Motion No. 2021-964
New York County Clerk's Index No. 652771/19
Appellate Division–First Department Docket No. 2020-03381

Court of Appeals

of the

State of New York

JOSEPH TODD LERNER and ANNA SARAI WINDERBAUM,

Petitioners-Appellants,

– against –

CREDIT SUISSE SECURITIES (USA) LLC,

Respondent-Respondent.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

RITZ CLARK & BEN-ASHER, LLP
Attorneys for Amicus Curiae
165 Broadway, 23rd Floor
New York, New York 10006
Tel: (212) 321-7075
Fax: (212) 321-7078
mclark@rcbalaw.com

COURT OF APPEALS
STATE OF NEW YORK
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JOSEPH TODD LERNER and ANNA SARAI WINDERBAUM,

Petitioners-Appellants,

Index No. 652771/19

-against-

CREDIT SUISSE SECURITIES (USA) LLC,

NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

Respondent-Respondent

----------X

YOUR HONORS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Rachel Geman, sworn to the 6th day of December, 2021, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a term thereof to be held at the Court of Appeals Hall in Albany, New York, on the 20th day of December, 2021, at the opening of this Court on that day, or as soon thereafter as

counsel may be heard, for an order granting the National Employment Lawyers Association/New York (NELA/NY) and the National Employment Law Project (NELP) leave to appear as *amici curiae* in the above-entitled appeal, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
December 6, 2021

Miriam F. Clark
RITZ CLARK & BEN-ASHER LLP
Attorneys for NELA/NY
One Liberty Plaza,
165 Broadway, 23 floor
New York, New York 10006
Tel: (212) 321-7075
Fax: (212)321-7078
mclark@rcbalaw.com

TO:
MINTZ & GOLD LLP
Attorneys for Petitioners-Appellants
600 Third Avenue, 25th Floor
New York, New York 10016
Tel.: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
mccormick@mintzandgold.com

EPSTEIN BECKER & GREEN, P.C.
Kenneth J. Kelly
Victoria Sloan Lin

Edward M. Yennock
875 Third Avenue
New York, NY 10022
Tel: 212.351.4500
KKelly@ebglaw .com
vsloan@ebglaw .com
eyennock@ebglaw .com
Attorneys for Respondent-Respondent

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Index No. 652771/19

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Rachel Geman, an attorney duly licensed to practice before the Courts of the State of New York, hereby affirms pursuant to CPLR §2106 and under the penalties of perjury as follows:

1. I am the Chair of the Amicus Committee of the National Employment Lawyers Association/New York ("NELA/NY"), the New York affiliate of the National Employment Lawyers Association ("NELA"). I make this affirmation in support of the request to submit a brief in support of Petitioners-Appellants in the above-captioned matter on behalf of the National Employment Lawyers Association, New York (NELA/NY) and the National Employment Law Project (NELP).

2. The brief submitted conditionally herewith addresses the issue of the potential forfeiture of earned commissions under the New York Labor Law. This issue, as described below, is of public importance, as well as critical to NELA/NY and NELP. (Proposed Amicus Brief annexed hereto as Exhibit "A")

3. The proposed *amici* have requested Miriam F. Clark, Esq., of the firm of Ritz Clark & Ben-Asher LLP, to write an *amici curiae* brief in support of their position on appeal. Ms. Clark is a member of the NELA/NY Amicus Committee and a New York practitioner who has practiced employment law for over thirty-four years.

4. NELA/NY is the New York chapter of a national bar association dedicated to the vindication of individual employees' rights. The National Employment Lawyers Association (NELA) is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 3000 member attorneys and approximately 67 state and local affiliates who focus their expertise on employment discrimination, employee benefits and other issues arising out of the employment relationship. NELA/NY, incorporated as a bar association under the laws of New York State, has over 300 members. Among NELA/NY's activities and services include the publication of a newsletter, continuing legal education and a referral service for employees seeking legal advice and/or representation. Through its various

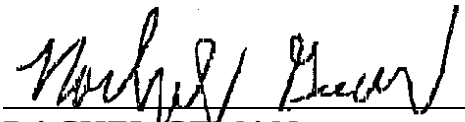
committees, NELA/NY also seeks to promote more effective legal protections for employees.

5. The National Employment Law Project (NELP) is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of lower-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP works closely with community-based worker centers, unions and allied groups, and informs its policies based on the information gathered in those relationships. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional and New York State testimony on a range of workers' rights issues.

