S232607

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
APPEAL From the Superior Court of Riverside County. Hon. Daniel A. Ottolia. (Super. Ct. No. RIC1211707)

APPELLANT'S ANSWER TO AMICUS BRIEFS

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

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I. INTRODUCTION

The Amici Briefs filed on behalf of Appellant and Respondent crystallize the two strains of issues in this case. The immediate issue is the propriety of Dart's particular Saturday and Sunday payment plan under both Federal and State Law. The broader issue is the proper way to calculate overtime under California law when employees are paid a fixed amount of remuneration that is in no way tied to the total number of hours worked. The broader issue is framed in connection with Dart's payment plan, because it involves a fixed amount that is not tied into total hours worked.

The Amicus Brief of California Employment Law Council and Employers Group ("CELC") in Support of Respondent ("CELC Brief") begins with a bold pronouncement unsupported by the record or reality:

"For over 65 years, employers across California have relied upon well-established federal law governing the calculation of overtime compensation on bonuses paid to non-exempt employees". (CELC Brief pg.1). On the next page, it portends "staggering unanticipated liability" that California employers would face. (See also CELC Brief at.31-33).

Obviously, these assertions are intended to elicit sympathy from the Court over a speculative consequence that should not and will not materialize.

If bold unsupported statements are countenanced by the court, it is simpler to prognosticate dire consequences if the Court of Appeal decision

is not overturned. A failure to reverse would license employers, "across California", to convert hourly or percentage based shift differentials to flat amount shift differentials in order to undermine 65 years of overtime calculation practices. That result will have a "staggering" impact on the take home pay of countless Californians who work overtime and currently receive shift differentials that are paid in hourly pay increments above what they would earn per hour on more desirable shifts. [1]

An example is illustrative. Suppose an employee at a hospital currently receives $30.00 per hour, plus a night shift premium of an extra $5.00 per hour, and the employee's non-overtime shift is 8 hours in length. Currently, that employee's regular rate for overtime purposes is $35.00 per hour under both federal and State law. (29 CFR §778.207; DLSE Manual 49.1.1 and 49.1.2 adopting the "all remuneration" language of 29 USC 207 (e)). If this Court upholds the Court of Appeal decision, the hospital would be incentivized to convert the $5.00 per hour shift premium to a flat premium of $40 per day (8 hours x $5.00), simply to get the benefit of a regular rate that decreases as more hours are worked. (e.g. for an employee

[1] On March 25, 2009 the U.S. Bureau of Labor Statistics published A Look at Supplemental Pay: Overtime Pay, Bonuses, and Shift Differentials www.bls.gov/.../a-look-at-supplemental-pay-overtime-pay-bonuses-and-shift- differentials. In that study the BLS found that 19.75 % of workers receive shift differentials. It is quite telling that the Study treats shift differentials and bonuses as separate forms of supplemental pay.

working 50 hours in 5 days, the regular rate would be $34.00 instead of $35. The $34 is calculated as follows -- $30.00 per hour in hourly rate pay + $4.00 per hour on the flat sum shift differential. The $4 is derived from the following: 5 daily premiums at $40 per day equals $200, divided by 50 hours of total work during the week, per Dart's methodology equals $4.00).

Or perhaps more insidiously, an employer could lower the hourly rate to $25.00 to achieve a much lower "regular rate", while maintaining the exact same pay level in non-overtime weeks.

Illustration: At the outset of this hypothetical, the night shift employee's "regular rate", combining base hourly rate with the $5.00 per hour shift premium, was $35.00 per hour. Multiplying that rate times a non-overtime week of 40 hrs. is $1400 for a week without overtime.

To get to that $1400, if the employee's base hourly rate is reduced by $10 to $25.00, the employer would have to make the flat rate shift premium $80. The reason being, 40 hours x $25.00 is $1000. The difference between $1400 and $1000 is $400. Dividing, $400 by a 5 day workweek = an $80 per day flat rate shift premium. In this scenario, if an employee worked 50 hours, her regular rate would be $33.00 per hour. $25.00 per hour in hourly regular rate wages would be added to $8 per hour based on the flat rate shift premium under Dart's methodology--$400 divided by 50 hours worked equals $8.00. The $33 per dollar regular rate, is $2 per hour lower than the $35 regular rate when the shift differential was hourly. The reduction in

"regular rate" occurred simply by transforming the hourly rate to a flat sum, and applying Dart's fluctuating workweek formula.

If the Court of Appeal decision is adopted by this court, and the demise of the foundation of California's time honored "regular rate calculations" are thereby secured, changes in the form of shift differentials throughout the State will be imposed, all to the detriment of a vast number of Californians.

II. PROPER APPLICATION OF FEDERAL LAW DOES NOT SUPPORT APPLICATION OF 29 CFR 778.209 (a) TO THE SATURDAY AND SUNDAY SHIFT DIFFERENTIALS DART PAYS ITS WEEKEND STAFF

The Amicus Brief of California Employment Law Council and Employers Group in Support of Respondent contends that the Dart pay system is consistent with Federal law. (CELC Brief pg. 7-9). See also the Brief of the National Association of Manufacturers ("Manufacturers") (Mfrs. Brief pgs. 2-11).

Their position in this regard is not well taken. The Manufacturers Brief states a truism that Appellant also embraces: "The Federal Regulations provide a clear, straightforward rule for how to calculate overtime in this situation." (Mfr. Brief at 21). What Dart and its Amici fail to appreciate is that in "this situation" Federal Regulations are clearly consistent with Appellant's calculation methodology.

The FLSA, as interpreted and applied in the CFR's and binding

precedent, rejects Dart's methodology, and supports the calculation system advocated by Appellant.

A. FLSA "Regular Rate" Determinations Look to All Forms of Remuneration Paid In Non-Overtime Weeks

Under Federal Law, the regular rate is determined by dividing *all* types of wages earned per the contract of employment by the hours worked in a normal non-overtime week.

Key here is the fact that the weekend shift premiums paid by Dart are paid irrespective of whether or not Dart employees scheduled for Saturdays and Sundays are working overtime during the weeks they work weekends. (Appx.68-70) For a workweek that includes Saturday and Sunday shifts, under the FLSA and California law, the "regular rate" is determined by adding the total hourly wages earned for non-overtime hours (40 in manufacturing) to the $30 in shift differential pay, and dividing by 40.

"As we have previously noted, the regular rate refers to the hourly rate actually paid the employee for **the normal, non-overtime workweek for which he is employed.** *Walling v. Helmerich & Payne, supra,* 323 U.S. 40 *United States v. Rosenwasser,* 323 U.S. 360, 363" *Walling v. Youngerman-Reynolds* 325 U.S. 419, 424 (1945). (emphasis added)[2];To

[2] Despite the attention it receives, the Federal "fluctuating workweek" exception to the *Walling v. Youngerman-Reynolds* rule is limited to a precise circumstance where an employee receives a fixed salary, works

determine the "hourly rate actually paid" 29 USC §207 (e) expressly requires the employer to look at **"all remuneration"** paid for a **non-overtime week** in determining the regular rate to be used in calculating overtime. Congress obviously contemplated that employees could be paid on a mixed basis, like in this case, with some hourly pay and some fixed payments a possibility. Here, "all remuneration" during non-overtime weeks includes hourly pay and $15.00 per weekend day for employees scheduled to work weekends.

In 29 CFR §778.207, the Department of Labor ("DOL") expressly pointed out that shift premiums are to be included in the determination of "regular rate", going so far as to address the issue in this case. "...lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate" .

In this case, if an employee during a "normal, non-overtime workweek [in which he works a Saturday and Sunday]" is paid $15 per hour and $15 per day for work on both Sunday and Saturday, applying *Walling v. Youngerman-Reynolds's* holding, to 29 CFR § 778.207's "regular rate" requirement, the "hourly rate actually paid the employee" is $15.75 per hour. The $15.75 per hour is calculated as follows:

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different numbers of hours weekly, and the salary is large enough to pay statutory minimums during the longest workweeks. See 29 CFR §778.114 "Fixed salary for fluctuating hours".

In a "non-overtime week" that includes a day of Saturday and a day of Sunday work, he is paid $630 for the week, $600 in base hourly pay ($15 x 40 hours = $600) + $30 in fixed payments. Dividing $630 by 40 hours = $15.75 per hour-- the "regular rate". Therefore, for weeks an employee works both weekend days and overtime, the overtime rate is 1.5 x $15.75 per hour under the Fair Labor Standards Act.

The *Youngerman-Reynolds* "regular rate" calculation process was codified in the Code of Federal Regulations:

"The 'regular rate' of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co. v. Aaron,* (1948)334 U.S. 446*)*. The Supreme Court has described it as the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed—an 'actual fact' (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419). Section 7(e) of the Act requires inclusion in the 'regular rate' of 'all remuneration for employment paid to, or on behalf of, the employee' except payments specifically excluded by paragraphs (1) through (7) of that subsection. .... As stated by the Supreme Court in the *Youngerman-Reynolds* case cited above: 'Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result

of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." 29 CFR §778.108.

Dart decided employees will get paid hourly wages and $15.00 per day for Saturday and Sunday work. Per the Federal authority referenced supra, this arrangement, under Federal law, compels dividing the combined forms of remuneration by 40 hours to determine the "regular rate".

B. 29 CFR §778.203 Expressly Prohibits Dart's Formula.

Glaringly absent from the Amici Briefs filed in support of Dart, is any reference to 29 CFR §778.203. This omission is telling because 29 CFR §778.203 is entitled "Premium pay for work on Saturdays, Sundays, and other 'special days'", and this case deals specifically with such premiums.

There is no question that Dart's formula uses the premiums for Saturday and Sunday pay as a "credit" against overtime obligations. During a non-overtime week, the $15.00 per day funds the non-hourly part of the straight time paid for the week. Under Dart's formula, when overtime is worked, the $15.00 per day is divided by total hours, and therefore, it funds, in part, pay for overtime hours, hours over forty. This practice is expressly prohibited by 29 CFR §778.203, which provides:

"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 [Federal] 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).

With $15 per day, which works out to under $2 per hour, added to base hourly wages, even if Dart only paid minimum hourly wages the extra $2 per hour added to the base hourly pay does not come close to 1.5 x the base hourly rate. (e.g. At well below the minimum wage, for example, $6 per hour, a weekend premium that works out to under $2 per hour when added to $6 per hour is less than $9 per hour which is 1.5 x the $6 base hourly wage). Therefore, under 29 CFR §778.203 the $15 *cannot be credited* in any manner *toward statutory overtime due.* Under Dart's formula, the $15 per day is unlawfully credited towards 2/3 of the overtime owing, the straight time part of the 1.5 multiplier.

C. Calling a Shift Differential A "Bonus" Does Not Legitimize Dart's "Regular Rate" Formula

Employers have, since the 1940's, attempted to come up with wage schemes in an effort to avoid paying overtime under the FLSA through calculation of "regular rate" by means other than taking all types of

remuneration in a non-overtime week, and dividing by forty, or in some industries a number different than 40. (e.g. *Walling v. Youngerman-Reynolds supra*, and *Walling v. Henmerich & Payne* 323 U.S. 40 (1944).) The Department of Labor addressed one such ruse in regulations designed to ferret out *pseudo* bonuses. See 29 CFR §778.502 and 29 CFR §778.503.

In the same manner that they ignored 29 CFR 778.203, Dart's Amici completely ignored 29 CFR §778.502. This failure on the part of Amici for Dart to confront clearly applicable regulations that have a clear potential of undermining the foundation of their basic argument, speaks volumes.

29 CFR §778.502 makes clear that 29 CFR §778.209 (a), the "bonus" provision of the CFR's relied on by Dart and its Amici, is inapplicable in this case.

The title of 29 CFR §778.502 provides:

"Artificially labeling part of the regular wages a 'bonus'."

Given the record in this case, there is no question that $15 a day is, along with hourly wages, part of the *regular wages* paid to employees scheduled to work on Saturdays and Sundays. The $15 flat sum is a shift differential payment that must be included in the regular rate calculation in the manner dictated by 29 CFR §778.108, 29 CFR §778.203, 29 CFR §778.207, and *Youngerman-Reynolds, supra.*

29 CFR §778.502 goes on to provide:

"(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."

In this case, the so called "bonus" is not for extra effort, a reward for loyal service, or a gift, it is part of the contract of employment –extra remuneration for work on particular shifts stated as a flat sum, not an increased hourly rate.

Subsection (a) of 29 CFR 778.502 goes on to provide: "The term [bonus] 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." Given this language, Dart's weekend premiums are improperly termed "bonuses". The so-called "bonuses" in this case are clearly wages Dart employees are entitled to receive for every weekend day they work pursuant to an implied in fact contract, just as they are entitled to receive their hourly pay for their work.

29 CFR 778.502 concludes: "(e) The general rule may be stated that whenever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply." At Dart, employees who work scheduled weekends are *guaranteed* a fixed amount of $15.00 per weekend day.

Given the foregoing, it is clear that 29 CFR 778.502 undermines the argument that Dart's practices are consistent with Federal law. Amici who wrote in support of Dart did not confront the reality of 29 CFR 778.502, in the same manner that they did not confront 29 CFR §778.203, because to do so would compel a conclusion that Dart's practices violate the FLSA. The flat sum payments at issue here are not a "bonus" under the FLSA, but rather a Saturday and Sunday shift premium not subject to the calculation methodology Dart has employed.

D. Federal Case Authority Supports The Conclusion That Dart's Practices Are Unlawful Under The FLSA.

" 'The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, **exclusive of overtime payments**.' *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948)." *Gagnon v. United Technologies,Inc.* 607 F. 3d 1036 (5th Cir. 2010). (Emphasis Added) See also: *Mata v. Caring For You Home Health, Inc.* (S.D. Texas 2015) 94 F.Supp.3d 867.

Bay Ridge Operating Co, supra 334 U.S. 446, is directly on point. The United States Supreme granted certiorari because of the issue operative in this case, on "account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay" *Id*, 334 U.S. at 459.

The Supreme Court then points out, consistent with the authorities cited above:

"We have said that 'the words 'regular rate' * * * obviously mean the hourly rate actually paid for the normal, non-overtime workweek.' *Walling v. Helmerich & Payne*, 323 U.S. 37, 40, 65 S.Ct. 11, 13" *Bay Ridge Operating Co, supra* 334 U.S. at 461. (asterisks in original)

The Court, in *Bay Ridge, supra,* apropos here, determined that a shift differential must be factored into the regular rate. i.e. the *actual hourly rate paid for non-overtime work*:

"Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium. Such payments enter into the determination of the regular rate of pay.[Cite Omitted]" *Bay Ridge Operating Co, supra* 334 U.S. at 469.

The Supreme Court did not find that extra pay for night and holiday work in *Bay Ridge* is a bonus that could fund in part both regular and overtime hours for night or holiday work. Instead the Court found the payments to be a "shift differential" that had to be factored into determination of the regular rate when those shifts are worked, by determining what employees who work those shifts receive for non-overtime hours when working those shifts.

In *Bay Ridge*, the shift differential "wage" manifested itself in an increased hourly rate when unwelcome shifts were worked. Here, it manifests itself in a flat rate payment. The distinction, given the foregoing authority, does not make a difference.

Reich v. Interstate Brands Corporation, (7th Cir. 1995) 57 F3d 574, picks up on the *Bay Ridge*, *supra* ruling in a context that involves a yearly payment over and above hourly wages. *Reich* points out that if an extra payment based on schedules is paid, the *Bay Ridge* analysis does not change. Particularly relevant is *Reich*'s views on lump sum differentials for weekend work:

"Section 7(e)(6) contains a similar provision for weekend work. So if a baker's regular weekday rate were $10 and the rate for Sunday work were $15, the Sunday premium would not be figured back into the "regular rate," and time-and-a-half pay for overtime during the week would remain at $15. But if the Sunday rate were $14, the extra pay would be included in the 'regular rate', raising the overtime rate for both weekdays and Sundays. *Bay Ridge Operating Co. v. Aaron,* 334 U.S. 446; ...**It is awfully hard to see why things should differ if the employer chooses to pay a "Sunday bonus" in a lump sum.** If the bonus is high enough to take the Sunday hourly wage over 150% of the weekday wage, then § 7(e) (7) keeps it out of the "regular rate"; but if it is not high enough, the manner of its payment cannot sensibly make a difference." *Reich, supra* 57 F3d at 578.

The wisdom of *Reich* is a matter of commonsense. It would be absurd to think that Congress intended that, in the calculation of overtime premiums, that extra pay paid on account of a set of facts as an hourly premium would be treated differently in the calculation of overtime, than if the extra pay for the same set of facts, was a lump sum.

Duplesse v. County of Los Angeles 714 F.Supp. 2d 1045, 1053-1054 (C.D. Cal. 2010) addressed what constitutes a "bonus" under the FLSA.

The conclusion in *Duplesse*, after referencing 29 CFR 778.502 (a) was that premiums for particular shift work were not "bonuses" under the FLSA *Id*, 714 F.Supp. 2d at 1053-1054. Here, as in *Duplesse*, the premium is merely part of a contract for work on a particular shift, and not an FLSA "bonus". In *Duplesse*, the shifts that triggered differentials were defined by days in which employees did particular jobs. Here the shifts that trigger differentials are defined by work on particular days.

E. If Dart's Fixed Weekend Payments Actually Were "Bonuses" The Rules Of Statutory Construction Would Render 29 CFR 778.209 Inapplicable

Amici for Respondent argue that the general bonus formula of 29 CFR 778.209 controls. Applying the tenets of statutory construction used in construing Federal law, this position is not well taken. The specific language of 29 CFR §778.203, which is entitled "Premium pay for work on Saturdays, Sundays, and other 'special days', trumps 29 CFR 778.209. 29

CFR § 778.203 specifically dictates how to calculate "regular rate" when weekend shift differentials are paid.

"It is fundamental that a general statutory provision may not be used to nullify or to trump a specific provision, irrespective of the priority of enactment. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524, (1989) (stating that a general statutory rule does not govern unless there is no more specific rule); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (holding that the general venue provision of the Securities Exchange Act of 1934 does not trump the specific venue provision of the National Bank Act...." *California v. United States* (9th Cir. 2000) 215 F.3d 1005, 1013.

California authorities are consistent with the above federal precedent. *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 879; *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960.

F. A Shift Differential Is Not an "Attendance Bonus"

In support of its position, that 29 CFR §778.209(a) controls under Federal law, Amici Manufacturers repeatedly reference the weekend shift premiums as an "attendance bonus" (Mfr. Brief, passim). This position is a perversion of the concept of an "attendance bonus", that if accepted would effectively convert all night shift and graveyard shift differentials to "attendance bonuses" as well. Preliminarily it needs to be pointed out that

the CFR's address shift differentials in 29 CFR § 778.207, and address "Bonuses" separately, beginning at 29 CFR §778.208.

The CFR's separate placement of the two concepts is consistent with the fact that an extra payment for working an unwelcome shift is not an attendance bonus. In industrial relations parlance, an attendance bonus is defined as a reward for perfect, or near perfect, attendance over a lengthy period of time, or an attendance record that reflects very little or no utilization of sick leave, over a period of time.

The Glossary of Compensation Terms- US Bureau of Labor Statistics, found at www.bls.gov/ncs/ocs/sp/ncbl0062, published by the Department of Labor defines, at pg. 5, "Attendance Bonus" as "Payment or other type of reward (e.g. a day off) for employees whose work attendance record meets certain standards."

A payment for working a Saturday or Sunday shift is clearly not a reward for a "good attendance" record.

29 CFR §778.211 provides:

" ...Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses... are in this category."

Nothing in the record in this case comes close to establishing that the Saturday and Sunday extra pay was intended to induce employees "to work

more steadily or more rapidly or more efficiently or to remain with the firm."

G. 29 CFR §778.209 Must Be Read In Context

As has been argued extensively in prior briefing, and as reiterated below, under California law, it is never appropriate to adopt a "regular rate" formula applied to a "flat sum" bonus that results in a decreasing "regular rate" with every additional minute of overtime work. Reading 29 CFR §778.209 in context makes the same conclusion operative under Federal law.

The Court of Appeal decision could be reversed solely on account of state law, on account of the Federal Regulations that define "Bonus", the Federal Regulation regarding "Saturday" and Sunday" work that expressly validate the calculation methodology advocated by Appellant, and/or on account of the holdings in United States Supreme Court cases, cited supra, including *Youngerman-Reynolds, supra,* 325 U.S. 419, 424, codified at 29 CFR 778.108. However, as amicus CELC points out, a larger issue looms, if the State law arguments of Appellants are not accepted by this Court. How is "regular rate" to be calculated when true bonuses are paid under Federal law, where the criteria for the bonus is not tied into all hours worked? (E.g. A true attendance bonus, having nothing to do with work during both regular and overtime hours, where an employee is paid, for

example, a flat sum for arriving at work on time every work day during a fiscal year.)

Dart's Amici argue that 29 CFR §778.209 dictates that when bonuses are fixed rate bonuses, the divisor used in determining regular rate, is always the combination of straight time hours and overtime hours. (CELC Brief Page 8; Mfr.'s Brief Pg.3). A proper reading of 29 CFR §778.209 does not support their position.

29 CFR §778.209 begins: "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." Substituting in the definition of "regular rate", for the words "regular rate", the language takes on clearer meaning.

"Where a bonus payment is considered a part of the [*remuneration an employee receives for a non-overtime week]* at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation".

29 CFR §778.209 continues, "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."

This section does not specify whether the divisor is the "total hours

worked during the "non-overtime" part of the week consistent with 29 CFR §778.108, or the total hours worked including overtime.

