COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Essex, ss.

FAR NO. ________

APPEALS COURT NO. 2018-P-0942

STEVEN P. SMITH,

Plaintiff-Appellant

v.

MERRIMACK VALLEY CORP. AND LEONARD J. THOMAS, JR.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE ESSEX COUNTY SUPERIOR COURT

APPELLEES' APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass.R.App.P. 27.1, the Defendants-Appellees, Merrimack Valley Corp. ("MVC"), and its principal, Leonard J. Thomas, Jr. ("Thomas"),[1] hereby request this Court to grant them leave to obtain further appellate review of their cross-appeal in this action.

As will be demonstrated below, a portion of this case concerns an undecided issue affecting the public interest, i.e., whether an employee's compensation plan, which provides for the payment of sales commissions via a weekly draw against earned commissions, in lieu of a lump sum payment, violates the Massachusetts Wage Act, G.L. c. 149, § 148, et seq. ("Wage Act").

The case at bar concerns substantial issues directly and critically affecting the public interest and justice, including whether an employee's compensation plan, which provides for the voluntary and agreed payment of sales commissions via a weekly draw, to enable workers to have weekly income, against

[1] For the sake of simplicity, this Application may reference only MVC unless otherwise the context requires otherwise.

earned commissions, in lieu of a lump sum payment at the end of long periods of time before they are "due and payable" commissions, violates the Wage Act.

Failing further appellate review in this matter, commission-based industries and companies in the Commonwealth of Massachusetts (i.e. any sales positions, securities, car dealerships, insurance, etc.) will suffer severe financial and operational hardship, up to and including potentially bringing company operations to a grinding halt and causing grave hardship for employees.

The Appeals Court erroneously declined to decide this important issue, which was raised by the Trial Judge when she unexpectedly and mistakenly instructed the Jury (after promising not to do so during the jury charge conference) that a weekly draw on commission compensation plan, as opposed to lump sum payments, is illegal under the Wage Act. The jury instruction was erroneous, and it resulted in a tainted, unfair, and unjust verdict in favor of the Plaintiff-Appellant, Steven P. Smith ("Smith") as to his Wage Act claims against MVC and Thomas.

The weekly draw against lump sum commission plan is exactly how commission-based industries and companies in the Commonwealth of Massachusetts (i.e. any sales positions, securities, car dealerships, insurance, etc.) operate, and, in fact, inure to the letter and spirit the legislature had in mind when enacting the Wage Act. Should commission-based positions not offer such arrangements, employees could be waiting months, even years, before the final "due and payable" amounts would be arithmetically calculated or processed. As such, without such arrangements commission-based employees could do without any income causing severe hardships, particularly while waiting on commissions and/or when there are downtimes and no commissions are being processed.

It would be grave error and a slippery slope to allow the Trial Court's jury instruction and personal judgment to stand - not only for the error itself, but the longtime affect it will bring to companies and industries in this Commonwealth. Further appellate review is not only warranted, but essential for the substantial interests of companies/industries and workers in the Commonwealth.

PRIOR PROCEEDINGS

On June 4, 2013, Smith filed a Complaint in the Essex County Superior Court against MVC and Thomas. *Record Appendix, hereinafter "R.A. I" or "R.A. II", 18-25.* Smith was alleging that his former employer, MVC, failed to pay him sales commissions, and that the failure to pay constituted both a breach of contract and a violation of the Wage Act. On September 9, 2013, MVC and Thomas filed an Answer and Counterclaim. *R.A. I, 7.*

In their Answer and Counterclaim, MVC and Smith alleged that MVC had entered into a written "Agreement" with Smith in November, 2011, to resolve a dispute which had arisen over the amount of sales commissions owed to him. *R.A. II, 141.* The Agreement [*R.A. II, 187*] provided that Smith was scheduled to earn $116,000 in commissions based on jobs booked prior to September 1, 2011. Paragraph 3 of the Agreement stated that these commissions were subject to adjustments if substantial additional costs of over $20,000.00 are incurred on any individual job." Id. The Agreement also stated that it "represent[ed] a full and final settlement of our [MVC's] commission obligations to you for the period under discussion."

R.A. II, 187. In its Counterclaim, MVC alleged that it paid Smith $102,000, and that due to the aforementioned adjustments, it owed nothing to Smith, who had, in fact, been overpaid. *R.A. II, 137, 141.*

On June 10, 2016, MVC and Thomas filed a Motion for Partial Summary Judgment as to the Wage Act violation [Count I]. *R.A. II, 143.* The basis for the Motion was that Smith's sole legal remedy was for a breach of contract under the Agreement, and that he had waived any Wage Act claim by virtue of the clause in the Agreement which stated that it "represent[ed] a full and final settlement of our [MVC's] commission obligations to you for the period under discussion." *R.A. II, 143, 151.*

The Motion Judge (Welch, J.) denied the Partial Summary Judgment Motion, because the "full and final settlement" language in the Agreement did not ***specifically mention the Wage Act***, and therefore, Smith did not waive his Wage Act claim.[2]

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[2] See Crocker v. Townsend Oil Co., Inc., 464 Mass. 1, 14 (2012)(a settlement or contract termination agreement by an employee that included a general release purporting to release all claims will be enforceable as to the statutorily provided rights and remedies conferred by the Wage Act only if such an agreement is stated in clear and unmistakable terms).

On March 3, 2017, Smith filed a "Motion in Limine to Preclude the Admission Into Evidence or Make Any Mention at Trial of the Invalid Agreement of November 16, 2011 for any Purpose". *R.A. II, 200.* MVC opposed Smith's Motion. *R.A. II, 211.* In his Motion, Smith argued that the Agreement should be excluded from the evidence to be presented at trial, because the Motion Judge "found" that the Agreement was "a 'special contract' under the Wage Act and is therefore invalid". *R.A. II 200.* On July 25, 2017, the Trial Judge (Fahey, J.) allowed Smith's Motion via a notation in the record which cited the statute invalidating "special contracts" in violation of the Wage Act, G.L. c. 149, § 148. *R.A. I, 13.*[3] The Trial Judge did not, however, cite any specific reason for finding that the Settlement Agreement was a "special contract" in the notation. Thus, the Agreement was never introduced or referred to at the eventual trial.

