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IN THE SUPREME COURT OF CALIFORNIA

HECTOR ALVARADO

Plaintiff, Appellant and Petitioner

vs.

DART CONTAINER CORPORATION OF CALIFORNIA

Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
CASE NO. E061645

PETITION FOR REVIEW

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

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ISSUES PRESENTED

The issues presented for review are:

1. Under California law, how must an employer calculate the "regular rate" for the purpose of determining overtime pay when a weekly wage has an hourly wage component and fixed amount component that is payable irrespective of whether or not overtime hours are worked?

2. Can an employer, under California law, divide a flat sum component of a weekly wage by total hours worked each week (apply "fluctuating workweek" methodology) to arrive at the "regular rate" for purposes of calculating overtime, where the number of hours varies from week to week, causing the overtime rate to decrease each week that the amount of overtime work increases?

3. Does California law require an employer to divide a flat sum component of a weekly wage by the maximum number of non-overtime hours for the week (e.g. 40 hours) in determining the "regular rate" to be utilized in calculating overtime?

4. If California law is indeed silent on how to calculate overtime when flat sums called "bonuses are paid as part of a weekly wage, was the Court of Appeal's application of 29 CFR 788.209 (a) wrong, given the provisions of 29 CFR 778.502 and 29 CFR 778.203.

INTRODUCTION

The Court of Appeal issued a decision that threatens to sweep away, in one stroke, years of firmly-established California case law that distinguishes the Federal means of calculating overtime for employees from California's means of calculating overtime when an employee's wages include a fixed salary component that is paid irrespective of whether overtime is worked. The Slip Opinion is attached hereto. Review is imperative to protect well established substantive overtime rights from forfeiture on account of a pay scheme, adopted by the Court of Appeals, that reduces, with each additional minute of overtime worked, the hourly rate upon which overtime must be calculated. The authority turned on its head by the Court of Appeal decision includes:

- 29 Ops. Attorney General, Opinion N0. 57-29, pg. 168-172 (May 15, 1957) in which the Attorney General, in response to a question posed by the Chairman of the Industrial Welfare Commission ("IWC")[1] regarding application of the Federal fluctuating work week methodology for calculating overtime, unequivocally rejected that methodology, opting

[1] The IWC is the quasi-legislative body that sets minimum wage and overtime law. Back in 1957 its authority was limited to women and children. Since its chairman received the 1957 A.G. Opinion, the IWC has repeatedly enacted wage orders with overtime provisions not unlike those operative when the AG Opinion issued, and it has not adopted the "fluctuating work week" methodology in any of those enactments.

instead for division of the salary by the regular workweek of forty hours.

- *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239 held that the fluctuating work week methodology does not apply under the California Wage Orders despite its applicability under the FLSA because of the differences between California law and the FLSA, including the 8 hour day provisions of California law.

- *Alcala v. Western Ag Enterprises* (1986) 182 CA 3d 546, 551 embraced and applied *Skyline*'s methodology for calculating overtime and rejection of the "fluctuating work week" method.

- *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721,728, where an employee had a fixed amount per workweek wage, the court expressly held that the *Skyline* overtime calculation methodology applied.

- *Ghory v. Al-Laham* (1989) 209 Cal.App.3d 1487, 1490-1491 adopted *Skyline* analysis rejecting the fluctuating work week methodology in application of California overtime law.

- *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785,795 acknowledged the continuing viability of *Skyline*'s overtime calculation methodology, distinguishing it from the federal rule authorizing use of the fluctuating workweek methodology.

- *Lujan v. Southern California Gas Co.* (2002) 96 Cal.App.4th 1200, upheld *Skyline* analysis in a context where meter readers were paid a fixed amount per route (not per Saturday or Sunday worked as here), and found

that dividing fixed route pay by actual hours worked to determine "regular rate" was improper. Independent of its adoption of *Skyline,* the court did rule that because of a collective bargaining agreement overtime exemption in the law, the overtime system utilized in *Lujan* was not illegal. Such an exemption is not available here.

- *Huntington Memorial v. Superior Court* (2007) 131 Cal.App.4th 893. In a non-flat rate context, the Court of Appeal rejected, as inconsistent with the purpose of California's overtime requirements, a pay plan that, like the pay plan here, caused the "regular rate" to decrease the more hours of overtime worked.

- *Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, 817-818 where the Court of Appeal, relying on *Skyline,* as well as the DLSE Manual provision rejected by the Court of Appeal herein, expressly rejected application of the "fluctuating work week methodology" in calculating overtime in flat rate "bonus" contexts.

By rejecting, implicitly or explicitly, no fewer than seven decisions from other California appellate courts and at least one from this Court, the Court of Appeal has engendered substantial doctrinal confusion requiring this Court's review.

The Court of Appeal reached its unprecedented holding without grappling with the fact that it is adopting the fluctuating work week approach to a flat amount component of a weekly wage (a "salary" in fact if

not in name), in the face of over fifty years of rejection of that approach--beginning with the AG's Opinion in 1957, continuing with the Industrial Welfare Commission's rejection of the "fluctuating workweek approach in "Findings" in 1963[2]; and the case law that followed beginning with *Skyline Homes, Inc., supra,* in 1985, and culminating in *Marin, supra* that applied *Skyline* to a fixed payment (i.e. salary, characterized as a "bonus" in a context where the employee, as in this case, also earned hourly wages).

The error in the Court of Appeal's analysis stems from a focus on a "bonus" characterization of the salary element of the Dart compensation system, not substance. Respondent Dart's plan paid flat amount payments in weeks in which weekend work is performed of $15 for one weekend day worked, and $30 for two weekend days worked. Dart called these fixed amounts "bonuses". Just as easily, Dart's policies could have called these flat amounts weekly "salaries" paid in addition to hourly pay for those weeks when their workers worked on weekends. Such payments, no matter

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[2] Per the 2002 DLSE Manual: "Recent research in IWC archives has disclosed that in 1963 'Findings', the Commission stated: 'In defining its intent as to the regular rate of pay set forth in Section 3(a)(3)(A) and (B) to be used as a basis for overtime computation, the Commission indicated that it did not intend to follow the "fluctuating work week" formula used in some computations under the Fair Labor Standards Act. It was the Commission's intent that in establishing the regular rate of pay for salaried employees the weekly remuneration is divided by the agreed or usual hours of work exclusive of daily hours over eight.' Thus, the DLSE position (and the Skyline court) is correct." DLSE Manual Page 48-2

how they are referred to, are salaries, not unlike the salaries at issue in the cases cited above. A "salary", as opposed to an hourly wage, is a fixed amount paid to an employee, measured by day, week, month or year, irrespective of the hours worked during the pay period. Here, in addition to hourly wages, Dart's employees earned salaries of $30 or $15 in any week they worked a weekend day. The only difference between this case and cases like *Skyline*, *Ghory*, and *Hernandez*, the salaries in those cases were the only wages paid in those cases, and here, the employees received both hourly wages and salaries in weeks they worked on weekends. Nothing in a mixed hourly pay-salary pay wage system, makes the salary component unlike any other salary subject to California's longstanding repudiation of the "fluctuating work week" methodology for calculating overtime. The "bonus" moniker does not change the fundamental requirement of how overtime is to be calculated in California.

The Court of Appeal, in adopting the fluctuating work week approach, pinned its analysis, in part, on the fact that sections 49.2.4.2 and 49.2.4.3 of the DLSE Manual, which expressly dealt with calculating overtime in the context of flat rate "bonuses", were not expressly tied, in those sections of the Manual, to any case law or other authority dealing with overtime on flat rate "bonuses" (Slip Op.22) . Without such support, the Court of Appeal reasoned, the Manual Provisions were not law, and therefore, the court was compelled to turn to a Federal Regulation

purportedly dealing with overtime on "flat rate bonuses" that authorized use of the "fluctuating work week" methodology. (Slip Op.24-25) In taking this approach, the Court of Appeal ignored the California authority cited above, putting blinders on to the fact that the flat amount "bonus" here was, as a matter of substance, no different than flat amount salaries in the California cases that have rejected the "fluctuating workweek" approach to calculating overtime.[3]

STATEMENT OF CASE

1. Facts

The facts in this case are undisputed. Dart Container corporation of California ("Dart") is a producer of food service products, including cups and plates. Appellant Alvarado began working for Dart in September 2010, as a warehouse associate, and was terminated in January 2012. (Slip Op. 2)

According to defendant's written policy, what Dart characterized as an "attendance bonus" would be paid to any employee who was scheduled to work a weekend shift and completed the full shift. (Slip Op. 2). The policy did not differentiate between days or weeks that would trigger overtime obligations, and those that would not. (Appx.68-70) The bonus was $15 per day, for working a full shift on Saturday and/or Sunday, regardless of the number of hours, if any, worked beyond the normal

[3] As will be demonstrated infra, the DOL Regulation the Court of Appeal turned to, was inappropriately relied on, even under Federal law.

scheduled length of a shift. (Appx. 68-70)

Dart calculates the amount of overtime paid on attendance bonuses during a particular pay period as follows:

1. Multiply the number of overtime hours worked in a pay period by the straight hourly rate (straight hourly pay for overtime hours).

2. Add the total amount owed in a pay period for (a) regular non-overtime work, (b) for extra pay such as attendance bonuses, and (c) overtime due from the first step. That total amount is divided by the total hours worked during the pay period. This amount is the employee's "regular rate."

3. Multiply the number of overtime hours worked in a pay period by the employee's regular rate, which is determined in step 2. This amount is then divided in half to obtain the "overtime premium" amount, which is multiplied by the total number of overtime hours worked in the pay period (overtime premium pay).

4. Add the amount from step 1 to the amount in step 3 (total overtime pay). This overtime pay is added to the employee's regular hourly pay and the attendance bonus. (Slip Op. 2-3)

During Appellant's employment, he worked some Saturdays and Sundays, including during weeks he worked overtime and sometimes double time; and therefore, was paid per Dart's policy. (Slip Op. 3)

The Dart formula operates in a manner consistent with the fluctuating

work week methodology rejected by *Skyline.* Applying the Dart formula to a hypothetical employee who works 45 hours in a week, earns an hourly rate of $10.00 per hour, and works a Saturday and Sunday during the workweek, plays out as follows:

Step 1. 5 hours of OT x $10.00 (straight rate) = $50

Step 2. (a) 40 hours of non-overtime x $10= $400 plus (b) $30.00 fixed amount, salary, for working on Saturday and Sunday plus (c) $50 from step 1 = $480. Dividing total by 45 hours =$10.66

Step 3. 5 OT hours x $10.66= $53.30 divided by 2 to get "overtime premium amount" = $26.65

Step 4. Adding step 1 to step 3 equals overtime pay under Dart's formula of $76.65.

The foregoing contrasts to the *Skyline* and Labor Code 515(d) approach which would entail dividing the $30 flat amount salary for the week in which Saturday and Sunday work occurred, by a non-overtime week's 40 hours = $0.75. Add the $0.75 to the hourly pay of $10 = a *regular rate* of $10.75 x 1.5 =$16.12 per OT hour x 5 hours of overtime = $80.60. With an additional 5 hours of overtime, this amount would, under the *Skyline* and Labor Code 515(d), be doubled, equaling $161.20 in overtime pay. Under the Dart formula, approved by the Court of Appeal, an extra 5 hours of overtime would be less than double the overtime pay of $76.65 under Dart's system for 5 hours :

Step 1. 10 hours of OT instead of 5 x $10= $100

Step 2. (a) 40 hours of non-overtime x $10= $400 plus (b) $30 fixed amount for working on Saturday and Sunday , plus (c) $100 from step 1= $530. Dividing the total by 50 hours =$10.60. (6 cents less per hour than when amount of OT was 5 hours)

Step 3. 10 OT hours x $10.60= $106. divided by 2 to get "overtime premium amount" = $53.00

Step 4. Add Step 1 to step 3 to get amount of overtime pay. $153.00--- an amount less than double the amount payable if only 5 instead of 10 hours of overtime were worked under Dart's formula.

The more hours an employee works under the Court of Appeal decision, the less he or she receives per overtime hour worked. Further, the higher the flat amount component of a wage program under the system approved by the Court of Appeal, the greater the differential with each extra hour of overtime worked.

2. Proceedings in the Trial Court

In August 2012, plaintiff filed a complaint for damages and restitution, alleging defendant had not properly computed bonus overtime under California law. Plaintiff's complaint as amended (complaint) alleges the following causes of actions: (1) Failure to pay proper overtime in violation of Labor Code sections 510 and 1194 by not including shift differential premiums and bonuses in calculating overtime wages; (2)

Failure to provide complete and accurate wage statements, in violation of Labor Code section 226; (3) Failure to timely pay all earned wages due at separation of employment, in violation of Labor Code sections 201, 202, and 203; (4) Unfair Business Practices, in violation of Business and Professions Code section 17200 et seq.; and (5) civil penalties under the Private Attorneys' General Act of 2004, Labor Code section 2698 et seq. (PAGA). (Slip Op. 3-4)

Defendant filed a motion for summary judgment or, alternatively, for summary adjudication. Defendant argued that defendant's formula for calculating overtime on plaintiff's attendance "bonuses", earned during pay periods in which they were earned, was lawful, and there was no legal basis for plaintiff's proposed alternative formula. Defendant further argued federal law applied to calculating overtime on the bonuses because there was no California law providing a formula for calculating overtime on bonuses. Defendant asserted that plaintiff's proposed formula is based solely on California public policy and void regulations from the Division of Labor Standards Enforcement (DLSE) Manual which have no force or effect. Defendant concluded that, since defendant's overtime formula complies with federal law and does not conflict with state law, it is lawful, rendering the Complaint meritless. (Slip Op.4)

On April 30, 2014,the trial court granted Dart's Motion for Summary Judgment. Judgment was entered thereafter, and on June 3,2014 Notice of

entry of Judgment was filed. (Appx.143,159)

3. Proceedings on Appeal

Alvarado filed a timely appeal from the Judgment on July 31, 2014 (Appx.165) On January 14, 2016, the Court of Appeal upheld the judgment of the trial court in a published opinion. (Slip. Op)

ARGUMENT-REASONS FOR GRANTING REVIEW

1. **REVIEW OF THE CONFLICT BETWEEN THE COURT OF APPEAL'S RULING AND AUTHORITY THAT PRECEDED IT IS OF VITAL IMPORTANCE TO WORKING MEN AND WOMEN IN CALIFORNIA.**

Wage Order No. 1, codified as title 8 California Code of Regulations section 11010(CCR), concerns the manufacturing industry and is therefore applicable in the instant case. It provides as to hourly employees that "employees shall not be employed more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than: (a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday,

and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek."

The issues presented by this case, centering on how to calculate the "regular rate" as that term is used above, are of vital importance to the welfare of California's workers and to the proper administration and enforcement of California's overtime laws. In the decision below, the Court of Appeal sanctions an employer practice of calculating overtime pay that is extremely detrimental to workers and that has consistently been declared illegal by every other Court of Appeal decision that has had occasion to consider it. The court does so without even acknowledging that its decision is an abrupt and dramatic departure from established precedent; indeed, the court goes to great lengths to make it appear that it is actually following governing law, failing to recognize that a fixed rate "bonus" paid as part of the wages for a week, is not, for purposes of overtime calculation jurisprudence, any different than a fixed rate salary paid for all of a week's work. Although the decision is rendered in the novel setting of a mixed hourly and salary payment scheme during weeks in which weekend work is performed, nowhere in the court's opinion is there an indication that the court finds something in this fact that authorizes what the court would

otherwise consider an illegal practice. On the contrary, the practice is summarily treated as perfectly legal under any wage program that includes a fixed amount paid for work during a week, whether an overtime week, or not, so long as the fixed amount is characterized a "bonus". In other words, the Court of Appeal decision stands as a *sub silentio,* wholesale repudiation of established California law that rejects application of the "fluctuating work week" methodology to fixed weekly wage payments in overtime "regular rate" determination. Plainly, letting the Court of Appeal decision stand against the backdrop of settled legal principles poses a grave danger of paving the way for the expansion of illegal practices and the systematic erosion and diminution of the fundamental overtime rights protecting California's workers. Review should be granted to resolve the conflict between the current decision and existing precedent and to prevent a process destructive of workers' rights from taking root. Calling a "salary" within a mixed wage package that includes hourly wages, and a fixed payment, a "bonus", cannot be allowed to undermine years of authority and license employers to run roughshod over settled principles of California Labor Law.

The mischief that can occur, absent reversal, is perhaps best illustrated by an example. Under the Court of Appeal decision, an employer can a adopt a pay scheme, for example, where a night shift nurse who normally earns $50 per hour is instead paid $10.00 per hour, and a flat rate

"bonus" of $1600 per week for any week in which she works at least three night shifts and a total of five shifts whether or not overtime is worked during the week. At $50 per hour, or $10 per hour plus a $1600 bonus, the nurse would earn $2,000 for a 40 hour week. At $50 per hour, if she worked overtime, her time and one half overtime rate would be $75 per hour. However, at $10 per hour plus a $1600 bonus, under the Court of Appeal decision herein, she would have a varying regular rate for overtime that diminishes with each hour of overtime worked. For example, under the Court of Appeal decision at 45 hours worked in a week, the regular rate would be $10.00 per hour on the $10 per hour hourly portion of her wages, and $35.55 ($1600 divided by 45 hours) per hour on the flat-rate portion of her wages for a regular rate of $45.55 per hour [$10 per hour + 35.55 per hour] and a time and one half rate of $68.32 per overtime hour, as opposed to the $50.00 per hour regular rate, and $75.00 per hour overtime rate she would receive if her wage was strictly $50.00 per hour with no fixed salary/bonus. If, instead of 45 hours worked, she worked 48 hours, her "regular rate" under the Court of Appeal decision would go down further, $10 per hour plus $33.33 ($1600 divided by 48 hours) = a regular rate of $43.33, and a time and one half rate of $63.99.

The above hypothetical represents application of the "fluctuating work hours" methodology approved by the Court of Appeal in this case, and rejected by the court of appeal in *Skyline Homes, Inc., supra* 165

Cal.App.3d 239 over 30 years ago. The rationale at the heart of *Skyline*, emphasizing the "penalty" purpose of California overtime law, and how an overtime system that reduces overtime rates the greater the amount of overtime worked is not consistent with that purpose, is a rationale just as relevant to a "salary" of $30 a week in a wage plan that also includes hourly pay, as it is in context where the only pay is a weekly "salary", and just as relevant when the fixed amount paid is characterized a "bonus".

Under the Court of Appeal sanctioned practice, as demonstrated above, the employer pays its employees a flat weekly or daily sum to cover a portion of wages that encompasses both the non-overtime and overtime hours that the employee works. The employer treats the flat sum as straight time compensation for both the non-overtime and overtime hours, and calculates the regular rate of pay for overtime purposes by dividing the flat sum by the total hours worked. As made clear above, under the system approved by the Court, the more overtime hours the employee works, the lower the regular rate of pay for the non-overtime hours. In effect, the employer uses the flat sum compensation it would have paid the employee had no overtime been worked, to partially discharge its premium wage rate obligation for the overtime hours. Instead of paying additional compensation, in an amount equal to the regular rate of pay plus the required premium, the employer reduces the employee's non-overtime compensation and then reapplies that reduction toward the overtime

compensation it owes for overtime hours. In other words, the employer allocates the flat sum among the non-overtime and overtime hours in amounts depending on whether or not, and to what extent, the employee works overtime. As demonstrated below, this approach is contrary to nearly sixty years of authority.

2. THE COURT OF APPEAL'S DECISION CONFLICTS WITH A 1957 ATTORNEY GENERAL OPINION THAT INFORMED FUTURE WAGE ORDERS THAT DID NOT ADOPT THE "FLUCTUATING WORKWEEK" CALCULATION MODEL

As far back as 1957, Dart's method of determining "regular rate" was deemed inapplicable by the Attorney General.

29 Ops. Attorney General, Opinion No. 57-29, pg. 168-172 was written in response to the following question posed by the chairman of the Industrial Welfare Commission:

"... 2. Does the wording of section 3(a-1) of the Industrial Welfare Commission Orders [overtime sections] preclude payment of overtime on the basis of a 'fluctuating work week,' i.e., the method of determining the hourly 'regular rate of pay' by dividing the amount regularly paid during the pay period, e.g. month week, day, by the total number of hours worked during such pay period, and using the hourly amount so determined as a basis for computing overtime pay of one and one-half times the "regular rate of pay"?

In response, the Attorney General expressly rejected the "fluctuating work week" methodology, finding, inter alia, that the " 'fluctuating work week ' theory is entirely inconsistent with the commission [IWC] orders, and contrary to the general legislative scheme for protecting women and minors. We perceive no reason to more clearly spell out a prohibition against that method of computing overtime in view of our conclusion that it does not meet the legal requirements of the present commission orders." In reaching this conclusion, the AG analyzed the meaning of "regular" in the context of a Wage Order that defined the workday as 8 hours and work week as 40 hours. The AG also referenced the fact that Federal Courts have adopted the "fluctuating work week" approach in application of the FLSA, not California overtime law. *Id*, pgs.170-172.

In *Skyline Homes, supra* 165 Cal.App.3d at 252-253, the Court remarked as to the 1957 A.G. Opinion:

"The opinion was issued in May 1957 in response to a question from the IWC as to whether language in a wage order which was a precursor to wage order 1–76 precluded payment of overtime on the basis of a fluctuating workweek and, if not, whether the IWC had authority to modify that wage order to prohibit the fluctuating workweek method if it wished to. The Attorney General's opinion stated that the fluctuating workweek method was inconsistent with the IWC wage orders. The IWC, on notice of the Attorney General's May 1957 opinion, enacted regulations shortly

thereafter without expressly permitting the fluctuating workweek and has continued to omit permission of that method of computing overtime compensation from subsequent wage orders. It seems apparent that, correct or incorrect, the IWC relied on the Attorney General's opinion and did not consider it necessary to add language specifically prohibiting the fluctuating workweek."

Consistent with the above conclusion in *Skyline*, and since the 1985 decision in *Skyline*, the IWC has continued to adopt Wage Orders without including the "fluctuating work week" methodology in them, thereby reinforcing the inapplicability of that methodology.

Had the IWC intended to adopt the "fluctuating workweek" methodology after the AG Opinion, and after *Skyline,* it necessarily would have expressly done so in the Wage Orders it adopted thereafter---having been on notice of the AG's Opinion and *Skyline.*

3. THE COURT OF APPEAL'S DECISION HEREIN CONFLICTS WITH "FINDINGS" OF THE IWC

In 1963, the IWC made clear in "Findings" relative to its regulatory authority, that the "fluctuating workweek" methodology was antithetical to the overtime provisions in IWC Wage Orders:

"Recent research in IWC archives has disclosed that in 1963 'Findings', **the Commission [IWC] stated: 'In defining its intent as to the regular rate of pay set forth in Section 3(a)(3)(A) and (B) to be used as**

a basis for overtime computation, the Commission indicated that it did not intend to follow the "fluctuating work week" formula used in some computations under the Fair Labor Standards Act. It was the Commission's intent that in establishing the regular rate of pay for salaried employees the weekly remuneration is divided by the agreed or usual hours of work exclusive of daily hours over eight.' Thus, the DLSE position (and the *Skyline* court) is correct." DLSE Manual Page 48-2 (emphasis added)

Such findings of the IWC, is an unequivocal indicator of the intent of that quasi-legislative body in using the words "regular rate" in its overtime provisions, an intent that has not changed since those 1963 findings.

4. THE COURT OF APPEAL'S DECISION CONFLICTS WITH CALIFORNIA APPELLATE COURT, STATUTORY, AND OTHER AUTHORITY THAT PREDATE IT.

A. The Court of Appeal's Ruling Conflicts with *Skyline Homes*

In 1985, in the watershed case of *Skyline Homes, supra* 165 Cal.App.3d 239 ("*Skyline*") disapproved on other grounds *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, the court held that the formula approved by the Court of Appeal herein was repugnant to California's overtime laws and illegal. *Skyline Homes, supra* 165 Cal.App.3d at *passim*. By agreeing with and adopting the DLSE's

overtime calculation formula, the court concluded that California law did not countenance a practice that progressively reduced the employee's regular rate of pay for non-overtime hours whenever the employee worked overtime and used that reduction to partially discharge the employer's premium wage rate obligations for the overtime hours. *Skyline Homes, supra* 165 Cal.App.3d at 244-249, 254. Such a practice was contrary to California's core polices of discouraging and penalizing overtime work, and of requiring the employer, not the employee, to bear the costs of the additional compensation due for the overtime work hours. *Skyline Homes, supra* 165 Cal.App.3d at 249. The court held that no part of the flat sum could serve to compensate the employee for the overtime hours and that the flat sum constituted compensation solely for the non-overtime hours. *Skyline Homes, supra* 165 Cal.App.3d at 244-245, where the applicable approved formula is spelled out. Thus, the regular rate of pay was required to be calculated by dividing the flat sum solely by the maximum legal non-overtime hours of 40 hours per week. *Id.* In expressly rejecting the fluctuating workweek methodology, *Skyline* compelled employers to use additional funds exclusive of the flat sum (salary) to pay the premium wage rates due for the overtime hours.

Skyline rejects the idea of a calculation system that causes the amount paid for overtime to decrease the more overtime worked because, as opposed to the "dissimilar" Federal statutory scheme, employers benefit

by the decreasing rate for overtime pay, and are not penalized for working their employee more overtime as the amount of overtime increases.

"[I]n California overtime wages are also recognized as imposing a premium or penalty on an employer for using overtime labor, and that this penalty applies to excessive hours in the workday as well as in the workweek."

"In *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 166 Cal.Rptr. 331, 613 P.2d 579, the California Supreme Court upheld the Wage Statement of Basis of wage order 1–80, which stated in part as follows: ' "The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order."'"*Skyline, supra* 165 Cal.App.3d at 249.

The foregoing rationale applies whether a fixed amount of pay is called a "salary" or "bonus". The Court of Appeal herein offered no argument to the contrary.

Skyline went on to hold: "Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work in California. (*California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 111)... In view of the dissimilar language and purpose of the California statute and regulation [compared to the FLSA], we conclude that the DLSE has correctly interpreted wage order 1–76 to

preclude the use of the fluctuating workweek method of overtime compensation." *Skyline, supra* 165 Cal.App.3d at 250.

Nothing in *Skyline* suggests that there is an exception when the "fluctuating workweek method of overtime compensation" is applied to a fixed wage called a "bonus" instead of a "salary".

B. Cases that Followed *Skyline* Are Also in Direct Conflict With The Court of Appeal's Decision Herein

The cases that have followed *Skyline,* and have cited it as binding authority, have been equally explicit in stating that a flat sum only provides compensation for an employee's non-overtime work hours and cannot in any manner be treated as compensation for overtime work.

"[T]he trial court properly concluded that . . . Alcala's monthly salary did not serve to compensate him for the overtime hours worked in excess of the hours set forth in wage order 14-80."*Alcala v. Western Ag Enterprises, supra,* 82 Cal.App.3d at p. 551. *Alcala* expressly adopts the *Skyline* calculation methodology and rejects the fluctuating workweek methodology. *Id,* at 551

"[T]he $300 per week compensation earned by appellant from November 1983 through July 1984 must be construed as the payment he received for a ***regular*** workweek. . . . [A] fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements." *Hernandez v. Mendoza, supra,* 199 Cal.App.3d at

725. "We,... agree with appellant that the law governing the appropriate method of calculating overtime wages is contained in *Skyline Homes, Inc....*". *Hernandez, supra* 199 Cal.App.3d at 728.

"We have already stated the general rule that a fixed salary for an irregular workweek does not compensate an employee for statutory overtime work...." *Ghory v. Al-Lahham, supra,* 299 Cal.App.3d at p. 1491.) " '[T]he law governing the appropriate method of calculating overtime wages [under wage order No. 7–80] is contained in *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, [citation].' (*Hernandez v. Mendoza, supra,* 199 Cal.App.3d at p. 728)" *Ghory, supra* 299 Cal.App.3d at 1490.

"*Skyline* has been followed in *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, and *Ghory v. Al–Lahham* (1989) 209 Cal.App.3d 1487. It is clear that *Skyline* remains good law with respect to the proposition that the State may use its own definition of "regular rate" and may set its own standards regarding the adequacy of overtime pay as long as it does not fall below the federal standards." *Lujan, supra* 96 Cal.App.4th 1200, 1209.

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C. This Court Acknowledged California's Rejection of "Fluctuating Workweek" Calculations In *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785.

In *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785 this court acknowledged the rejection of "fluctuating workweek" in the calculation of overtime as one of the areas indicative of state laws being more protective of workers' interests than Federal law:

"The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations.... (See .... *Skyline Homes, Inc.* v. *Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 247 disapproved on other grounds in *Tidewater, supra,* 14 Cal.4th at p. 574 [regular rate of pay for overtime purposes calculated by dividing salary by no more than 40 hours, notwithstanding federal rule authorizing use of fluctuating workweek].)" *Id,* at 795 (Brackets in original).

D. The Court of Appeal Decision Herein Conflicts with the Codification of *Skyline* in Labor Code 515 (d)

Skyline was ultimately codified in AB 60 at Labor Code 515(d) in 2001. It provides: "For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the

employee's weekly salary." In this case, Dart employees, in weeks they work on Saturdays and/or Sundays, in addition to receiving forty hours of pay at hourly rates, also receive salaries of $15 or $30 for the week. Per Labor Code Sec. 515 (d), determination of the "regular hourly rate" on those salaries shall be 1/40th of the salary, consistent with *Skyline*, not a variable amount tied into the number of overtime hours worked.

E. The Court of Appeal's Decision Is In Direct Conflict with *Marin v. Costco Wholesale Corp's*. (2008) 169 Cal.App.4th 804, 817-818 Analysis of Skyline in the Context of a Wage Scheme that Includes a Flat Rate "Bonus"

Marin, supra 169 CA4th 804, 817-818 applied *Skyline* analysis to contexts involving the calculation of overtime on a flat rate "bonus". Remarking on *Marin*, the Court of Appeal herein, stated:

"Nevertheless, the court in *Marin* indicated that the DLSE Manual section 49.2.4.2 provides a reasonable formula for calculating overtime on a flat sum bonus. 'The flat sum bonus formula set forth in sections 49.2.4.2 and 49.2.4.3 of the Manual, which uses a divisor of straight time, instead of total hours worked to set the regular bonus rate, and a multiplier of 1.5, rather than 0.5, to fix the bonus overtime due, produces 'a premium based on bonus' that the DLSE believes is necessary to avoid encouraging the use of overtime.' (*Marin, supra,* 169 Cal.App.4th at pp. 817–818). The *Marin* court noted that, '[i]n the case of a true flat sum bonus where the employee

cannot earn any additional bonus by working overtime hours, excluding such hours from the divisor prevents them from diluting the regular rate. Including those hours would give the employer an incentive to impose overtime because the additional overtime would reduce the cost of overtime by decreasing the regular rate—part of the situation addressed in the *Skyline* case.' (*Marin, supra,* 169 Cal.App.4th at pp. 819)" (Slip Opinion at 23)

The Court of Appeal decision herein, then expressed its disagreement/conflict with *Marin*:

"Although, as indicated by *Marin,* the DLSE Manual section 49.2.4.2 provides a reasonable formula for calculating overtime on a flat sum bonus, the formula has not been enacted as enforceable law and therefore this court cannot enforce it. Furthermore, enacting the formula in the DLSE Manual section 49.2.4.2 as enforceable law falls within the domain of the Legislature and IWC, not this court." (Slip Opinion at 23).

Obviously, *Marin* recognized that characterizing a *flat sum* paid a "bonus", irrespective of whether an employee works overtime, does not insulate the payment from application of *Skyline*'s overtime calculation methodology when factoring that flat rate "bonus" into overtime pay. The failure of the Court of Appeal to recognize the same in this case, clearly makes review by this court imperative.

F. The Court of Appeal's Decision Conflicts with the DLSE's Valid Interpretation of How Overtime Should Be Calculated, an Interpretation that, Contrary to the Court's View, Aligns With Statutory and Appellate Authority Expressly Referenced in the Manual.

The Court of Appeal goes to great lengths in an effort to explain how Section 49.2.4.2 of the DLSE Manual is not law, how that provision of the Manual does not cite legal authority for the proposition stated therein; and therefore, the Court is necessarily compelled in this case to look to Federal law. (Slip Opinion 23-15).

The Court of Appeal goes through this process, notwithstanding its conclusion that the formula in 49.2.4.2 is "a reasonable formula for calculating overtime on a flat sum bonus". (Slip Opinion 23). The Court of Appeal's reasoning in this regard is not well taken. Section 49.2.4.2 of the DLSE Manual does not exist in a vacuum. There are two compelling reasons why the Court of Appeals repudiation of Section 49.2.4.2, and consequent reliance on a Federal Regulation is wrong.

First, there can be no question that the AG's opinion, IWC findings, *Skyline, Ramirez*, the other cases cited above, and Labor Code 515 (d) establish the operative methodology for determining overtime in contexts where employees are paid a flat sum as part of wages.

Secondly, 49.2.4.2 in the Manual must be read in conjunction with

the "Basic Overtime" provisions of the Manual, which provide the basis for the formula in that section.

The DLSE Manual provides, at 49.2.4.2, consistent with *Skyline*:

"If the bonus is a flat sum, such as $300 for continuing to the end of the season, or $5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies. This is so because the bonus is not designed to be an incentive for increased production for each hour of work; but, instead is designed to insure that the employee remain in the employ of the employer. To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy."

The Court of Appeal clearly failed to apprehend that the "public policy" referenced above is not pulled out of thin air, but is grounded in *Skyline*, the A.G. Opinion given to the IWC, and the consistent application of *Skyline's* analysis in subsequent appellate decisions, referenced supra. Further, the Court of Appeal disregarded or overlooked Section 48 of the DLSE Manual, and how that section necessarily informs and provides context for the Manual Section it deemed void, 49.2.4.2.

Section 48 of the Manual is entitled "Basic Overtime". Section 49, that includes challenged Section 49.2.4.2 of the Manual is "Calculation of Regular Rate of Pay and Overtime". Sections 48 and 49, given their titles and text, are inextricably related to each other, with Section 49 building off the "Basics" covered in Section 48. Section 48 details the basis of the Manual's overtime analysis and the Manual's rejection of "fluctuating workweek", pointing out how the Manual's overtime commentary derives from *Skyline, supra,* and *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, as well as 1963 findings of the IWC. (See DLSE Manual at 48.1.4 "Fluctuating Workweek Compensation Arrangement Not Allowed"). See also 48.1.5.1which points out, citing *Industrial Welfare Commission, supra* (1980) 27 Cal.3d 690, that California law requires a "penalty" for overtime, and "No penalty is involved in a fluctuating workweek because the rate of pay actually decreases."

With Section 48.1.4 and 48.1.5.1 as a backdrop for 49.2.4.2, it was patently wrong for the Court of Appeal to disregard 49.2.4.2 as void improper law making tethered to nothing but "public policy".

G. The Court of Appeal's Decision Conflicts with *Huntington Memorial v. Superior Court* (2007) 131 Cal.app.4th 893

Aside from conflicting with cases that deal specifically with calculating overtime in a context where a flat sum is part of wages, the Court of Appeal decision herein conflicts with *Huntington Memorial, supra*

(2007) 131 Cal.App.4th 893, a case which condemned, as antithetical to State and Federal law, any pay system that incentivized employers to work employees extra hours on account of decreasing payments per hour. The *Huntington* case involved hourly paid employees whose hourly rates went down the more hours they worked.

Citing Federal cases, the court in *Huntington* pointed out:

"The Supreme Court has explained: '[T]he *regular rate* refers to the *hourly rate* actually paid the employee for the normal, *non-overtime* workweek for which he is employed....'(*Walling v. Hardwood Co.* (1945) 325 U.S. 419, 424–425" *Huntington, supra* at 904. Here, therefore, the *regular rate* to be used to determine overtime in any week, is the rate paid for non-overtime weeks in which an employee works on weekend days. The hourly wage plus the weekend day premium divided by 40 hours.

Again citing Federal authority, Huntington pointed out:

"[W]here different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee [the case here, where Dart's system causes rates to change based on the number of overtime hours worked]—the longer he works the lower the rate—the device is *evasive* and the *rate actually paid* in the shorter or *nonovertime* [period] is his *regular rate* for overtime purposes in all weeks." (29 C.F.R. § 778.327(b) (2004), italics added; see *Walling v. Hardwood Co., supra,* 325 U.S. at p. 424, 65

S.Ct. 1242 ['regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek'].) In other words, 'the hourly rate paid for the identical work during [overtime] hours ... cannot be lower than the rate paid for non-overtime hours....' (29 C.F.R. § 778.500(b) (2004).) 'Overtime rates cannot be avoided by manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the ... overtime rate that will have to be paid.' (*Reich v. Midwest Body Corp.* (N.D.Ill.1994) 843 F.Supp. 1249, 1251.)" *Huntington,supra* at 905.

5. THE COURT OF APPEAL'S RELIANCE ON 29 CFR 788.209 (a) CONFLICTS WITH FEDERAL REGULATIONS THAT DIRECTLY APPLY TO DART'S COMPENSATION SCHEME.

Given the foregoing, this court should grant review, irrespective of the Court of Appeal's default reliance on 29 CFR 788.209 (a). However, that reliance conflicts with Federal law, and adds a further basis for review. California Courts, in all contexts where applying Federal Law to interpret State law is warranted, should do so properly.

There are obviously bonuses for production, different than the so-called "bonuses" herein, tied into the number of hours worked, that justify the formula adopted by the Court of Appeal. If, for example, an employee gets a $100 bonus for producing 50 widgets in a week, and she works 49 hours in the week producing those widgets, she was paid straight time in

the bonus for the 9 hours of overtime in the $100 bonus because the bonus was earned by labor producing the 50 widgets over the whole week, including the overtime hours. The overtime owing on that type of bonus, would, therefore, be the $100 bonus divided by 9 hours x 1/2 under both State and Federal Law because straight time was already paid for the bonus hours. (See 29 CFR 778.110, and DLSE Manual 49.2.4 and 49.2.4.1). Such a production bonus system fits perfectly into the language of 29 CFR 788.209 (a) relied on by the Court of Appeal. However, careful scrutiny of the Federal Regulatory scheme makes clear that 29 CFR 788.209 (a) does not apply to the "bonuses" at issue here.

29 CFR § 778.502, entitled "Artificially labeling part of the regular wages a 'bonus' ", makes this clear. It provides, in relevant part:

"**(a)** The term "bonus" is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract."

In this case, the implied in fact employment contract at Dart provided the so-called "bonus" as a portion of regular wages each week an employee worked weekends. Pursuant to the foregoing, such payments are not a "bonus" under the Federal Regulations, and therefore, the Court of Appeals reliance on 29 CFR 788.209 (a) in this case is misplaced.

29 CFR § 778.502 goes on to provide: "**(e)** The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week [here the case each week with weekend work], no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply."

Here, the foregoing must necessarily inform this court's decision to grant review, given that "each week" that includes a Saturday and/or Sunday, fixed amounts are paid which have nothing to do with the amount of overtime, if any, is worked during the day or week.

Further proof of the mistake the Court of Appeal made in relying on the general language in 29 CFR 788.209 (a) is 29 CFR § 778.203, which is entitled "Premium pay for work on Saturdays, Sundays, and other 'special days'." It provides in relevant part:

"Under section 7(e)(6) and 7(h) of the Act,[29 USC 207 (e) and (h)] extra compensation provided by a Premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as "special days") may be treated as an overtime premium for the purposes of the Act. **If the premium rate is less than time and one-half, the extra compensation provided by such rate *must be included in determining the employee's regular rate of pay and cannot be credited***

***toward statutory overtime due*, unless it qualifies as an overtime premium under section 7(e)(5).**" (emphasis added).

There is no question that Dart's weekend pay program is a premium for working weekends, thus analysis under 29 CFR § 778.203, is warranted if federal law is pertinent at all.

The first question posed by 29 CFR § 778.203 is whether the weekend premium is less than 1.5 the normal rate. Unless employees work very few hours on Saturdays, and/or Sundays it must be. Dividing a $15 Saturday premium by a regular work day of 8 hours, the premium would be $1.87 per hour. If Dart's employees were only paid a minimum wage of $8.00 per hour, and $1.87 was added to it, the Saturday and Sunday premium would be far less than 1.5 x $8.00. Therefore, the Weekend Premium, under 29 CFR § 778.203, "**cannot be credited toward statutory overtime due**" The Saturday and Sunday premiums at Dart do not qualify as an overtime premium under the 29 USC 207(e)(5) exception because the payments are for weekend work, which per the record herein, is not necessarily tied into hours of "work in excess of eight in a day or in excess of the maximum workweek applicable to such employee under [29 USC] subsection (a), or in excess of the employee's normal working hours or regular working hours, as the case may be".

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CONCLUSION

For the reasons discussed, review should be granted by this Court.

Dated: February 22, 2016

Respectfully Submitted,

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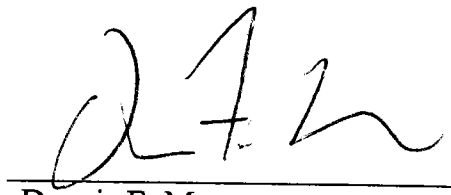
By: DENNIS F. MOSS
Attorneys for Plaintiff, Appellant
and Petitioner
HECTOR ALVARADO

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 8,306 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 22, 2016



Dennis F. Moss

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HECTOR ALVARADO, Plaintiff and Appellant, v. DART CONTAINER CORPORATION OF CALIFORNIA, Defendant and Respondent.	E061645 (Super.Ct.No. RIC1211707) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

Lavi & Ebrahimian, Joseph Lavi, Jordan D. Bello; and Dennis F. Moss for Plaintiff and Appellant.

Best Best & Krieger, Howard Golds and Elizabeth A. Han for Defendant and Respondent.

I

INTRODUCTION

Plaintiff Hector Alvarado (plaintiff) appeals summary judgment entered in favor

of defendant Dart Container Corporation of California (defendant). The facts are undisputed. This appeal raises the sole question of law of whether defendant's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful. We conclude it is. There is no California law specifying a method for computing overtime on flat sum bonuses, and defendant's formula complies with federal law, which provides a formula for calculating bonus overtime. We accordingly affirm summary judgment in favor of defendant.

II

FACTS AND PROCEDURAL BACKGROUND

The following summary of facts is based on the parties' joint statement of undisputed material facts. Defendant is a producer of food service products, including cups and plates. Plaintiff began working for defendant in September 2010, as a warehouse associate, and was terminated in January 2012.

According to defendant's written policy, an attendance bonus would be paid to any employee who was scheduled to work a weekend shift and completed the full shift. The bonus was $15 per day, for working a full shift on Saturday or Sunday, regardless of the number of hours worked beyond the normal scheduled length of a shift.

Defendant calculates the amount of overtime paid on attendance bonuses during a particular pay period as follows:

1. Multiply the number of overtime hours worked in a pay period by the straight hourly rate (straight hourly pay for overtime hours).

2. Add the total amount owed in a pay period for (a) regular non-overtime work, (b) for extra pay such as attendance bonuses, and (c) overtime due from the first step. That total amount is divided by the total hours worked during the pay period. This amount is the employee's "regular rate."
3. Multiply the number of overtime hours worked in a pay period by the employee's regular rate, which is determined in step 2. This amount is then divided in half to obtain the "overtime premium" amount, which is multiplied by the total number of overtime hours worked in the pay period (overtime premium pay).
4. Add the amount from step 1 to the amount in step 3 (total overtime pay). This overtime pay is added to the employee's regular hourly pay and the attendance bonus.

During plaintiff's employment, he earned attendance bonuses during weeks he worked overtime and sometimes double time.

In August 2012, plaintiff filed a complaint for damages and restitution, alleging defendant had not properly computed bonus overtime under California law. Plaintiff's complaint as amended (complaint) alleges the following causes of actions: (1) Failure to pay proper overtime in violation of Labor Code sections 510 and 1194 by not including shift differential premiums and bonuses in calculating overtime wages; (2) Failure to provide complete and accurate wage statements, in violation of Labor Code section 226; (3) Failure to timely pay all earned wages due at separation of employment, in violation of Labor Code sections 201, 202, and 203; (4) Unfair Business Practices, in violation of

Business and Professions Code section 17200 et seq.; and (5) civil penalties under the Private Attorneys' General Act of 2004, Labor Code section 2698 et seq. (PAGA).

Defendant filed a motion for summary judgment or, alternatively, for summary adjudication. Defendant argued that defendant's formula for calculating overtime on plaintiff's attendance bonuses, earned during pay periods in which they were earned, was lawful, and there was no legal basis for plaintiff's proposed alternative formula. Defendant further argued federal law applied to calculating overtime on the bonuses because there was no California law providing a formula for calculating overtime on bonuses. Defendant asserted that plaintiff's proposed formula is based solely on California public policy and void regulations from the Division of Labor Standards Enforcement (DLSE) Manual which have no force or effect. Defendant concluded that, since defendant's overtime formula complies with federal law and does not conflict with state law, it is lawful. Therefore plaintiff's entire complaint has no merit.

Plaintiff filed opposition, arguing there was valid California authority, *Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804 (*Marin*), applicable in the instant case to calculating overtime on bonuses. Plaintiff further argued that defendant's formula dilutes and reduces the regular rate of pay by including overtime hours when calculating the regular rate of pay used to compute overtime on plaintiff's flat sum bonuses. Plaintiff asserted this violates California wage and hour policy, in which overtime is discouraged. Plaintiff also argued defendant's formula failed to account for all required overtime rates and improperly used a multiplier of .5, rather than 1.5, or 2.0, if applicable.

Relying on *Marin, supra,* 169 Cal.App.4th 804, plaintiff argued in his opposition that the formula stated in the DLSE Manual sections 49.2.4.2 and 49.2.4.3 applied. The DLSE Manual formula is as follows:

1. Multiply regular hours by the employee's hourly rate (regular pay)
2. Multiply overtime hours by the employee's hourly rate (overtime pay on overtime hours)
3. Divide flat sum bonus by regular hours (overtime rate), and multiply by 1.5 (overtime pay on bonus)
4. Add pay for regular hours, bonus, overtime pay on overtime hours, overtime pay on bonus (total pay).

After reviewing the parties' briefs and listening to oral argument, the trial court granted defendant's motion for summary judgment on the following grounds: The facts were undisputed; there was no California law applicable to calculating overtime on bonuses paid in the same pay period in which they were earned; *Marin* is inapplicable; DLSE Manual sections 49.2.4.2 and 49.2.4.3 do not have force of law and are void regulations; in the absence of controlling California law, federal law directing the method of computing overtime on bonuses must be followed; defendant used this federal formula, which was lawful; and therefore there was no basis for liability on any of plaintiff's causes of action.

III

STANDARD OF REVIEW

Plaintiff appeals summary judgment on the ground the trial court erred as a matter

of law in ruling that defendant's formula for calculating overtime on flat sum bonuses is lawful. Summary judgment is properly granted when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*).) Here, where the parties agreed to a joint statement of undisputed material facts and there are no disputed facts, we review de novo the trial court's ruling granting defendant's motion for summary judgment. (*Ibid.*)

IV

COMPUTING OVERTIME ON FLAT SUM BONUSES

In addressing the issue of whether defendant's formula for calculating overtime on plaintiff's flat sum bonuses is lawful, we look to federal and state wage and hour law, which in some instances differs substantially, with California laws tending to be more protective of employees. Where federal and California laws conflict, the law most beneficial to employees applies. (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28 (*Aguilar*).)

A. Federal Wage and Hour Law

Under section 207(a)(1) of the federal Fair Labor Standards Act of 1938, as amended (FLSA),[1] if an employee works over 40 hours in one week, overtime compensation is computed at one and one-half times the employee's regular rate of pay. Section 207(a)(1) provides that "no employer shall employ any of his employees . . . *for a*

[1] 29 United States Code sections 201-219.

workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the *regular* rate at which he is employed." (Italics added.)

As to hourly employees, such as plaintiff, title 29 of the Code of Federal Regulations (CFR) provides at section 778.110(a) that overtime shall be computed as follows: "If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the 'regular rate.' For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588."

Subdivision (b) of section 778.110 of title 29 of the CFR provides the following formula for computing overtime on a "production bonus" (an incentive to increase production): "If the employee receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50)."

Title 29 of the CFR section 778.110 does not provide a formula for a flat sum bonus, which is at issue in the instant case. However, title 29 of the CFR section 778.209(a) provides the following formula for bonus overtime in general: "Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked."

B. California Wage and Hour Law

Unlike federal law, California statutory law requires overtime pay for work exceeding a maximum workday, as well as for work exceeding a maximum workweek. "Under California law, plaintiffs are entitled to 'no less than one and one-half times the regular rate of pay' for work in excess of eight hours in one workday. (Lab. Code, § 510, subd. (a); see Cal. Code Regs., tit. 8, § 11070, subd. (3)(A)(1)(a) [wage order No. 7-2001].) In this respect, California law is more protective of workers than the federal 'fluctuating workweek' law, which requires one and one-half time overtime compensation only after an employee works more than 40 hours in a workweek." (*Marin, supra,* 169 Cal.App.4th at pp. 806-807, fn. omitted.)

Labor Code section 510 provides that "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work

in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work."

Supplementing state statutory wage law are state regulations, which include wage and hour orders. "The Industrial Welfare Commission (IWC) 'is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California.' [Citation.] . . . [¶] 'IWC has promulgated 15 [industry and occupation wage] orders—12 orders cover specific industries and 3 orders cover occupations—and 1 general minimum wage order which applies to all California employers and employees (excluding public employees and outside salesmen). [Citations.]' [Citation.]" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581 (*Morillion*); see *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 252 (*Skyline*); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562 (*Tidewater*).)

Wage Order No. 1, codified as title 8 California Code of Regulations section 11010 (CCR), concerns the manufacturing industry and is therefore applicable in the instant case. It provides as to hourly employees that "employees shall not be employed

more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than: [¶] (a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day; of work in a workweek; and [¶] (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek."

"The DLSE 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.' [Citations.]" (*Morillion, supra,* 22 Cal.4th at p. 581; see *Skyline, supra,* 165 Cal.App.3d at p. 252; *Tidewater, supra,* 14 Cal.4th at pp. 561-562.) "As a general rule, the courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area. [Citation.] However, final responsibility for interpreting a statute or regulation rests with the courts and a court will not accept an agency interpretation which is clearly erroneous or unreasonable. [Citations.]" (*Aguilar, supra,* 234 Cal.App.3d at p. 28.)

C. Analysis

In determining whether defendant's overtime bonus formula is lawful we begin with the principle that federal law on bonus overtime does not preempt more protective California law. "Federal regulations recognize that various state and local laws will require payment of minimum hourly, daily or weekly wages different from minimums set forth in the Labor Standards Act, and provide that where state or local laws provide greater protection to the employee they shall be taken to override the provisions of the FLSA. (See 29 C.F.R. § 778.5.)" (*Skyline, supra,* 165 Cal.App.3d at p. 251.) As noted in *Skyline*, "The specification of a lower maximum workweek or of a minimum workday is rendered meaningless if the state is deprived of the power to enforce the lower maximum. Because the requirement of the payment of an overtime rate is the sole method by which the maximum hour provisions are made effective, it follows that 29 United States Code, section 218(a), necessarily authorizes the state to require the payment of an overtime rate that recognizes the state's imposition of a maximum workday and/or a lower maximum workday." (*Ibid.*)

Our high court in *Tidewater* explained in the following analytical framework generally applicable to preemption questions that federal law does not preempt state labor law other than in three circumstances: "(1) [W]here the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves '"no room" for supplementary state regulation,' or (3) where the federal and state laws 'actually conflict[].' [Citation.]" (*Tidewater, supra,* 14 Cal.4th at p. 567.)

The court in *Tidewater* decided the issue of whether California IWC wage orders were enforceable against maritime employers under state law. Federal law exempted seamen from federal overtime pay law. The employer filed an action asking for an injunction curtailing DLSE enforcement of IWC wage orders governing overtime pay. (*Tidewater, supra,* 14 Cal.4th at p. 563.) The *Tidewater* court concluded federal law did not preempt California law regulating maritime employment within California. (*Id.* at p. 564.) In reaching this conclusion, the *Tidewater* court noted that, "not only does the FLSA leave 'room' for supplementary state regulation of overtime," the FLSA expressly states that it does *not* presumptively preempt state law regulation of overtime. (*Id.* at p. 567.) The *Tidewater* court explained that "[t]he FLSA includes a 'savings clause,' WHICH PROVIDES: 'No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . State law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter . . . .' (29 U.S.C. § 218(a).) The federal courts that have addressed this question have interpreted this savings clause as expressly permitting states to regulate overtime wages. [Citations.].)" (*Ibid.*) The *Tidewater* court concluded that none of the three situations in which preemption may occur applied. (*Id.* at p. 568.)

Likewise, here, there is no federal law preemption. None of the three situations in which preemption may occur applies here. First, the FLSA does not expressly preclude states from regulating overtime applied to bonuses. Furthermore, as explained in *Tidewater, supra,* 14 Cal.4th 557, the FLSA includes a savings clause which expressly permits states to regulate overtime wages. Second, as indicated by our high court in

Tidewater, the federal law is not so comprehensive that it leaves no room for supplementary state regulation of overtime. Third, federal and state laws regarding overtime, as applied to bonuses, do not actually conflict; primarily because there is no express state law providing a formula for calculating bonus overtime. Even though federal law does not preempt state law here, this does not preclude applying federal law where there is no state law regulating bonus overtime.

Plaintiff argues there is state law applicable to bonus overtime which is more favorable than federal law. Citing *Skyline, supra,* 165 Cal.App.3d 239, plaintiff argues federal formulas for calculating overtime cannot be used because they disregard the differences in federal and California law and the federal formulas undermine the legislative intent behind California overtime laws. In *Skyline*, the employer filed a declaratory relief action against the DLSE, seeking a ruling that the employer's method for computing overtime pay for its salaried employees was proper. The employees worked a fluctuating workweek, in which their work hours varied. On some days the employees worked more than eight hours and on other days they did not work or only worked a few hours. Some weeks the employees worked more than 40 hours. The employer paid its workers a fixed minimum salary, plus overtime for working over 40 hours a week. The employees argued the employer improperly computed their overtime pay, leading DLSE to institute proceedings against the employer to compel payment. The trial court granted DLSE's motion for summary judgment, and the court in *Skyline* affirmed. (*Id.* at p. 255.)

The trial court in *Skyline* rejected the employer's method of calculating overtime by dividing the employee's weekly salary by the total number of hours actually worked in a given week to obtain the regular rate of pay, with hours worked over 40 hours in a week compensated as overtime at one-half the regular rate of pay. This method, based on federal law, resulted in lower pay for overtime because the more hours an employee worked overtime, the lower the regular pay rate used to calculate overtime. (*Skyline, supra,* 165 Cal.App.3d at pp. 245-247.)

The *Skyline* court noted that, "Unless the insertion of the limitation with respect to the eight-hour day is to be rendered meaningless, we must assume that the IWC intended to impose a different standard for determining overtime than that allowed under the FLSA. If, as seems obvious, the IWC intended to employ an eight-hour day standard and to discourage the use of longer work days, the fluctuating workweek would not effectuate this purpose." (*Skyline, supra,* 165 Cal.App.3d at p. 248.) The *Skyline* court concluded California law's eight-hour day limitation was incompatible with the federal law's fluctuating workweek method of calculating the regular pay rate and overtime, which relies solely on the 40-hour workweek, without taking into account an eight-hour day limitation. (*Id.* at pp. 248, 254.) "[I]n California overtime wages are also recognized as imposing a premium or penalty on an employer for using overtime labor, and . . . this penalty applies to excessive hours in the workday as well as in the workweek." (*Id.* at p. 249.) *Skyline* noted that a purpose of the California overtime premium requirement "is to discourage long daily hours which the commission has determined are detrimental to the

welfare of employees, and further, that the overtime is to discourage the use of daily schedules in excess of eight hours." (*Id.* at p. 254.)

The *Skyline* court therefore rejected the federal law method of calculating overtime and approved the method based on a California wage order regulation, as construed by the DLSE. (*Skyline, supra,* 165 Cal.App.3d at p. 250.) After the *Skyline* decision, the formula *Skyline* adopted for salaried employees was codified in Labor Code section 515, subdivision (d), which provides: "For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary." (Lab. Code, § 515, subd. (d); *Marin, supra,* 169 Cal.App.4th at p. 812.)

Plaintiff's reliance on *Skyline* is misplaced because it was confined to salaried employees working a fluctuating workweek, did not address bonuses, and dealt with an employer who failed to pay overtime for work exceeding eight hours in a day. (See *Marin, supra,* 169 Cal.App.4th at pp. 810-811.) In rejecting an equal protection challenge, the *Skyline* court states: "[*T*]*he method of computing overtime compensation for employees other than salaried employees is not before us.* Plaintiffs' pleadings in the trial court specifically stated that 'The dispute in this case centers on the proper method of overtime computation for employees who receive a fixed salary but work a variable number of hours each week. This case does not concern employees working on a commission, piece rate or other wage basis.' There has been no showing that those employees are similarly situated to salaried employees." (*Skyline, supra,* 165 Cal.App.3d

at p. 254 (emphasis added); see *Marin,* at pp. 812-813.) *Skyline* is not dispositive in the instant case, which concerns computing an hourly employee's bonus overtime.

In *Tidewater*, the court disapproved *Skyline*, but only as to *Skyline*'s holding that DLSE's written interpretive policies in its manual are not regulations within the meaning of the Administrative Procedure Act (APA).[2] (*Tidewater, supra,* 14 Cal.4th at pp. 561, 572-573; *Skyline, supra,* 165 Cal.App.3d at p. 253.) The court held in *Tidewater* that DLSE Manual's written policies interpreting IWC wage orders constitute void regulations because they are legislative in nature and were not adopted in accordance with requisite APA rulemaking procedures. (*Tidewater,* at pp. 561, 573; *Marin, supra,* 169 Cal.App.4th at p. 812.) Therefore the trial court cannot rely on DLSE Manual policies and interpretations because they do not have the force of law. (*Tidewater,* at p. 573; see *Marin,* at p. 815.)

The *Tidewater* court explained that in the early 1980's, written DLSE "policy existed only in a draft policy manual the DLSE prepared for the guidance of deputy labor commissioners. In 1989, however, the DLSE prepared a formal 'Operations and Procedures Manual' incorporating the same policy and made that manual available to the public on request. The manual reflected 'an effort to organize . . . interpretive and enforcement policies' of the agency and 'achieve some measure of uniformity from one office to the next.' The DLSE prepared its policy manuals internally, without input from affected employers, employees, or the public generally." (*Tidewater, supra,* 14 Cal.4th at

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[2] Government Code section 11340 et seq.

p. 563.) There was thus no compliance with the APA, which is required when creating regulations.

The court in *Tidewater* acknowledged that, "[o]f course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. [Citations.] Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. (Gov. Code, §§ 11343, subd. (a)(3), 11346.1, subd (a).) Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (Cf. Lab. Code, § 1198.4 [implying that some 'enforcement policy statements or interpretations' are not subject to the notice provisions of the APA].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes." (*Tidewater, supra,* 14 Cal.4th at p. 571.) The DLSE Manual provisions were regulations but are unenforceable because they were not adopted in accordance with the APA. (*Id.* at p. 573.) Likewise, DLSE opinion letters are not controlling upon the courts as binding legal authority. (*Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11; *Morillion, supra,* 22 Cal.4th at p. 584.)

The court in *Tidewater* nevertheless held, based on independent analysis other than the DLSE Manual provisions, that the DLSE properly exercised its enforcement jurisdiction and the trial court erred in enjoining DLSE's enforcement of IWC wage

orders regarding overtime pay. (*Tidewater, supra,* 14 Cal.4th at p. 577.) The *Tidewater* court reasoned: "The DLSE's policy may be void, but the underlying wage orders are *not* void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy." (*Ibid.*) The *Tidewater* court accordingly concluded the wage orders applied as authoritative law and therefore the trial court erred in enjoining overtime applications founded on the wage orders. (*Id.* at p. 579.)

Tidewater is instructive here as to its holding that the DLSE Manual provisions are void regulations which are not binding on this court. (*Tidewater, supra,* 14 Cal.4th at p. 576.) Even though DLSE's interpretations are not entitled to the judicial deference due quasi-legislative rules, such interpretations may be entitled to consideration. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 21 (*Yamaha*).) As explained by our high court in *Yamaha*, "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent — the 'weight' it should be given — is thus fundamentally *situational.* A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command." There are two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: "[t]hose 'indicating that the agency has a comparative interpretive advantage over the courts,' and those 'indicating that the interpretation in question is probably correct.' [Citations.]" (*Id.* at p. 12.)

The first category includes factors that "'assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' [Citation.]" (*Yamaha, supra,* 19 Cal.4th at p. 12.)

The second group of factors relevant to assessing the weight due an agency's interpretation "includes indications of careful consideration by senior agency officials ('an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member' [citation], evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing' [citation] . . . and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted. If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act provisions . . . that circumstance weighs in favor of judicial deference. However, even formal interpretive rules do not command the same weight as quasi-legislative rules. Because "'the ultimate resolution of . . . legal questions rests with the courts"' [citation], judges play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules." (*Yamaha, supra,* 19 Cal.4th at pp. 12-13.)

The extent of our reliance on the DLSE Manual for guidance turns on "'*the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*'" (*Yamaha, supra,* 19 Cal.4th at pp. 14-15, quoting *Skidmore* [*v. Swift & Co.* (1944) 323 U.S. 134,] 140.) In determining how much weight to give the DLSE Manual as guidance in the instant case, we first consider the DLSE Manual's statement of sources relied upon in forming the DLSE policies and interpretations stated in the DLSE Manual: "This manual summarizes the policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California. The summarized policies and interpretations are derived from the following sources:

"1. Decisions of California's courts which construe the state's labor statutes and regulations and otherwise apply relevant California law.

"2. California statutes and regulations which are clear and susceptible to only one reasonable interpretation.

"3. Federal court decisions which define or circumscribe the jurisdictional scope of California's labor laws and regulations or which are instructive in interpreting those California laws which incorporate, are modeled on, or parallel federal labor laws and regulations.

"4. Selected opinion letters issued by DLSE in response to requests from private parties which set forth the policies and interpretations of DLSE with respect to the application of the state's labor statutes and regulations to a specific set of facts.

"5. Selected prior decisions rendered by the Labor Commissioner or the Labor Commissioner's hearing officers in the course of adjudicating disputes arising under California's labor statutes and regulations." (DLSE Manual, June 2002, § 1.1.6, pp. 1-2, 1-3.) The DLSE Manual further states that the particular sources underlying the DLSE Manual's specific policies and interpretations, such as opinion letters, administrative decisions, and decisions by the labor commissioner adopted as a precedent decision, are indicated in the DLSE Manual. (DLSE Manual, June 2002, §§ 1.1.6.1, 1.1.6.3, p. 1-3.)

The DLSE Manual contains provisions on how to calculate overtime on bonuses. It distinguishes between flat sum bonuses and percentage of production or other formulaic bonuses. The DLSE Manual sections 49.2.4.2 and 49.2.4.3 of the DLSE Manual address overtime on flat sum bonuses. The DLSE Manual section 49.2.4.2 provides: "If the bonus is a flat sum, such as $300 for continuing to the end of the season, or $5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies. This is so because the bonus is not designed to be an incentive for increased production for each hour of work; but, instead is designed to insure that the employee remain in the employ of the employer. To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy." The DLSE Manual section 49.2.4.3 of the Manual gives an example of how such overtime on a flat sum bonus is calculated.

Because the DLSE Manual does not carry the force of law, this court is not required to mandate compliance with the formula provided in the DLSE Manual section 49.2.4.2. As explained in *Marin, supra,* 169 Cal.App.4th at p. 815, "[l]ike the DLSE interpretation at issue in *Skyline,* Manual section 49.2.4.2 is 'a standard of general application interpreting the law the DLSE enforce[s],' and 'not merely a restatement of prior agency decisions or advice letters.' [Citation.] Our conclusion is supported by section 1.1.6.1 of the Manual, which states that if the source of the interpretation is a statute, regulation, court decision, opinion letter, or 'Administrative Decision' or 'Precedent Decision' of the Labor Commissioner, that source will be identified in the Manual. No such sources are mentioned in section 49.2.4.2. The only source cited for the flat sum bonus rule is 'public policy.' Accordingly, section 49.2.4.2 does not have the force of law." (*Ibid.*, fn. omitted.) It not only has no precedential value, it carries very little, if any, persuasive value because the DLSE Manual section 49.2.4.2 does not cite any supporting legal authority. This lack of any citation to supporting binding California law is because there is none. There is no state law specifying a formula for overtime applied to bonuses, particularly flat sum bonuses.

Nevertheless, the court in *Marin* indicated that the DLSE Manual section 49.2.4.2 provides a reasonable formula for calculating overtime on a flat sum bonus. "The flat sum bonus formula set forth in sections 49.2.4.2 and 49.2.4.3 of the Manual, which uses a divisor of straight time, instead of total hours worked to set the regular bonus rate, and a multiplier of 1.5, rather than 0.5, to fix the bonus overtime due, produces 'a premium

based on bonus' that the DLSE believes is necessary to avoid encouraging the use of overtime." (*Marin, supra,* 169 Cal.App.4th at pp. 817-818.)

The *Marin* court noted that, "[i]n the case of a true flat sum bonus where the employee cannot earn any additional bonus by working overtime hours, excluding such hours from the divisor prevents them from diluting the regular rate. Including those hours would give the employer an incentive to impose overtime because the additional overtime would reduce the cost of overtime by decreasing the regular rate—part of the situation addressed in the *Skyline* case." (*Marin, supra,* 169 Cal.App.4th at p. 819.) Although, as indicated by *Marin*, the DLSE Manual section 49.2.4.2 provides a reasonable formula for calculating overtime on a flat sum bonus, the formula has not been enacted as enforceable law and therefore this court cannot enforce it. Furthermore, enacting the formula in the DLSE Manual section 49.2.4.2 as enforceable law falls within the domain of the Legislature and IWC, not this court.

In *Marin*, the court concluded the DLSE Manual flat sum bonus formula did not apply because the bonus in *Marin* was a hybrid bonus which functioned primarily as a production bonus and did not encourage the use of overtime. (*Marin, supra,* 169 Cal.App.4th at p. 818.) Relying on *Skyline* and the DLSE Manual policies, the trial court in *Marin* held the employer's overtime formula violated California law, noting that "'[t]he law is sparse regarding how an employer is to calculate overtime when awarding bonuses,' and finding that, 'given the paucity of California authority in this area and contrary Federal authority, there are substantial grounds for differences of opinion.'" (*Marin,* at p. 810.) On appeal, the *Marin* court reversed the trial court, concluding the

employer's formula did not violate either California or federal law and was lawful. (*Id.* at p. 806.)

Marin is not dispositive here. *Marin* concerns a deferred, semi-annual, formulaic bonus which is primarily a production bonus and was not paid in the same pay period earned. The *Marin* bonus was based on the number of years worked for the company and number of paid hours accrued during a six-month period. In addition, the bonus was paid at the end of a six-month period, with overtime pay added to the bonus. Furthermore, in *Marin*, unlike in the instant case, there was no directly applicable federal regulation or statute. Here, plaintiff's bonus is a flat sum bonus paid in the same period earned. Unlike in *Marin*, federal regulation, CFR section 788.209(a), applies and provides a formula used by defendant for computing overtime on plaintiff's bonus.

Defendant argues that since there is no state law that provides a formula for computing overtime on bonuses, defendant lawfully applied the federal formula. In urging this court to find defendant's use of the federal formula lawful, defendant explains it had no alternative but to follow the only existing explicit method founded on enforceable law. By not regulating overtime pay on bonuses, the state has in effect left to federal regulation computing overtime on bonuses. Congress has specifically permitted states to enforce overtime laws more generous than the FLSA under the savings clause (*Tidewater, supra,* 14 Cal.4th at p. 567; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795 (*Ramirez*)), yet this state has not enacted any legislation or regulations specifying a formula for computing overtime paid on bonuses. This court therefore cannot mandate and enforce compliance with plaintiff's proposed formula for computing

overtime on bonuses, when there is no applicable statute or regulation providing for such a formula. Even though the federal formula for computing bonus overtime may not comport with state policy discouraging overtime, defendant's use of the federal formula is lawful because it is based on federal law, and there is no state law or regulation providing an alternative formula.

In the absence of a formula for computing bonus overtime founded on binding state law, there is no law or regulation the trial court or this court can construe or enforce as a method for computing overtime plaintiff's bonuses, other than the applicable federal regulation, CFR section 778.209(a). This is not a situation in which state and federal labor laws substantially differ and therefore reliance on federal law is misplaced. (*Skyline, supra,* 165 Cal.App.3d at pp. 247-249; *Ramirez, supra,* 20 Cal.4th at p. 798.) Defendant therefore lawfully used the federal formula for computing overtime on plaintiff's flat sum bonuses. In turn, the trial court properly granted defendant's motion for summary judgment.[3]

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[3] During oral argument plaintiff untimely raised new legal theories not previously briefed by plaintiff and authority not included in plaintiff's appellate briefs. Plaintiff argued for the first time the flat sum bonus was not actually a bonus but rather salary, and the flat sum bonus was artificially labeled a bonus, constituting a subterfuge that operates to evade overtime pay laws by reducing the regular hourly rate when overtime hours are worked on the weekend. The legal authority, raised for the first time during oral argument, included *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893; *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424-425; 29 CFR § 778.203 (premium pay for work on Saturdays, Sundays, and other "special days"); 29 CFR § 778.327(b) (temporary or sporadic reduction in schedule); and 29 CFR § 778.502 (artificially labeling part of the regular wages a "bonus").

We do not address in this decision such untimely, waived theories and legal authority on the grounds plaintiff did not include them in its appellate opening brief or

[footnote continued on next page]

V

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.

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reply; plaintiff did not provide defendant or this court with notice before oral argument of plaintiff's intent to rely on new legal authority and raise new theories; and defendant therefore did not have an opportunity to review and provide a fully informed response to such new theories and legal authorities.

Furthermore, without suggesting whether plaintiff's new theories and legal authority have merit, we decline to consider them because plaintiff has not demonstrated good cause for raising them for the first time during appellate oral argument. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [points raised in appellate reply brief for the first time will not be considered, unless good reason is shown for failure to present them before]; *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 977, fn. 12; *Estate of McDaniel* (2008) 161 Cal.App.4th 458, 463, quoting *People v. Harris* (1992) 10 Cal.App.4th 672, 686 ["'contentions raised for the first time at oral argument are disfavored *and* may be rejected solely on the ground of their untimeliness.'"].

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on February 22, 2016 declarant served the PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of February, 2016 at Sherman Oaks, California.

Lea Garbe

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