

FILED
SAN MATEO COUNTY

NOV 06 2020

Clerk of the Superior Court
By  _____
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO
COMPLEX CIVIL LITIGATION

MARYAM ABRISHAMCAR and
KAVI KAPUT,

Plaintiffs,

vs.

ORACLE AMERICA, INC., and Does 1
through 100, inclusive,

Defendants.

Case No. CIV 535490
REPRESENTATIVE ACTION

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

**TENTATIVE DECISION AFTER
PHASE TWO COURT TRIAL**

Phase Two Court Trial commenced on November 4, 2019 in Department 2 of this Court before the Honorable Marie S. Weiner. Xinying Valerian of Valerian Law, Michael Palmer, Meredith Firetog and Daniellé Fuschetti of Sanford Heisler Sharp LLP, and Laura Ho, James Kan and Ginger Grimes of Goldstein Borgen Dardarian & Ho appeared on behalf of Plaintiffs Maryam Abrishamcar and Kavi Kapur; and Brendan Dolan, Lucky Meinz, and Lowell Ritter of Sheppard Mullin Richter & Hampton LLP appeared on behalf of Defendant Oracle America Inc. The presentation of evidence concluded on January 15, 2020. Counsel for the parties stipulated to do closing arguments by written briefs, to be followed by oral presentation. Upon completion of the

trial transcripts, opening and rebuttal briefs were submitted, and oral Closing Arguments were held on August 10, 2020.

Upon due consideration of the evidence presented, and the oral arguments of counsel for the parties, and having taken the matter under submission,

IT IS *TENTATIVELY* DECIDED as follows:

1. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 2751(a) when Defendant failed to provide to any commissioned employee a written contract setting forth the method by which the commissions shall be computed and paid *prior to the time that the commissioned employee first started performing services for Oracle*. Evidence was presented that Defendant Oracle has an intentional business practice of never providing the Individual Compensation Plan stating the commission rates and sales target and never providing the Terms and Conditions thereto to any putative employee until they actually started working at Oracle. Evidence was presented that typically and usually a new employee subject to commission-based compensation would start performing sales services at Oracle before receiving any ICP or T&C documents.

2. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 2751 when Defendant issued new/revised ICPs and Ts&Cs to *existing* commissioned employees, with an effective date *prior to* the date of actual issuance thereof. Subsection b provides: "In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party." Evidence was presented that Defendant Oracle issues new/amended ICPs and Ts&Cs at the beginning

of each fiscal year, which specifically state that it expires on the date which is the end of that fiscal year. Evidence was presented that intentionally waits to give its existing commissioned employees the new fiscal year ICPs and Ts&Cs until several days after the actual beginning of the new fiscal year. In the interim, the commissioned employee may engage in sales efforts for which he/she is entitled to a commission. If there was no new contract, then the law provides that the employee would be entitled to commissions under the terms of the expired ICP. But the evidence presented demonstrates that these commissioned employees agreed to a new ICP with a “back dated” effective date instead. This would constitute a “superseding” contract, and is not illegal to use an effective date prior to the actual date the contract was signed. As this is a PAGA case seeking civil penalties for statutory violations of the Labor Code, the fact that such business practices may be unfair to the employee is not the issue – the employee could have refused the new contract and demanded/sued for the commissions under the terms of the expired contract.

3. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 221, by taking back or off-setting commissions already paid to the commissioned employee, under certain circumstances. It depends upon whether the offset/take-back is based upon conditions specifically stated as terms of the employment contract. For example, the law allows commission offsets based upon advances paid but a consumer fails to pay for the product. On the other hand, the offset must be within a reasonable time. Evidence was presented that Defendant Oracle stated in its Terms and Conditions that its business practice to proceed with collections for non-payment after 90 days. Reasonable delay in imposing offsets would be a violation of Section 221. In addition, the basis of the offset must be a specific term of the employment contract, and cannot be a vague, non-descript, “discretionary” “condition”.

Further, a commission cannot be offset on the basis of things that are actually employer business expenses or the cost of doing business. The assertion by Defendant Oracle that all commissions are advances and are *never* final or “earned”, even years later, is rejected.

4. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle’s business practice of paying commissions 45 days after the end of the month were the sale was made is a violation of Labor Code Section 204. Evidence was presented that this was a reasonable business practice and that the commissions were not reasonably calculable prior thereto.

5. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle’s business practice of exercising discretion to delay the payment of commissions (more than the 45 days period) in order to conduct additional “reviews”, e.g., reviews of “mega-deals”, or to impose a “performance review”, is a violation of Labor Code Section 204. This is a compounded violation when Defendant Oracle additionally freezes the payment of commissions to that employee on *other sales with other customers*, while it performs an “audit” or “review” of commissions on a particular sale/deal.

6. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Sections 201, 202 and 203 regarding payment of wages upon termination.

7. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 226, regarding accurate wage statements, by the above-stated violations.

8. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code section 432.5 by the above-stated violations.

9. As to Defendant Oracle's affirmative defense that Plaintiffs failed to exhaust administrative pre-litigation conditions of PAGA, specifically Labor Code Section 2699.3(a)(1), requiring written notice to the LWDA and the employer "of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation":

(a) Any alleged failure to exhaust as to a Section 226 violation is MOOT as this Court found no violation;

(b) Plaintiffs adequately raised a violation of Section 432.5 in their LWDA notice, and thus adequately met PAGA's pre-litigation requirement;

(c) Plaintiffs adequately raised a violation of Section 2751 in their LWDA notice, and thus adequately met PAGA's pre-litigation requirement.

10. Requests for judicial notice of legislative history are GRANTED.

The Court will issue a detailed Proposed Statement of Decision of Phase Two Court Trial.

DATED: November 6, 2020



HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT