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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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SENT BY REGULAR MAIL
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Re: Request For Opinion Letter On Issues Raised In Case of *Survival v. Faavela Moananu, et al*
LASC Case No. BC 208 668

Gentlemen:

This letter is in response to the correspondence received in this office on March 28, 2000, from Mr. Behnam and the subsequent correspondence from both Mr. Behnam and Mr. Stitt on this subject. Mr. Behnam represented that he had been asked by Judge Susan B. Deeson, before whom this matter is pending, to solicit an "interpretation (private opinion letter) from the Department of Labor[1] regarding this matter." Mr. Stitt did not contradict this allegation in his correspondence and we assume that both parties agree to the Division preparing this letter.

This office has carefully reviewed the correspondence submitted by the parties. There are some differences between the

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[1]Obviously, the Division of Labor Standards Enforcement is not the "Department of Labor" (a federal agency), but the term is often used to identify this state agency.

parties regarding the "facts" at issue, but in general, the issues appear to be clear. We will address the various issues below and, where there is a substantial variance in the way the facts are viewed by the parties, we will so note. In addition, there are a few points which lack sufficient information upon which to base an opinion. These we also note.

Discussion of Issue Relating to "Debit" Incurred In Hiring Assistance

In his letter of March 23rd, Mr. Behnam states:

"Each sales manager at Survival was responsible for the pay of his sales assistants/associates on his sales team. These assistants/associates would receive a paycheck from Plaintiff (Survival), and defendants gross pay would be debited the amount of the assistant/associates's pay (times 1.25 in order to cover the cost of Survival's payroll taxes). No written agreement exist [sic] to support this procedure and the policy has been in force for more than three (3) years."

In response to this particular issue, Mr. Stitt responded *inter alia*:

"...[s]ome Solicitors, such as Defendants Tajalli and Panah, are permitted to hire associate sales persons. These same Solicitors are also permitted to hire administrative assistants to help with paperwork on the insurance transactions. **These associates and administrative assistants are employees of Survival, but are hired solely for the benefit, and at the request, of the Solicitor.**

"The Solicitor hiring the associate or administrative assistant receives an increased income as a result of these hirings. Specifically, as to the associate, the Solicitor receives the same commissions discussed above, minus the pay owed to the associate (this equates to an override). **Similarly, the Solicitor would pay an administrative assistant to handle the paperwork of insurance transactions, thus allowing the solicitor to sell more insurance and make more commissions.**

"The Associate is then paid by Survival the commission which was agreed upon by him/her and the Solicitor. Likewise, the Administrative Assistant is paid by Survival the salary/wage agreed to by him/her and the Solicitor. The amount paid to

the assistant/associate is then taken out of the total commissions earned by the sales team for that pay period (this is listed as a "debit" on the Solicitor's pay account).

"The gross pay figures for each employee would then be deducted for taxes, medical, etc. to determine the net pay."

It would appear to be axiomatic that any increase in the amount of legitimate sales made by an agent of an insurance company would normally be expected to result in an increase in the profits of the company. Additionally, of course, if based on a normal commission plan, such an increase in sales would also add to the remuneration of the employee whose efforts resulted in the increased sales or, in the case of an override commission, the managing employee who was responsible for the increase in sales activity.

We believe that the facts are established that the employment by the Sales Managers of assistants and associates was an expected part of the duties of the Manager. Inasmuch as the additional help was designed, ultimately, to increase sales, the employment of the Associates/Assistants could be expected to inure to the benefit of Survival.

On the other hand, as the employer, Survival could have instructed the Sales Managers that they could not hire assistance or, alternately, Survival could have limited the employment as it pleased.

With this basic premise in mind, it must be concluded that the statement by Mr. Stitt to the effect that "These associates and administrative assistants are employees of Survival, <u>but are hired solely for the benefit</u> ... <u>of the Solicitor</u>." is incorrect. The employment of the administrative assistants and associates was obviously intended to insure that Survival sold more insurance and, as a direct result of those sales, makes more money. As a matter of fact, Mr. Stitt alludes to this truism when he states: "Similarly, the Solicitor would pay an administrative assistant to handle the paperwork of insurance transactions, thus allowing the solicitor to sell more insurance..."

