STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
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July 27, 2010

Phil Siegel
C.F.O. and Interim C.E.O.
Telscape Communications, Inc.
606 East Huntington Drive
Monrovia, CA 91016

Re: Request For Exception Under Labor Code § 1402.5 (Cal-WARN Act)
Employer: Telscape Communications, Inc.

Dear Mr. Siegel:

This letter is in response to Telscape Communications, Inc.'s ("Telscape") March 19, 2010, supplemental submission to the Department of Industrial Relations ("Department") regarding its request for exception under California Labor Code § 1402.5 of the Worker Adjustment and Retraining Notification Act ("Cal-WARN Act") .[1] Telscape failed to give the notice to its employees provided in Labor Code § 1401(a) when it ceased substantially all of its Wireline Service sales operations, resulting in the termination of 159 employees on December 12, 2008. Telscape claims it is exempt from the notice requirements on the basis that it was an employer actively seeking capital or business at the time notice would have been required as set forth in Section 1402.5.

Based upon a review of the further submissions by Telscape and the applicable law, the Director finds that Telscape satisfies the requirements of Section 1402.5 and therefore, is excused from providing its affected employees with the 60-day notice required by Section 1401(a). This letter is the Director's final Determination and supersedes the March 4, 2010, Determination in this matter.

I. FACTUAL BACKGROUND

Telscape submitted to the Office of the Director and to the Labor Commissioner your letter dated January 16, 2009, signed under penalty of perjury, alleging that Telscape ceased substantially all of its Wireline Service sales operations and terminated 159 employees on December 12, 2008. Attached as Exhibit "A" to the January 16, 2009, letter is a letter dated December 12, 2008, addressed to the State Employment Development Department and local officials purporting to give notice under the Cal-WARN Act. The December 12, 2008, letter states that Telscape will be ceasing substantially all of its Wireline Service sales operations effective that same date. The January 16, 2009, letter states that "notice was shortened based on the Company's reasonable good faith belief that providing prior notice would have prevented the Company from securing the business and capital it was actively seeking and which was necessary to avoid the termination of the Wireline Service sales operations." Telscape also asserts in the

[1] All statutory section references are to the California Labor Code unless otherwise indicated.

January 16, 2009, letter that it retained the services of an investment banker and took other steps to secure funds for the Company and reasonably believed its efforts would prove successful, only learning in the week prior to December 12, 2008, that its efforts had failed.

Attached to the January 16, 2009, letter as Exhibit "B" is an engagement agreement dated October 24, 2008, between Houlihan Lokey and Telscape whereby Houlihan Lokey was to provide financial, advisory, and investment banking services "in connection with the possible merger, consolidation, joint venture, partnership, spin-off, business combination, tender or exchange offer, acquisition, sale, transfer or other disposition of assets or equity interests or similar transactions, involving all or a substantial portion of the business, assets or equity interests of the Company and/or any of its subsidiaries or affiliates, in one or more related transactions." The engagement agreement also provides that "Houlihan Lokey's services will exclusively consist of assisting the Company in the following: (a) drafting a bid procedure letter to be delivered to potential acquirors of the Company, (b) reviewing and providing feedback to the management presentation, as prepared by the Company, to be delivered to potential acquirors, (c) organizing an online data room, (d) evaluating letters of intent regarding a Transaction, (e) selecting an acquirer of the Company based on such letters of intent, and (f) negotiation of the purchase agreement and other financial aspects in order to consummate a Transaction." (*See* page 1, paragraph 1 of the October 24, 2008 engagement agreement.)

On March 13, 2009, (erroneously dated 2008) in response to a request for information from the Labor Commissioner's Office, Telscape provided its Balance Sheet dated December 31, 2008, a "Financial Flash" dated December 31, 2008, and portions of Financial Statements as of December 31, 2007 (pages 11 and 15 are missing). Telscape indicates in its March 13, 2009, letter that the financial statements show significant losses incurred in 2008. Telscape also attached bank and credit arrangement documents Telscape states reveal outstanding loans.

On March 19, 2010, in response to the Department's March 4, 2010, letter, Telscape submitted supplemental materials consisting of the Affidavit of Philip Siegel, Telscape's CFO, Declaration of Bill Nietschmann, Senior VP of East West Bank, Telscape's primary lender, Declaration of Nathan Johnson, Partner and Principal with Gemini Partners, Inc., and Greg McPherson, Chief Operating Officer with Westrec Capital Partners, LLC.

II. THE ACTIVELY SEEKING CAPITAL OR BUSINESS EXCEPTION UNDER SECTION 1402.5

The notice requirement exception contained in Section 1402.5 provides:

(a) An employer is not required to comply with the notice requirement contained in subdivision (a) of Section 1401 if the department determines that all of the following conditions exist:

(1) As of the time that notice would have been required, the employer was actively seeking capital or business.

(2) The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination.

(3) The employer reasonably and in good faith believed that giving the notice required by subdivision (a) of Section 1401 would have precluded the employer from obtaining the needed capital or business.

(b) The Department may not determine that the employer was actively seeking capital or business under subdivision (a) unless the employer provides the Department with both of the following:

(1) A written record consisting of all documents relevant to the determination of whether the employer was actively seeking capital or business, as specified by the Department.

(2) An affidavit verifying the contents of the documents contained in the record.

(c) The affidavit provided to the Department pursuant to paragraph (2) of subdivision (b) shall contain a declaration signed under penalty of perjury stating that the affidavit and the contents of the documents contained in the record submitted pursuant to paragraph (1) of subdivision (b) are true and correct.

Section 1402.5 is modeled in substantial part, upon the "faltering company" exception set forth in the federal Worker Adjustment and Retraining Notification Act ("Warn Act"), which provides:

> An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(*See* 29 U.S.C. § 2102(b)(1).) While federal law is not binding on California courts, "when California laws are patterned after federal statutes, federal decisions interpreting the federal provisions are persuasive authority." (*See Alcala v. Western Ag Enterprises* (1986) 182 Cal. App. 3d 546, 550.) Regulations promulgated by the United States Department of Labor to interpret and implement the federal Warn Act provide that an employer seeking to qualify for the faltering company exception must demonstrate that the following four conditions are satisfied:

(1) the employer was actively seeking capital or business at the time the notice would have been required;

(2) there was a realistic opportunity to obtain the financing or business sought;

(3) the financing or business sought would have been sufficient, if obtained, to keep the business open for a reasonable period of time; and

(4) the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.

(*See* 20 C.F.R. § 639.9(a).) 20 C.F.R. § 639.9 provides at subsection (a)(1) that "the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business."

A. <u>Actively Seeking Capital Or Business (Section 1402.5(a)(1))</u>

Section 1402.5(a)(1) requires that the employer must have been actively seeking capital or business as of the time notice "would have been required," which is at least 60 days prior to the effective date of any mass layoff, relocation, or termination.

Here, Telscape ceased its Wireline Service sales operations and terminated the affected workers on December 12, 2008. Thus, notice was required as of October 13, 2008. Telscape's main shareholder, Gemini Partners lists several investors that it contacted in seeking capital. Telscape submits information from one of the potential investors, Granite Creek Capital ("Granite Creek"). At least as of October 13, 2008, the date that Telscape was required to give notice, it was communicating with Granite Creek regarding a capital investment of approximately $6 million dollars. Moreover, the Declaration of Bill Nietschmann, Senior Vice President of East West Bank suggests that Telscape was actively attempting to recapitalize the company which prompted East West Bank in part to agree to temporarily waive the anticipated financial covenant violations. (*See* Declaration of Bill Nietschmann, March 18, 2010.)

Based on the foregoing, Telscape has presented sufficient facts indicating that it was "actively seeking capital or business" at the relevant time, that is, as of October 13, 2008.

B. <u>Postpone Termination (Section 1402.5(a)(2))</u>

Section 1402.5(a)(2) requires that the employer must show that the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination. The federal regulations provide that "[t]he employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled

the employer to keep the facility, operating unit, or site open for a reasonable period of time." (*See* 20 C.F.R. § 39.9(a)(3).)

Here, Telscape presented evidence that it attempted to negotiate a $6 million dollar capital investment from Granite Creek. (*See* Affidavit of Philip Siegel, March 23, 2010, Exhibits C-E.) Analyzing the available company financial evidence under financial accounting standards and analysis, it is reasonable to conclude that an additional $6 million in or around October 2008 would have postponed the termination of Telscape's Wireline Service sales operation for at least 3 more quarters into 2009, assuming similar performance as in 2008.

Based on the foregoing, Telscape has presented sufficient facts indicating that the capital sought, if obtained, would have enabled it to at least postpone the termination of its Wireline Service sales operations for a reasonable period of time.

C. Reasonable And Good Faith Belief That Giving Notice Would Preclude Employer From Obtaining Capital Or Business (Section 1402.5(a)(3))

Finally, the employer must have a reasonable and good faith belief that giving the notice would have precluded the employer from obtaining the needed capital or business. (*See* Section 1402.5(a)(3).) 20 C.F.R. § 639.9(a)(4) provides in part:

> The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. *This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.*" [emphasis added.]

The information and documents submitted indicate that at the time notice was required, October 13, 2008, Telscape was actively seeking capital or business within the meaning of Section 1402.5(a)(1) or the similar federal exception.

The information and documents submitted sufficiently establish that providing notice would have likely precluded Telscape from securing a purchaser. Bill Nietschmann, Senior Vice President of East West Bank, declared that in his opinion, any notice of significant layoffs or closure while Telscape was in the process of seeking capital would have detrimentally affected Telscape's ability to obtain such capital. (*See* Declaration of Bill Nietschmann, March 18, 2010.) The evidence suggests that Granite Creek was performing due diligence in assessing the viability of investing in Telscape's Wireline Service business. Based on Granite Creek's business inquiries, Telscape had an objectively reasonable basis to believe that giving notice would have likely caused Granite Creek not to do business with a troubled company or with a company

whose workforce was looking for other jobs. (*See* Declaration of Nathan Johnson, March 17, 2010, Exhibit A.)

Moreover, Greg McPherson, Chief Operating Officer with Westrec Capital Partners, LLC, an investment firm approached to invest in Telscape noted that had any significant layoffs occurred with respect to Telscape, during the time in which Telscape was actively seeking capital, Westrec would have decided not to provide any additional capital to Telscape because it would no longer be a viable or prudent investment. (*See* Declaration of Greg McPherson, March 18, 2010.)

Accordingly, based on the information and documents submitted, Telscape has sufficiently established that it had a reasonable and good faith belief, as required under Section 1402.5(a)(3), that notice would have precluded it from obtaining capital or business.

III. CONCLUSION

Based on the foregoing reasons and under the facts presented here, Telscape has met the requirements under Section 1402.5. It is therefore entitled to an exception from the employee notice requirements contained in Section 1401.

Dated: July 27, 2010

John C. Duncan, Director
Department of Industrial Relations