In addition, the Trial Judge allowed Smith's "Motion in Limine to Dismiss Defendants' Counterclaim"

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[3] The Wage Act provides that "[n]o person shall by a ***special contract*** with an employee *or by any other means* exempt himself" from the obligation to pay weekly wages to employees. G.L. c. 149, § 148 (emphasis added).

[*R.A. I, 4*], which Motion was based on Smith's argument that the Counterclaim should be dismissed because the claim was premised upon the supposedly unlawful Agreement. *R.A. II, 238*. MVC had opposed the Motion. *R.A. II, 254*.

The jury trial in this action took place between August 10, 2017 and August 18, 2017. *R.A. I, 14*. The Trial Judge (Fahey, J.) instructed the Jury that MVC's draw on commission compensation plan (pursuant to which Smith was continuously paid a $1,400 weekly draw against earned commissions as opposed to a lump sum payment) ***was a violation of the Wage Act***. On August 18, 2017, the Jury returned its "Special Jury Verdict." *R.A. II, 289*. The Jury found that neither MVC nor Thomas breached any employment contract with Smith. *R.A. II, 291.*[4] The Jury did find, however, that MVC and Thomas violated the Wage Act. *R.A. II, 289*. More specifically, the Jury awarded damages for sales commissions definitely determined and due and payable to Smith after January 15, 2012 in the amount of $25,318.96. *R.A. II, 290*. The Jury also found MVC

[4] The Trial Judge specifically instructed the Jury that MVC's Compensation Plan with Smith was the contract that it should consider in connection with Smith's breach of contract claim.

and Thomas were liable to Smith in the amount of $26,864.45, for "meeting the sales quota for man days sold (the '5% Net Profit Man-Day Bonus') that were definitely determined and due and payable to Smith on or before January 15, 2012". Id. Conversely, the Jury found that Smith incurred no damages for sales commissions definitely determined and due and payable to Smith before January 15, 2012, or for any 5% Net Profit Man-Day Bonus definitely determined and due and payable to Smith after January 15, 2012. Id.

On August 22, 2017, the Trial Court entered a Judgment in Smith's favor with respect to his Wage Act claims. *R.A. I, 251.* The $25,318.96 award was trebled under the Wage Act[5] to $75,956.88 plus prejudgment interest in the amount $12,819.77; and the $26,864.45 award was trebled under the Wage Act to $80,593.35 plus prejudgment interest in the amount of $13,602.30. *R.A. I 15, 251.* After a hearing, the Trial Judge awarded Smith attorneys' fees in the amount of $499,936.20, and costs in the amount of

[5] A successful plaintiff under the Wage Act "shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees." G.L. c. 149, § 150.

$16,954.10. *R.A. II, 132.* This sizeable award was encompassed in a final Judgment entered by the Trial on December 5, 2017. *R.A. I, 16.*

MVC and Thomas filed a Notice of Appeal from this final Judgment on December 18, 2017. *R.A. I, 16.* Smith filed a Cross-Appeal on December 22, 2017. Id.

In their Cross-Appeal, MVC argued, *inter alia*, that the Trial Judge's instruction regarding the illegality of MVC's draw on commission compensation plan was erroneous, and that the Trial Judge's instruction resulted in a tainted verdict in favor of Smith as to his Wage Act claims.

The Appeals Court declined to decide whether the Trial Judge's jury instruction was erroneous, because "MVC has not made a plausible showing that the jury might have reached a different result if the challenged instruction had not been given." Memorandum and Order of the Appeals Court dated May 24, 2019, hereinafter, "Memorandum and Order", p. 6. As will be explained below, this aspect of the Appeals Court's decision was clearly mistaken,[6] and this issue

[6] MVC and Thomas filed a Motion for Reconsideration with the Appeals Court on June 7, 2019, which was denied on June 11, 2019.

(as to which there is no case law in Massachusetts) should be addressed by this Court. In particular, the issue should be addressed because many employers with seasonal or lengthy sales cycles use similar compensation plans, and it is in the public interest for this Court to determine whether the Trial Judge's ruling regarding its illegality was correct.

In addition, the Appeals Court upheld the Trial Court's ruling that the Settlement Agreement was unenforceable since it constituted an invalid "special contract" under the Wage Act. MVC and Smith submit that excluding the Settlement Agreement from the evidence submitted at trial was also a mistake, and is not justified under the Wage Act.

STATEMENT OF FACTS

Smith was employed by MVC from July, 2004 until January 12, 2011, as a salaried plus commissions salesman of commercial heating, ventilating and air conditioning jobs to be performed by MVC for various commercial customers. *R.A. I, 138, 143-44.* The terms of his employment were set forth in an Offer Letter dated July 19, 2004, which was sent by Thomas, the owner and President of MVC. *R.A. I, 121.* Smith was to receive, *inter alia*, a base salary, a "sign on" bonus, and a sales commissions in accordance with the Commission Plan attached to the letter. Id. The Commission Plan provided as follows: "***Commissions will be paid on a weekly in the form of a draw on commissions earned.*** Commissions are deemed earned when the contract revenue is collected in full and the contract is closed out of the accounting system." *R.A. I, 122* (emphasis added).

