked the obvious - one-time sales of a product (not “annual recurring revenue”) were never excluded under the SCP. The March 2020 Suuchi/Herman emails informed the sales team that sales of PPE would be treated like ARR (governed by the SCP) *and* recorded on a net basis (which had been done historically on commissionable PaaS deals). (Pa 273-Pa274). So too, at the time of the PPE sale in March 2020, no one, including the Defendants could envision that PPE would only be a one-time order.

Paragraph 12 of the SCP accounted for the possibility of new products being commissionable: “12. Right To Change This Compensation Plan: Suuchi reserves the right to change or modify the policies, procedures or compensation plan at any time at its discretion and will provide reasonable advance notice of any material modifications”. **Although intended to cover all sales situations, when a new situation arises, i.e., a new product or service offering is defined, or a provision requires change, the document will be amended, and each Sales Team Member will be informed in writing.** (Pa155-163). The March 2020 emails clearly reflect that Suuchi intended to amend / clarify the

SCP to include PPE sales as commissionable sales (not some other form of incentive payment).

It should also be noted, that Suuchi, Inc. was also a garment manufacturer with an onsite factory that switched to the production of PPE masks. In fact, both Individual Defendants paid themselves a 4% gross commission on those masks that were sold to customer Joann Fabrics. (Pa352). It should be noted that PPE was sold to Joann Fabrics prior to Ms. Musker's PPE sale; so, this was not an entirely new product as Defendants have argued.

On the one hand, the Court acknowledged that PPE deals involved **promised** commissions (based on a time, task, piece, or commission basis), direct compensation (where salespersons earned commissions on eligible sales), and a tiered commission structure delineated in the SCP with specific pay periods. This finding demonstrates the payments were not bonuses. On the other hand, the Court ruled that commissions on PPE deals are NOT a "wage" because it was based upon a) a one-time deal; b) deals that involved a product not listed in the SCP; and c) a "pep talk" designed to boost sales. Simply put, this is not the applicable legal standard and certainly not the question with which the Supreme Court requested the Appellate Division to decide.

The Supreme Court should accept the herein motion and reverse the Appellate Division's findings by ruling that Musker's commissions are her wages that fall under the remedial protection of the NJWPL and are not supplementary incentives.

### **CONCLUSION**

The Appellate Division made fatally errant factual conclusions that flew in the face of the Defendants' own admissions. Defendants' March 23, 2020 emails detail that it understood and intended that commissions would be paid to salespersons (including Plaintiff) on PPE deals. Defendants did not exclude PPE deals from being commissionable; rather, Defendants expressly stated that PPE deals were commissionable and would be treated under its SCP. The record is replete with the parties' disputes about the calculation and payment of "commissions" – establishing that each side understood that PPE sales would result in non-discretionary commissions consistent with the contractual nature of the parties' agreement of specified wages (commissions) for sales secured by salespeople, in this case, Ms. Musker.

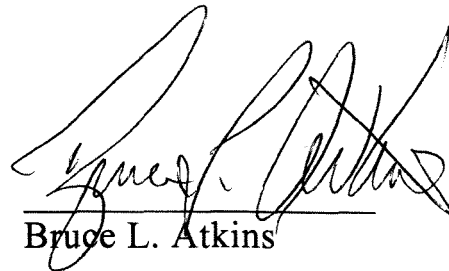
The Appellate Division was given a specific question to rule on: whether the specific commission structure in Plaintiff's sales compensation plan at issue falls under the Wage Payment Law. The Appellate Division provided no clear



guidance as to whether the commission structure at issue falls under the NJWPL as mandated by the Supreme Court. Instead, the Appellate Division made a narrow and unsound ruling – overlooking the Defendants’ admissions – to conclude that Plaintiff’s commissions were supplementary incentives rather than earned wages protected by the NJWPL. The ruling was not based in law, but upon errant readings of two emails authored by the Defendants on March 23, 2020, which were grossly misinterpreted by the Appellate Division. The emails themselves constituted admissions by Defendants that PPE sales would result in commissions, established by set formulas.

The interests of justice and equity require this Court grant Plaintiff’s Motion for Leave and reversal of the Appellate Division’s June 24, 2024 Decision and grant review of the published decision and find that commissions earned by Ms. Musker fall under the New Jersey Wage Payment Law and the 2019 amendment thereto.

Date: July 10, 2024



Bruce L. Atkins