6. The organizations described above respectfully request permission to file an amicus brief in this matter because the issue of protection of employee commissions from forfeiture under the Labor Law is of paramount importance, not only to their constituencies and their membership, but to the general public, given the increased reliance by employers on forms of non-cash compensation and New York State's longstanding public policy against forfeiture of earned compensation, as described in the proposed brief.

7. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. No party or a party's counsel contributed money that was intended to fund preparation or submission of the brief. No person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

Dated: New York, New York
December 6, 2021



RACHEL GEMAN

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel.: 212.355.9500
Fax: 212.355.9592
rgeman@lchb.com

on behalf of amicus curiae:

National Employment Lawyers Association/New York
90 Broad Street, Room 210
New York, NY 10004

National Employment Law Project/New York
75 Maiden Lane, Suite 601
New York, NY 10038

TO:

MINTZ & GOLD LLP
Attorneys for Petitioners-Appellants
600 Third Avenue, 25th Floor
New York, NY 10016
Tel.: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
mccormick@mintzandgold.com

EPSTEIN BECKER & GREEN, P.C.
Kenneth J. Kelly
Victoria Sloan Lin
Edward M. Yennock
875 Third Avenue
New York, NY 10022
Tel: 212.351.4500
KKelly@ebglaw.com
vsloan@ebglaw.com
eyennock@ebglaw.com

Attorneys for Respondent-Respondent

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-against-

CORPORATE DISCLOSURE STATEMENT

CREDIT SUISSE SECURITIES
(USA) LLC,

Respondent-Respondent.

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Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Proposed *Amici Curiae* NELA-NY and NELP certifies: NELA-NY is the local affiliate of the National Employment Lawyers Association. It has no corporate parents, subsidiaries or affiliates. NELP has no corporate parents, subsidiaries or affiliates.

Dated: New York, New York
December 6, 2021

MIRIAM F. CLARK

RITZ CLARK & BEN-ASHER LLP
One Liberty Plaza, 23rd Floor
New York, NY 10006
Tel.: 212.321.7075
Fax: 212.321.7078
mclark@rcbalaw.com

on behalf of amici curiae:

National Employment Lawyers
Association/New York
90 Broad Street, Room 210
New York, NY 10004

National Employment Law
Project/New York
75 Maiden Lane, Suite 601
New York, NY 10038

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MINTZ & GOLD LLP
Attorneys for Petitioners-Appellants
600 Third Avenue, 25th Floor
New York, NY 10016
Tel.: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
mccormick@mintzandgold.com

EPSTEIN BECKER & GREEN, P.C.
Kenneth J. Kelly
Victoria Sloan Lin
Edward M. Yennock
875 Third Avenue
New York, NY 10022
Tel: 212.351.4500
KKelly@ebglaw.com
vsloan@ebglaw.com
eyennock@ebglaw.com

Attorneys for Respondent-Respondent

EXHIBIT A

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Petitioners-Appellants,

– against –

CREDIT SUISSE SECURITIES (USA) LLC,

Respondent-Respondent.

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS-APPELLANTS

RITZ CLARK & BEN-ASHER, LLP
Attorneys for Amicus Curiae
165 Broadway, 23rd Floor
New York, New York 10006
Tel: (212) 321-7075
Fax: (212) 321-7078
mclark@rcbalaw.com

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Dated: New York, New York
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MIRIAM F. CLARK

RITZ CLARK & BEN-ASHER LLP
One Liberty Plaza, 23rd Floor
New York, NY 10006
Tel.: 212.321.7075
Fax: 212.321.7078
mclark@rcbalaw.com

on behalf of amici curiae:

National Employment Lawyers
Association/New York
90 Broad Street, Room 210
New York, NY 10004

National Employment Law
Project/New York
75 Maiden Lane, Suite 601
New York, NY 10038

TO:

MINTZ & GOLD LLP
Attorneys for Petitioners-Appellants
600 Third Avenue, 25th Floor
New York, NY 10016
Tel.: (212) 696-4848
Fax: (212) 696-1231
mintz@mintzandgold.com
mccormick@mintzandgold.com

EPSTEIN BECKER & GREEN, P.C.
Kenneth J. Kelly
Victoria Sloan Lin
Edward M. Yennock
875 Third Avenue
New York, NY 10022
Tel: 212.351.4500
KKelly@ebglaw.com
vsloan@ebglaw.com
eyennock@ebglaw.com

Attorneys for Respondent-Respondent

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PRELIMINARY STATEMENT

Amici NELA/NY and NELP submit this brief in support of Petitioner-Appellants' ("Petitioners") motion for leave to appeal. *Amici* submit that the issues involved are of public importance: the Appellate Division's holding, if allowed to stand, will result in the forfeiture of earned compensation for employees in many sectors of the economy, directly contrary to long-standing public policy of the State of New York.