Under Merrimack's Commission Plan, therefore, employees like Smith were paid their commissions solely via the weekly draw, and amounts that may have been owed to him once the contract was closed out of MVC's system were credited against his weekly draw. *R.A. I, 122, 130, 138, 160-64.* Originally, Smith's weekly draw was $400, but it was increased to $1,200 and eventually $1,400 to reflect the level of his sales activity. *Addendum to Appellees' Brief, hereinafter "Add.", Add. 6.* In addition, Smith was entitled under the Commission Plan to year-end bonuses for meeting the sales quota for man-days sold (the "5% Net Profit Man Day Bonus"). *R.A. I, 128.*[7]

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[7] Smith was never deprived of money needed to support him family (as the Trial Judge theorized) where he was being paid a salary ***plus*** $1,400 per week. This would be especially true when he had not fully earned a

Around October, 2011, Smith claimed that he was owed approximately $194,000 in commissions. *R.A. II, 145.* MVC disagreed and a dispute arose between the parties as to what Smith was owed. Id. The parties agreed to work together to resolve their differences, and the resolution was embodied in a written Agreement dated November 16, 2011, executed by both Smith and Thomas.[8] *R.A. II, 187.*

In the Agreement, Smith and MVC agreed that "the total amount of commissions you [Smith] are scheduled to earn is $116,000.00 based on the jobs booked prior to Sept. 1, 2001"; that "[t]hese commissions are subject to adjustments if substantial additional costs of over $20,000.00 are incurred on any individual

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particular commission under his compensation plan, and may have actually owed MVC money. In fact, Smith's balance went into the negative at one point because the company was paying Smith $1,400 weekly during a 21-month period during which the earning of commissions was suspended by MVC due to the economic collapse in 2008. *Add. 14.* In addition, Smith's initial weekly draw was $400, but it was increased to $1,200 and eventually $1,400 to reflect the level of his sales activity. *Add. 6.* In other words, Smith was always treated fairly by MVC and the draw on commission compensation plan was not designed to harm him.

[8] Smith has never denied executing the Agreement, but he insisted in pretrial submissions that he executed it under economic duress [*R.A. II, 203, 264*], an often raised but rarely successful defense to an otherwise valid contract.

job"; and that [t]hese commissions shall be paid weekly in the form of a draw of $1,400.00 against earned commissions until paid in full." *R.A. II, 187*. Lastly, the Agreement provided that Smith would be compensated pursuant a new commission plan with respect to all jobs entered in MVC's system after September 1, 2011. Id. The new plan did not include the 5% Net Profit Man-Day Bonuses. *R.A. II, 182*.

On or about January 5, 2012, Smith received a "Notice of Termination of Employment" from MVC. *R.A. II, 134*. The letter, which was executed by Smith, stated that "[y]ou will be paid your commissions booked prior to Sept. 1, 2011 in accordance with the agreement you signed dated November 16, 2011." Id. MVC continued to pay Smith his weekly draw of $1,400, and in the end, it paid Smith $102,000 pursuant to the Agreement. MVC contended in its pleadings that as a result of certain adjustments specified in the Agreement, it owed nothing to Smith, and he had, in fact, been overpaid.

As a result of the Trial Judge's ruling on Smith's Motion in Limine regarding the Agreement, there was no mention of it at the trial; no mention of the agreed upon amount for the commissions owed to

Smith; no mention of the circumstances which resulted in its execution; and no mention of MVC's performance of the Agreement or lack thereof.

At the trial, Smith's expert witness, Frank E. Rudewicz ("Rudewicz"), testified that during the course of his employment at MVC (eight fiscal years), Smith earned sales commissions (including 5% Net Profit Man-Day Bonuses totaling $195,505.36) totaling $1,093,122.73. *Add. 8.* He also testified that Smith was actually paid $712,649.60 by MVC. *Add. 10.* Thus, Rudewicz testified that it was his "opinion that Mr. Smith is owed a minimum of 380,653 dollars and 13 cents." *Add. 11.*

Thomas rebutted several aspects of Rudewicz's testimony. He testified that 5% Net Profit Man-Day Bonuses were not owed to Smith for the years 2009-2102 because MVC suspended these bonuses as of 2008, and that $127,162.66 had to subtracted from the amount Rudewicz's calculation. *Add. 13.* Thomas also testified that the earning of commissions was suspended for a 21-month period between "September of '08 through the end of our fiscal year, 5/31/2010."

Add. 14.[9] Thomas testified that some of the commissions which Smith claimed were owed to him were not owed because they originated in this 21-month suspension period. Id. The total amount of these disputed commissions was $92,837.31. *Add. 16.* Thomas also testified that MVC had never agreed to compensate Smith for jobs that were left "open" at the time of his termination, January 15, 2012. *Add. 15.* According to Thomas, Smith was seeking approximately $224,375.45 in commissions for these open jobs that he was not entitled to be compensated for. *Add. 17.*[10]

These disputed amounts totaled $444,375.42, and when that amount was subtracted from Rudewicz's starting figure of $1,053,122.73, the actual amount of compensation owed to Smith by MVC was ***$647,747.21***, not $1,053,122.73. *Add. 18.* Smith was actually paid

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[9] The suspension was a product of the terrible economic downturn at that time. Despite the suspension, MVC continued to pay Smith his weekly commission draw of $1,400, which caused him to go into a negative balance.

[10] MVC's Commission Plan provided that upon termination of employment, "variable compensation payments will be debited or credited throughout the end of the month preceding the 'date of departure' and no further commissions shall be due [sic] payable to the individual." *R.A. I, 125.*

$712,649.60 by MVC, meant that Smith was not owed anything and was actually overpaid. Id.

During a colloquy with Counsel at the trial, the Trial Judge revealed that she had concluded that the draw on commission aspect of the MVC's Commission Plan was ***unlawful under the Wage Act***. *Add. 25*. Counsel for MVC had attempted to explain to the Judge that the commissions did not become "wages" until they were "due and payable", which by agreement were due and payable as weekly draws of $1,400.00. *Add. 24.*[11] The Court responded as follows:

> THE COURT: But by your calculations, you're allowing the employer to retain monies owed to the employee after the amount is arithmetically determined and due and payable, apart from the commission language …
>
> MR. SCANDORE: I understand your position, Your Honor. I have seen no case law to say that the draw itself is illegal. …
>
> THE COURT: Well, what happens here is the employee, who has got a family to support and knows he is owed tens of thousands of dollars, has to basically beg

[11] The Wage Act, G.L. c. 149, § 148 applies "so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee." See Commonwealth v. Savage, 31 Mass.App.Ct. 714, 716 (1991).

> and have an argument with his employer.
> That is not how we work in Massachusetts.

Add. 25.

In addition to explaining that the commissions were "due and payable" as weekly draws and did not constitute "wages" under the Wage Act until then, Counsel for MVC attempted to explain that the draw on commission feature of the compensation plan ***benefitted*** an employee like Smith because there were times when "his commissions were in the negative, [and] he continued to receive his weekly draw." In other words, "whether the commission fluctuates, the employee has a steady check he can count on". *Add. 25-26.*

After rejecting MVC's position and stating that "I don't think that's what the SJC would accept" [*Add. 27*], the Trial Judge took up the question of what to instruct the Jury on this issue. Counsel for MVC pleaded with the Trial Judge to ***not*** specifically instruct the Jury that MVC's commission plan was a violation of the Wage Act, because the practical result would be an inevitable finding by the Jury that

MVC violated the Wage Act. *Add. 25.*[12] The Trial Judge responded by insisting that she would ***only*** read the language of the Wage Act regarding when commissions become wages under the Act. *Add. 28.* The Trial Judge stated that she would give an instruction that "[t]he Wage Act, if it conflicts with this, is not in compliance, violates the Wage Act", to which Counsel for Smith replied, "[y]ou mean the commission plan," and the Trial Judge agreed. *Add. 28.* In an effort to further alleviate the concerns expressed by Counsel for MVC, the Trial Judge also stated: "***I do not want to put my thumb on the scale***, but again, what happened here I think - I do think was really improper …". *Add. 28* (emphasis added).

Despite promising not to put a "thumb on the scale", that is precisely what the Trial Judge did when she actually instructed the Jury. After correctly explaining to the Jury how and when the Wage Act applies to commissions (i.e., they are "definitely

[12] The exact words used by Counsel for MVC were: "[I]f you have an instruction that implies to them [the jurors] that the commission plan is illegal, ***I think we have lost the case right there.***" *Add. 28* (emphasis added).

determinable" and "due and payable"), the Judge stated the following with respect to MVC's commission plan:

> So, what does definitely determinable mean? In this case, it means arithmetically determinable when the job is closed and the company has all the profit it needs to determine the net profit of the job. The Wage Act requires that once the employer has all this information to determine the net profit of the job, the employer is required to determine the commission and pay the employee within six days the commission he has earned. ***So to the extent that the commission plan, Exhibit 2, permits the employer to continue paying the 1,400 dollar draw after the commission is able to arithmetically determinable, then the commission plan is unenforceable, because it is in violation of the Wage Act.*** Once, in this case, the commission can be definitely determinable, the math, the numbers are available to the defendants to determine definitely the commission, they have to figure it out, determine the commission, and ***within six days pay it.*** That's what the Wage Act requires.

Add. 30 (emphases added). To this erroneous jury instruction, the Trial Court added the following:

> If you find that the defendant failed to pay Mr. Smith for either or both the commission he was ***legally entitled to once it was definitely determinable*** and/or the five per cent net profit for the man-day bonus, either or both of those would constitute a Wage Act violation. ***And then you would go on to decide the issue of damages.***

<u>Trial Transcript</u>, August 16, 2017, pp. 245-46 (emphases added).

For his part, Counsel for Smith emphasized the erroneous instruction by the Trial Judge in his closing argument to the Jury. In particular, Counsel for Smith stated:

> Her Honor will tell you that when a commission plan, like the one you see here, conflicts with the statute, it's the statute that provides -- that prevails, not the commission plan. ***That becomes very important here.*** And the commission plan conflicts with the statute in a number of ways. Number one, ***it doesn't call for payment of commissions when they're owed.***

Trial Transcript, August 16, 2019, p. 198 (emphases added).

After the Jury was instructed, and Counsel for MVC objected to this instruction ["[y]ou said that paying via a draw is illegal under the statute …"], the Trial Judge's response was "I don't think I said illegal". Counsel for MVC then stated: "You said it's a violation of the Wage Act" to which the Trial Judge responded "Yes, it is" and "[t]here were lots of others [jury instructions]. I only said it once". *Add. 31.*

ISSUES AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

MVC and Smith are seeking further appellate review as to: (1) the Trial Judge's jury instruction regarding the illegality under of MVC's draw on commission plan under the Wage Act; and (2) the Trial Judge's exclusion of the Agreement between MVC and Smith dated November 16, 2011, as relevant evidence of the amount owed to Smith, based on her ruling that it constituted a "special contract" under the Wage Act.

REASONS FOR FURTHER APPELLATE REVIEW

MVC submits that the Trial Judge's conclusion regarding the illegality of MVC's draw on commission compensation plan under the Wage Act, and the jury instruction based on that conclusion, were erroneous.

Under the terms and conditions of MVC's draw on commission plan, Smith earned a commission when a job was paid in full and closed out in the company's accounting system, and it was then due and payable as a weekly draw of $1,400. The Trial Judge should have instructed the Jury as to what the phrase "due and payable" in the Wage Act means,[13] and let the Jurors make their own determination under the terms and conditions of the Commission Plan as to when Smith's commissions became "due and payable". Instead, the Trial Judge Court substituted her ***own judgment*** as to

[13] The Trial Judge mentioned the phrase but never actually explained its meaning like she did with the phrase "definitely determinable". *Add. 30.*

when the commissions were due and payable to Smith, namely, six days after "the math, the numbers are available to the defendants to determine definitely the commission".[14] In essence, the Trial Judge mistakenly conflated commissions with ordinary weekly wages (which are payable within 6 days) and ignored the phrase "due and payable" in the Wage Act.

Moreover, the Trial Judge's conclusion that a commission plan featuring a weekly draw in lieu of a lump sum payment is in violation of the Wage Act was contrary to public policy. The Trial Judge reasoned that such a commission plan harms the employee "who has got a family to support and knows he is owed tens of thousands of dollars, has to basically beg and have an argument with his employer". *Add. 25*. On the other hand, the weekly draw feature ***helps*** an employee because he receives substantial weekly compensation at a time when he may not have earned a commission and would not otherwise be paid anything beyond his

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[14] The Trial Judge's instruction was especially unjustifiable given that ***no*** appellate court in Massachusetts has ever ruled that a draw on commission plan is barred by the Wage Act. This fact was, of course, correctly brought to the attention of the Trial Judge by Counsel for MVC. *Add. 25*.

salary. In other words, the purpose of a draw on commission plan is for employees to receive regular, guaranteed income in businesses with lengthy or seasonal sales cycles.

If an employer and employee agree that earned commissions are "due and payable" as a weekly draw because it helps an employee earning commissions in the long run to have a check from the employer each week, such an agreement should be encouraged as striking a reasonable balance between the needs of the employer and the employee.[15] This agreed upon balance should not be struck down by a judge, who substitutes his or her own judgment as to what is fair, by considering only the detriment to the employee and disregarding the benefit to him or her under the mutual arrangement.

There are undoubtedly other employers (e.g., auto dealerships, office equipment leasing, commercial printing, insurance agents, stockbrokers,

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[15] There are downsides to an employer as well under such a compensation plan if an employee has several bad commission periods and does not earn enough money to cover the employee's draws, and ends up owing the employer money. Such an employee might also leave the business at a time when he or she owes money to the employer.

loan/mortgage officers) who utilize a similar compensation system to that of MVC (draw on commission in lieu of lump sum payments), and the legality of such a compensation system is a matter of public interest. Moreover, this is an issue which has not been decided by any appellate court in this Commonwealth, and MVC and Smith respectfully submit that it should be decided by this Court.

Furthermore, determining the legality of MVC's draw on commission plan is not a theoretical exercise, because the Trial Judge's erroneous instruction resulted in a tainted verdict in favor of Smith with regard to his Wage Act claims.

After discussing MVC's argument that the Trial Judge gave the Jury an erroneous jury instruction regarding the legality of Smith's Commission Plan with MVC under Wage Act, the Appeals Court Panel declined to address the issue, because "MVC has not made a plausible showing that the jury might have reached a different result if the challenged instruction had not been given." Memorandum and Order, p. 6. In particular, the Panel stated that the case concerned a dispute only about the amount of money that Smith was owed for commissions/bonuses and "nothing in the record suggests that the verdict was based on the timing of commission payments, as opposed to their nonpayment." Id.

Both of the foregoing statements by the Panel are mistaken. First of all, the Special Jury Questions state as follows: "Did the Defendants [MVC and Thomas] violate the Massachusetts Wage Act: a. By failing to ***timely*** pay commissions? [YES] b. By failing to ***timely*** pay the 5% net profit bonus for meeting the man day quota? [YES]." *R.A. II 289* (emphasis added). Thus, the fact that the Jury's verdict was based on the ***timing*** of the payments, as opposed to nonpayment, is evident from the ***plain wording of the verdict.*** The Jury then awarded monetary damages that were "attribut[ed]" to certain categories of commissions and bonuses based on the failure to make "timely" payments. *R.A. II, 290.*

Secondly, the Jury found in favor of MVC and Thomas as to Smith's breach of contract claims, both as to commissions and the 5% Net Profit Man-Day Bonuses. *R.A. II, 291.* Common sense dictates that if the Jury verdict on the violations of the Wage Act was based on the nonpayment of commissions (or the bonuses), the Jury would have found that the nonpayment was ***also*** a violation of the MVC's Commission Plan and, therefore, ***a breach of contract.*** The fact that the Jury found in favor of MVC and Thomas on Smith's breach of contract claims constitutes additional, objective evidence that the Jury believed that Smith was paid everything he was owed by MVC,[16] and that its finding that MVC and Thomas violated the Wage Act was based solely on the timing of the payments from MVC to Smith.

Accordingly, it is apparent that the Appeals Court Panel mistakenly overlooked both the plain wording of the verdict and the significance of the finding in MVC's and Thomas' favor on Smith's breach of contract claim in its decision.

The Panel was also mistaken that the only issue at trial was how much of the commissions and bonuses owed to Smith by MVC had been paid. The Trial Judge's erroneous instruction on the Wage Act ***also*** made the

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[16] As the Panel correctly noted: "MVC's expert testified that Smith had earned only $647,747.21 in commissions, that is, that MVC had overpaid Smith." Memorandum and Order, p. 6. It is, therefore, entirely plausible that the Jury agreed with MVC's expert, and found in favor of the Defendants as to the breach of contract claim, because Smith had been paid in full by MVC.

timing of the payments an issue for the Jury to consider in connection with the special questions regarding whether MVC violated the Wage Act. More specifically, the Trial Judge instructed the Jury that:

> The Wage Act requires that once the employer has all the information to determine the net profit of the job, the employer is ***required to pay the employee within six days*** the commissions that he has earned. To the extent that the commission plan, Exhibit 2, permits the employer to continue paying the 1,400-dollar draw after the plaintiff's commission is able to arithmetically determinable, then the commission plan is unenforceable, because it is in violation of the Wage Act. Once, in this case, the commission can be definitely determinable, the math, the numbers are available to the defendants to determine definitely the commission, they have to figure it out, determine the commission, and ***within six days pay it.*** That's what the Wage Act requires.

Trial Transcript, August 16, 2017, pp. 242-43 (emphases added). To this erroneous instruction, the Trial Court added the following:

> If you find that the defendant failed to pay Mr. Smith for either or both the commission he was ***legally entitled to once it was definitely determinable*** and/or the five per cent net profit for the man-day bonus, either or both of those would constitute a Wage Act violation. ***And then you would go on to decide the issue of damages.***

Trial Transcript, August 16, 2017, pp. 245-46 (emphases added).

The evidence in this case was that under MVC's Commission Plan, employees like Smith were paid their commissions solely via the weekly draw, and amounts that may have been owed to him once the contract was closed out of MVC's system were credited against his weekly draw. *R.A. I, 122, 130, 138, 160-64.* By using the phrase "legally entitled to once it was definitely determinable," and having just instructed the Jury that Smith was legally entitled under the Wage Act to be paid his ***entire*** commission six days after the commissions were capable of being determined mathematically, the Trial Judge essentially ***guaranteed*** that the Jury would conclude that MVC's payments to Smith violated the Wage Act based on the timing of MVC's payments to Smith (i.e., paying the commissions and the bonuses as a $1,400 weekly draw credited against the total amount owed, as opposed to paying the entire commission and bonus within six days). The Trial Judge, of course, then instructed the Jury to "decide the issue of damages" if they found any violation of the Wage Act ***regardless of the type of violation*** (i.e., missing or late payments).

The Appeals Court Panel also pointed out in its decision that "[n]othing in the record suggests that there was any evidence, or that the jury received any instruction, about how to calculate damages based on how long payments were withheld after they became definitely determinable." Memorandum and Order, p. 6. The Jury did not receive such an instruction because the Trial Judge introduced the issue of the timing of the payments in a draconian fashion during her jury instructions, after promising MVC's Counsel that this would ***not*** be done. Infra, at 16. As a result, it is unfair to expect MVC's Counsel to have requested, at the eleventh hour, an instruction regarding how to calculate damages based on how long payments were withheld after they became definitely determinable.

The fact that no one can seem to determine the source of the ***amount*** that the Jury awarded Smith should not make a difference. Instead, the focus should be on the plain language of the Jury's Verdict and the finding in favor of MVC and Thomas on Smith's breach of contract claim, both of which strongly suggest that at least some amount of money was improperly awarded to Smith based on an erroneous jury instruction.

Finally, the Appeals Court upheld the Trial Court's ruling that the November, 2011 Agreement was unenforceable since it constituted an illegal "special contract" under the Wage Act.[17] MVC is not arguing that the Agreement should have been enforced as a ***release*** of Smith's Wage Act claims, as the Appeals Court appears to have reasoned. Instead, the Agreement should have been admitted at trial to allow the Jury to consider (along with the other evidence in the case regarding Smith's compensation) that Smith was only owed $116,000.00 based on the jobs booked prior to Sept. 1, 2001.[18] This is a case where there was a bona fide dispute

[17] The Panel reasoned as follows: "To the extent MVC withheld commissions beyond the date when "the amount of such commissions, less allowable or authorized deductions, ha[d] been definitely determined and ha[d] become due and payable" to Smith, id., it violated the Wage Act. That is, MVC would be liable whether the commissions it owed were merely late, or were not paid at all. As the settlement agreement purported to limit or immunize MVC from Wage Act liability, it amounted to an impermissible 'special contract.' Smith was entitled to present his Wage Act claims to the jury without MVC interposing the improper settlement of the claims as a defense." Memorandum and Order, p. 3.

[18] MVC and Thomas are not conceding that the Agreement was a "special contract" within the meaning of the Wage Act, but will leave this discussion for another time in the event their FAR Application is allowed.

between MVC and Smith as to the amount of compensation he was owed.[19] To the extent that Smith agreed upon the amount owed, MVC should have been allowed to contradict, with the figures contained in the Agreement, his expert's claim that he was actually owed $380,653.13.

Instead of introducing the Agreement to contradict Smith's evidence, MVC was compelled to shoot holes in the various factual assumptions that Smith's expert made to arrive at the $380,653.13 figure. Infra, at 14. This was considerably more difficult than simply introducing into evidence the amount that Smith agreed he was owed in the Agreement. MVC submits that there is nothing in the Wage Act which makes a compromise in the case of a bona fide dispute between employer and employee inadmissible for all purposes, as the Trial Court and the Appeals Court erroneously ruled in this case.

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[19] As the Jury's verdict in favor of MVC and Thomas on Smith's breach of contract claims strongly suggest, MVC owed him nothing as it maintained all along.

CONCLUSION

For the foregoing reasons, the Defendants-Appellees, Merrimack Valley Corp. and Leonard J. Thomas, Jr., request this Court to grant them leave to obtain further appellate review of their cross-appeal in this action pursuant to Mass.R.App.P. 27.1.

THE APPELLEES

By their Attorney,

/s/ Isaac H. Peres

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DATED: June 14, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Mass.R.App.P. 16(k), I hereby certify that this Motion complies with all applicable rules of court pertaining to the filing of Briefs and Requests for Further Appellate Review, including the brief statement, which consists of not more than either 10 pages of text in monospaced font (Courier New) indicating why further appellate review is appropriate.

/s/ Isaac H. Peres

Isaac H. Peres

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, this Application was served, by e-mail and first class mail, on Appellant's Counsel.

/s/ Isaac H. Peres

Isaac H. Peres

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-942

STEVEN P. SMITH

vs.

MERRIMACK VALLEY CORP. & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

These appeals arise from an action brought by the plaintiff, Steven P. Smith, for sales commissions and bonuses owed to him by his former employer, defendant Merrimack Valley Corp., and its principal, defendant Leonard J. Thomas, Jr. (collectively, MVC). A Superior Court jury awarded damages to Smith for MVC's violations of the Wage Act, G. L. c. 149, § 148,[2] and the trial judge awarded attorney's fees and costs, including a sanction for MVC's failure to timely produce critical documents in discovery.

MVC appeals from the principal judgment, raising various trial-related issues, and from the separate judgment awarding attorney's fees and costs. In his cross appeal, Smith

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[1] Leonard J. Thomas, Jr.

[2] The jury found for MVC on Smith's breach of contract claim.

challenges how the discovery sanction was fashioned and the award of costs. We affirm.

Discussion. 1. MVC's claims of trial error. "We review a judge's evidentiary rulings on a motion in limine for abuse of discretion." Commonwealth v. Rosa, 468 Mass. 231, 237 (2014). In the absence of an abuse of discretion or other legal error, we will not disturb a judge's decision on whether to admit evidence. Zucco v. Kane, 439 Mass. 503, 507 (2003). We review jury instructions for error and, if erroneous, whether the error affected the substantial rights of the objecting party. See Beverly v. Bass River Golf Mgt., Inc., 92 Mass. App. Ct. 595, 603 (2018). "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial -- that is, unless the result might have differed absent the error." Id., quoting Blackstone v. Cashman, 448 Mass. 255, 270 (2007).

a. Exclusion of the settlement agreement. MVC asserts that the trial judge erred by excluding the parties' settlement agreement from evidence. The settlement agreement was the subject of a summary judgment motion and two motions in limine. On appeal, MVC focuses on the trial judge's determination that the settlement agreement was inadmissible because it amounted to an invalid "special contract" exempting MVC from compliance with the Wage Act.

The Wage Act provides that "[n]o person shall by a special contract with an employee or by any other means exempt himself from" the Act. G. L. c. 149, § 148. MVC argues that because the settlement agreement addressed only the amount of the commissions owed to Smith, rather than the timing of payments (thus never depriving Smith of a weekly wage), the agreement does not constitute a "special contract." We disagree. To the extent MVC withheld commissions beyond the date when "the amount of such commissions, less allowable or authorized deductions, ha[d] been definitely determined and ha[d] become due and payable" to Smith, id., it violated the Wage Act. That is, MVC would be liable whether the commissions it owed were merely late, or were not paid at all. As the settlement agreement purported to limit or immunize MVC from Wage Act liability, it amounted to an impermissible "special contract." Smith was entitled to present his Wage Act claims to the jury without MVC interposing the improper settlement of the claims as a defense.

Nevertheless, not all "special contracts" of this nature are categorically unenforceable. MVC further contends that the settlement agreement was enforceable as a general release, and that general releases are favored as a matter of public policy. See Crocker v. Townsend Oil Co., 464 Mass. 1, 14 (2010). However, a general release agreement is "enforceable as to the statutorily provided rights and remedies conferred by the Wage

Act only if such an agreement is stated in clear and unmistakable terms" and "specifically refer[s] to the rights and claims under the Wage Act that the employee is waiving." Id. The settlement agreement here contains no such express language. As the settlement agreement does not constitute a valid waiver of Smith's Wage Act claims and is therefore unenforceable, we discern no error of law or abuse of discretion in the judge's decision to exclude it from evidence.

b. Instruction on MVC's commission plan. The Wage Act applies, "so far as apt," to the payment of commissions once they become "definitely determined" and "due and payable." G. L. c. 149, § 148. In explaining the meaning of "definitely determined" to the jury, the judge instructed that MVC's compensation plan violated the Wage Act if MVC did not pay Smith the balance it owed him within six days of when the commission became "arithmetically determinable."[3] Without citation to any

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[3] The judge instructed as follows:

> "So, what does definitely determined mean? In this case, it means arithmetically determinable when the job is closed and the company has all the profit it needs to determine the net profit of the job.
>
> "The Wage Act requires that once the employer has all this information to determine the net profit of the job, the employer is required to determine the commission and pay the employee within six days the commission that he has earned.

authority, MVC argues that a commission plan providing payment through a weekly draw in lieu of a lump sum does not violate the Wage Act because the commissions become "due and payable" only at the time of the weekly draw (and is even desirable as a matter of public policy). Indeed, the challenged jury instruction removed this defense from the jury's consideration. We need not determine whether payment of commissions by a weekly draw is permissible under the Wage Act, however, because even assuming that the instruction was erroneous, MVC has not shown that it was prejudicial.

MVC asserts that because the jury found for the plaintiff under the Wage Act, but not under the contract, it is "entirely possible that the [j]ury found that only the manner and timing of the payments (weekly draw vs. lump sum) were unlawful." But nothing in the record suggests that the jury based their damages award on the fact that MVC made late payments. From what we can discern from the record the parties have provided us, the only issue at trial was how much of the commissions owed to Smith had been paid. Both sides agreed that Smith had been paid a total of $712,649.60 in commissions over the course of his employment

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"To the extent that the commission plan . . . permits the employer to continue only paying the 1,400-dollar draw after the plaintiff's commission is able to be arithmetically determinable, then the commission plan is unenforceable, because it is in violation of the Wage Act."

with MVC.[4] Smith's expert testified that Smith was owed a minimum of $380,653.13 more. MVC's expert testified that Smith had earned only $647,747.21 in commissions, that is, that MVC had overpaid Smith. Neither side explained in its brief, nor were they able to explain when questioned at oral argument, how the jury arrived at their damages award. Nothing in the record suggests that there was any evidence, or that the jury received any instruction, about how to calculate damages based on how long payments were withheld after they became definitely determinable.[5] That is, nothing in the record suggests that the verdict was based on the timing of commission payments, as opposed to their nonpayment. As the parties have failed to provide a complete record of the evidence or the judge's instructions, we are in no position to review, much less disturb, the judgment. See <u>Buddy's Inc</u>. v. <u>Saugus</u>, 62 Mass. App. Ct. 256, 264 (2004). In short, MVC has not made a plausible showing that the jury might have reached a different result if the challenged instruction had not been given. See

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[4] Smith's expert testified that Smith had been paid $680,649.60, but assumed in MVC's favor that Smith had received a side payment of $32,000.

[5] The sparse record before us indicates some recognition that if Smith's commissions were merely delayed, rather than unpaid, his Wage Act damages would be limited to interest lost from the delay. In this regard, Smith's counsel stated, "[W]e haven't sought the interest because they --," but never completed this thought after the interruption.

Campbell v. Cape & Islands Healthcare Servs., Inc., 81 Mass. App. Ct. 252, 258-259 (2102); Global Investors Agent Corp. v. National Fire Ins. Co. of Hartford, 76 Mass. App. Ct. 812, 825 (2010).

c. Statute of limitations. MVC challenges the special question that asked the jury to determine the amount of unpaid "man-days sold" bonuses that were "definitely determined and due and payable to Smith on or before January 15, 2012." MVC contends that by asking the jury to determine damages without a specific start date, the judge allowed the jury to consider unpaid bonuses that may have been due prior to April 15, 2010, the agreed-upon cutoff date under the Wage Act's three-year statute of limitations.

Our review of this claim is again hampered by the deficient record before us. Specifically, MVC provided only a partial transcript of the conference during which the parties and the judge discussed the language of the special questions.[6] Smith attached to his reply brief some additional pages of the transcript, which appear to show that the April 15, 2010, cutoff date was included in an earlier version of the proposed special questions, and that counsel for MVC expressly agreed to its removal. MVC therefore waived its right to claim error on

[6] We are unable to discern if this omission was inadvertent or intentional; it was nonetheless misleading to the court.

appeal. See Boston Edison Co. v. Massachusetts Water Resources Auth., 459 Mass. 724, 740 (2011), citing Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974).

Even if MVC had preserved its rights, the limited record available to us does not demonstrate that the omission of the statute of limitations cutoff date was prejudicial. To the contrary, Smith's expert testified he was "fully paid" as of September 14, 2010, and MVC's expert testified that Smith was credited with $32,000 in October 2010, which accounted for "all commissions through 2010." Based on the record available to us, the evidence suggests that the damages award could not have been based on commissions or bonuses outside of the statute of limitations period.

In summary, MVC has not demonstrated any error of law or abuse of discretion warranting relief from the jury's verdict.

2. MVC's appeal of attorney's fees. A party who prevails in a Wage Act claim is entitled to reasonable attorney's fees and the costs of litigation. Dixon v. Malden, 464 Mass. 446, 453 (2013), citing G. L. c. 149, § 150. Absent legal error, we review an award of attorney's fees and costs for abuse of discretion. See Beninati v. Borghi, 90 Mass. App. Ct. 556, 568 (2016). A trial judge has considerable discretion in awarding attorney's fees under applicable statutes, and when made, the "award is presumed to be right and will not be disturbed without

a showing that the fee is excessive." Keville v. McKeever, 42 Mass. App. Ct. 140, 155-156 (1997). The trial judge "is in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorney's services." Fontaine v. Ebtec Corp., 415 Mass. 309, 324 (1993).

MVC asserts that the award of $499,936.20 in attorney's fees is excessive because it is disproportionate to the $52,183.41 (before trebling and interest) awarded by the jury in compensatory damages, reflects an unreasonable amount of time and labor, and is inappropriate for a case that MVC claims was not complex.

The judge issued a detailed decision, reflecting a thorough review of the billing records and other submissions before her. The judge found the hourly rates reasonable, reduced the total fees by twenty percent, and applied other reductions where appropriate. With respect to MVC's concern with proportionality, the judge noted that "some disproportion between the verdict and the fee award is warranted given the work required, and reasonably necessary in light of the extensive and prolonged discovery, motions practice, and length of the jury trial." See A.C. Vaccaro, Inc. v. Vaccaro, 80 Mass. App. Ct. 635, 643-644 (2011) (attorney's fee award not "excessive by reason of its disproportionality" to total amount of damages where proceedings "encompassed extensive discovery and motion practice, and a five-day jury trial"). We discern no abuse of discretion.

3. Smith's appeal of discovery sanction and award of costs. The trial judge possesses wide discretion in sanctioning a party for discovery violations. See Short v. Marinas USA Ltd. Partnership, 78 Mass. App. Ct. 848, 852-853 (2011). Here, the judge imposed a sanction against MVC for producing thousands of documents on the eve of trial, well after the close of discovery, which were responsive to Smith's document requests and obviously critical to Smith's case. The judge determined that MVC's failure was "egregious and deserving of sanctions."[7] Rather than excluding the late-discovered documents or imposing a specific amount to be paid by MVC, the judge ordered MVC to place $30,000 in escrow, pending resolution of any appeal, to reimburse Smith for expert fees he incurred as a result of the late production.

Smith takes exception, arguing that the judge later recharacterized the reimbursement as part of the statutorily

[7] In responding to Smith's claim, MVC argues in passing that its late discovery of 5,500 pages of crucial documentary evidence was "not the product of willful neglect," but mere "happenstance." The judge specifically rejected MVC's characterization, finding that "[defendant] Thomas totally failed to make any, let alone sufficient, efforts before claiming [d]efendants had no such documents," and that his conduct was "intentional" as well as "egregious." MVC has not shown that this finding was clearly erroneous or that the sanction was an abuse of discretion.

mandated costs awarded to Smith under the Wage Act. However, as the judge's order makes clear, the sanction was always intended to be a reimbursement of costs incurred, as determined at a later date. Moreover, by ordering the sanction to be held in escrow, the judge reserved a meaningful opportunity for MVC to appeal the order. While we agree that fashioning the sanction in this manner may have diminished its impact, "it is not our province to substitute our judgment for that of the judge." Short, 78 Mass. App. Ct. at 853.

Smith also challenges the costs awarded for the services of his accounting experts. With respect to Frank Rudewicz, Smith argues that the judge abused her discretion by awarding costs for only the hours Rudewicz spent preparing for and testifying at trial, but not for the time he spent working on the case prior to trial. We discern no abuse of discretion. The $7,100 awarded to compensate for Rudewicz's time was in addition to the $30,000 sanction, which the judge found reasonable to cover the costs associated with "the preparation of the calculations and expert report as to [Smith's] damages." Smith makes no reasoned argument, nor does he cite any documents in the record, to show that $30,000 was insufficient to cover his pretrial expert costs. Without any basis in the record to support Smith's claim, we will not substitute our judgment for that of the trial judge. See Fitzgibbons's Case, 374 Mass. 633, 640 (1978).

Smith further argues that the judge abused her discretion by reducing Rudewicz's hourly rate -- which he billed variously at $400, $410, $450, and $510 -- to $250 for trial preparation and $300 for time spent in court. Again, the record contains no documentation to support Smith's claim that Rudewicz's services were worth their sticker price, leaving us unable to conclude that the hourly rates the judge did allow were out of line with that of other forensic accountants with similar experience.

Finally, Smith challenges the judge's decision to deny costs altogether as to Brian Peterson. The judge declined to award fees for Peterson's time because Smith "has not provided the court with information regarding Mr. Peterson's credentials and, thus, this court cannot find any basis to award fees for his time." As we are in the same position as the judge, we have no basis in evidence to determine that she abused her discretion.

Judgments affirmed.

By the Court (Massing, Ditkoff & Wendlandt, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: May 24, 2019.

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[8] The panelists are listed in order of seniority.