As mentioned above, as with any commission plan, the fact that the Solicitor sold more insurance (which, as noted, benefitted Survival) meant that the Manager was concomitantly entitled to more commissions (or "bonus" or "override" or whatever else one might

call it). This result does not, however, diminish the fact that Survival was also benefitted by the employment of the assistance.

The California Law And Its Impact

California Labor Code §2802 provides:

"An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."

Labor Code §2804 provides:

"Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State."

These sections announce the long-standing policy of the State of California in regard to an employer's obligation to pay all costs his employee expends or loses in carrying out the duties of the employment. The employment of more help to either sell insurance or help with the paperwork so that others would be free to sell more insurance is, as discussed above, a "direct consequence of the discharge of [the Manager's] duties."

As is clear from the legislation, under the California law, an employer may not "pass through" the normal costs of operating a business to the employee he hires. Debiting an employee's earned wages to cover a normal operating expense of the employer is not allowed in California. Further, a contract or agreement (written or oral) which purportedly allows an employer to repudiate this statutory obligation, is void *ab initio*. Additionally, any practice by the employer (written or unwritten) which amends the contract of employment to pass on costs to the employee is invalid and illegal.

Debit Of Employee's Commission Account Resulting From "Losses" Suffered By The Employer As A Result Of Void Contracts Or Non-Payment

Mr. Behnam's letter set out various scenarios which, he alleges, result in Survival debiting the account of the Managers:

SPLDN or Split Down results when the insurance customer chooses to pay for the insurance package he/she purchased in two or more installments. The employer pays the Manager for the full amount of the commission he/she would earn on the particular insurance sale and then debits the commission statement for the amount of the commission attributable to the unpaid installments. We find this is normal practice not only in the insurance business, but many other industries and does not violate any California statute so long as the parties understand the policy. Under these circumstances, the total amount of the commission is contingent and is not earned until such time as the insurance company has received all of the installments. Paying the commissions due on the payments as they are received is a common, prudent and businesslike way to handle the situation.

STOPD-Stop Payment of Check. This debit arises when a client stops payment on the check he used to pay the premium on the insurance the Manager sold. There is nothing inherently wrong with debiting a previously earned commission when, in fact, the contract upon which the commission was based fails. However, if, as Mr. Behnam alleges, the face value of the check is debited, then the employer is attempting to recover from the employee for a loss that the employer did not suffer - or, indeed, in the unlikely event the employer did suffer a loss (payment of a claim on a policy paid for with either a dishonored check or a stopped payment check) that is a cost of business and cannot be charged to the employee. Despite the contentions of Mr. Stitt that Survival did not require the Managers to "bare a 'cash shortage' or to 'insure a business loss'", the teachings of the California Supreme Court in the case of *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, are on point here.

ACTCL and/of BOUNC. The same analysis as that above would apply to "ACTCL" (Account Closed) and "BOUNC" (insufficient funds checks).

PNDEB. There is not enough information given regarding the PNDEB or Promissory Note Debit category for this office to make a

determination. It is unclear whether the collection efforts are those of the company or some outside agency and whether there is a "service charge" or interest rate applied to the note. There are additional issues - not addressed - which the Division of Labor Standards Enforcement might consider in determining the appropriateness of the debit. As discussed, *infra*, under the heading "Debits For Cancellation Of Policies", the common law doctrine of unjust enrichment would be among the issues considered by the Division.

Debits For Cancellation Of Policies. Mr. Behnam's letter contains an allegation which is ambiguous, at best, to the effect that "Survival has a policy of deducting commissions from an associate/manager in the event a customer cancels their policy with Survival prior to full term which is normally one year." Mr. Stitt replies with an equally unclear statement which says he will not address the inaccuracies of the statement and leaves the impression that the Manager receives "his/her proportionate commission of monies received." If Mr. Stitt's statement accurately reflects the facts, that policy would not be illegal. It would be unjust enrichment for the employer to retain <u>all</u> of the commissions in the event only part of the premium is paid; but it is common practice to proportionately deduct commissions in the event monies have to be returned because of the failure of the contract which is not the fault of the employer (i.e., failure of consideration, fraud, etc.).

We hope this adequately addresses the issues raised in the letters we received. The Division is pleased to be of assistance to the court in this matter.

Yours truly,

MILES E. LOCKER
Chief Counsel

cc: Arthur S. Lujan, State Labor Commissioner
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