No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. No party or a party's counsel contributed money that was intended to fund preparation or submission of the brief. No person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief.

INTEREST OF AMICUS CURIAE NELA/NY

The National Employment Lawyers Association (NELA) is a national bar association dedicated to the vindication of individual employees' rights. NELA/NY, incorporated as a bar association under the laws of New York State, is NELA's New York affiliate, with more than 300 members. NELA/NY's activities and services include continuing legal education and a referral service for employees seeking legal advice and/or representation. Through its various

committees, NELA/NY also seeks to promote more effective legal protections for employees.

INTEREST OF AMICUS CURIAE NELP

The National Employment Law Project (NELP) is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of lower-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP works closely with community-based worker centers, unions, and allied groups, and informs its policies based on the information gathered in those relationships. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional and New York state testimony on a range of workers' rights issues.

INTRODUCTION

The overwhelming trends in compensation over the last forty years have moved away from cash compensation and toward various forms of non-cash and deferred compensation. Employers increasingly use non-cash compensation to compensate all different types of employees, such as sales workers, lower-level managers, and even lower-wage workers. The Appellate Division's reading of the New York Labor Law as permitting the forfeiture of earned and vested

compensation would foreseeably and dangerously result in the forfeiture of earned wages and commissions across many sectors of the workplace, and is contrary to New York Labor Law and public policy.

In the present case, there is no dispute that the Petitioners' earned commissions are based on a fixed formula. The amount of these commissions was not a discretionary bonus; it was based exclusively on Petitioners' own endeavors. According to the employer's unilateral policy, however, the commissions were paid not in cash, but in restricted stock that was then subject to vesting criteria. The Petitioners were terminated without cause, thus meeting the vesting criteria. However, the employer refused to deliver the commissions to the employees. The employees argued that this refusal violated the Labor Law. The employer argued to the contrary, on the ground that the commissions were not actually earned compensation pursuant to the Labor Law, because they had been converted by the employer from cash into stock. A duly constituted arbitration panel rejected this argument, as did the trial court.

However, the Appellate Division egregiously misinterpreted the statute and the caselaw interpreting it, holding that the vested commissions were not actually "earned" for one reason: they had been converted unilaterally by the employer into stock, whose value was determined by the rise and fall of the company stock, a factor outside the employees' control.

Nowhere in the text of the statute or in the decades of case law developed under it is there any hint that otherwise earned and vested non-cash commissions are not protected by the Labor Law. If the Appellate Division's decision is allowed to stand, the vested earnings of millions of New Yorkers will be at risk of forfeiture, in violation of public policy.

ARGUMENT

New York's Labor Law Section 190 *et seq.* provides a comprehensive scheme for the protection of employee earnings and commissions earned by independent sales people. The public policy underpinning the statute is to protect employee earnings from forfeiture. *Kolchins v. Evolution Markets Inc.*, 31 N.Y.3d 100, 109-110 (N.Y. App. Div. 2018).

Over the past several decades, the undisputed trend has been for employee to be compensated less in cash and more in equity or equity-like instruments, such those at issue here. Andrew Lund, *Compensation as Signaling*, 64 Fla. L. Rev. 591, 598 (2012). Jiayi Bao and Andy Wu, *Equality and Equity in Compensation*, Harvard Business School Working Paper, 17-093 (2017), https://www.hbs.edu/ris/Publication%20Files/17-093_b4f6e873-ad56-4f49-a6b8-0d7b50cd07ab.pdf.

Where such compensation is discretionary on the part of the employer, the law is clear that it does not constitute wages protected from forfeiture under the Labor Law. *Truelove v. Northeast Capital & Adv.*, 95 N.Y.2d. 220 (N.Y. App.

Div. 2000). But when this compensation is based on an employee's own performance, it is equally well-settled that compensation is protected from forfeiture. As the court stated in *Hallett v. Stuart Dean Co.*, 481 F. Supp. 3d 294, 310 (S.D.N.Y. 2020), there are "three principles that New York courts apply to determine whether incentive compensation qualifies as 'wages' for purposes of Section 193, i.e., whether the incentive compensation was (1) tied to personal productivity or to the performance of the company; (2) guaranteed or discretionary; and (3) vested or contingent."

All three of these principles favor the Petitioners in this case. Therefore, in ordering the forfeiture of Petitioners' earned commissions, the Appellate Division has turned thirty years of Labor Law on its head.

The Appellate Division's analysis essentially begins and ends with *Truelove*, *supra*, a case that involved an employee bonus that was based on the performance of a pool of employees, as opposed to the employee's personal performance. The *Truelove* Court articulated the following standard:

> We therefore agree with those courts that have concluded that the more restrictive statutory definition of "wages," as "earnings … for labor or services rendered," excludes incentive compensation "based on factors falling outside the scope of the employee's actual "work." In our view, the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to

> which that employee is entitled. 95 N.Y.2d at 224 (citation omitted).

The present case meets the *Truelove* standard in that there is an absolute, total, relationship between the Petitioners' earned commissions and their performance.

In purportedly relying on *Truelove*, the Appellate Division has stretched to invent a standard that is neither supported by caselaw nor present in the statute: that the mere fact that the employer chose to pay the Petitioners' earned and vested commissions in stock, not cash, exempted those commissions from statutory protection from forfeiture. The Appellate Division explains this in one phrase: that the value of a company's stock can rise and fall due to factors other than employee performance. *Matter of Lerner v. Credit Suisse Sec. (USA) LLC*, 193 A.D.3d 649, 650 (1st Dep't 2021).

As a matter of basic economics, this principle is absurd. The value of a cash bonus can also rise and fall due to factors other than employee performance. The value of the U.S dollar, compared to other world currencies, and compared to buying power in the U.S. market, also rises and falls -- especially at present due to rising inflation. There is no instrument whose value does not rise and fall in comparison with that of other instruments or currencies. CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 29, 2021); Euro Foreign Exchange Reference Rates, https://www.ecb.europa.eu/

stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html (last visited Nov. 29, 2021).

The fact remains that, although payable in equity, the bonuses in this case were completely earned and measured by the employees' performance, were non-discretionary, and were completely vested, thus meeting the three principles set forth in *Hallett*, *supra*.

Not only is the Appellate Division's rationale economically dubious and contrary to caselaw, it is completely contrary to New York's longstanding policy against the forfeiture of earned wages, (*see, e.g.*, *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 389 (1st Dep't 1994)), which also applies to earned, uncollected commissions. *Arbeeny v. Kennedy Exec. Search, Inc.*, 71 A.D.3d 177, 182 (1st Dep't 2010), citing *Weiner v. Diebold Grp.*, 173 A.D.2d 166, 166-167 (1st Dep't 1991). This policy would be rendered meaningless if an employer could make earned commissions forfeitable simply by paying them in stock rather than cash. In an economy that increasingly relies on non-cash compensation of employees' earned wages and commissions, an affirmance of the Appellate Division in this case would eviscerate important employee protections under the Labor Law.

CONCLUSION

Petitioner-Appellants' motion for leave to appeal should be granted.

Dated: December 6, 2021

Respectfully submitted,

Miriam F. Clark
RITZ CLARK & BEN-ASHER, LLP
Attorneys for Proposed *Amici Curiae*
One Liberty Plaza, 165 Broadway, 23rd Floor
New York, New York 10006
Tel: (212) 321-7075
Fax: (212)321-7078
mclark@rcbalaw.com

CERTIFICATE OF COMPLIANCE

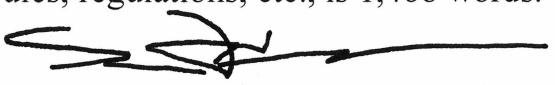
I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 1,468 words.

Dated: December 6, 2021



Miriam F. Clark
RITZ CLARK & BEN-ASHER, LLP
Attorneys for Proposed *Amici Curiae*
One Liberty Plaza, 165 Broadway, 23rd Floor
New York, New York 10006
Tel: (212) 321-7075
Fax: (2120321-7078
mclark@rcbalaw.com