As referenced, supra, the Supreme Court laid out the general principal underlying regular rate calculations in *Walling v. Helmerich & Payne, supra* 323 U.S. 37, 40, (1944) where it stated, "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the **normal, non-overtime workweek**." A position echoed in *Youngerman-Reynolds, supra*, 325 U.S. 419, 424. Here that amount is 40 hours of hourly wages and $30 for work on a Saturday and Sunday in "non-overtime workweeks". Moreover, as referenced above, several DOL regulations note the Supreme Court's holding in *Walling* and other cases. E.g. 29 C.F.R. § 778.108. It is in this context that 29 C.F.R. § 778.209 must be read.

"The proper scope of [a regulation] is derived not from reading it in isolation, but from a careful consideration of the complete regulatory scheme ... against the backdrop of its policies and objectives." *United States v. Stansell,* 847 F.2d 609, 614 (9th Cir.1988).

Given the foregoing, any ambiguity in section 778.209 should be resolved to yield a single consistent understanding of the regular rate throughout the DOL FLSA regulations. Cf. *Watson v. United States* (2008) 552 U.S. 74, 81 (noting the "paradigm of a statute 'as a symmetrical and coherent regulatory scheme, ... **in which the operative words have a**

consistent meaning throughout'") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)).

The basic regulation and the Supreme Court unambiguously define the regular rate as "the hourly rate actually paid for the normal, non-overtime workweek." See 29 C.F.R. § 778.108 which expressly cites *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. at 419. Therefore, the ambiguous term "total hours worked" in 29 C.F.R. § 778.209 necessarily denotes the total number of hours worked in the regular non-overtime workweek.

Scott v. City of New York (S.D.N.Y. New York 2008) 592 F.Supp. 2d 475, 487 invoked the above analysis in a context, similar to the context here, where the bonus at issue was not dependent on the number of straight time and overtime hours worked during the period for which the bonus was paid.

The court in *Scott* went on to point out, that its interpretation of 29 C.F.R. § 778.209 was also the most logical outcome. "It is counterintuitive for [the bonus at issue in *Scott*] - as a component of the regular rate - to decrease when an experienced employee volunteers or is ordered to work more hours than a regularly scheduled work period." *Id,* 592 F.Supp. 2d 475, 487. The same applies here. It is counterintuitive for the $15 per day bonus in this case, $1.87 per hour in an 8 hour day, "as a component of regular rate", to decrease when an employee is scheduled to work overtime

hours.

III. CALIFORNIA LAW COMPELS APPLICATION OF *SKYLINE HOMES, INC. V. DEPARTMENT OF INDUSTRIAL RELATIONS (1985) 165 CAL.APP 3rd 239* TO FIXED PAYMENT WAGES THAT ARE NOT DRIVEN BY THE TOTAL AMOUNT OF TIME WORKED.

A. In An Action For Overtime Under California Law, When The Intent Of California Overtime Law Diverges From The Intent of Federal Overtime Law, The Intent Of California Controls

Dart's Amici make two principal arguments as to California law. First, they argue that Federal law applies because California cases such as *See's Candy v. Superior Court* 210 CA4th 889, 903 (2012) , and *Martinez v. Combs* (2010) 49 Cal. 4th 35, 68 require that California court defer to Federal law in interpreting "regular rate" because the expression "regular rate" is not defined in California as applied to fixed amounts that are not large salaries that constitute all of an employee's wages. (CELC Brief 21-22; Mfr. Brief 4). On this issue, as will be demonstrated below, they are wrong. However, if they are correct on this point, reversal would still be mandated because, as the first 21 pages of this brief establish, Dart's formula is not compatible with Federal law.

The error in the analysis of Dart's Amici on deference to Federal interpretations, is embedded in cases they rely on.

"We have previously cautioned against 'confounding federal and state labor law' (*Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th 785 and explained '**that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced**" (*ibid.;* see also *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575, 588 Courts must give the IWC's wage orders independent effect in order to protect the commission's delegated authority to enforce the state's wage laws and, as appropriate, to provide greater protection to workers than federal law affords. (See *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575, 592; *Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th 785, 798 **We therefore apply the applicable wage order according to its terms, having in mind its distinct language, history and function in the context of state wage law."** *Martinez, supra,* 49 Cal. 4th 35, 68 . (Emphasis added)

Per the foregoing authority, substantial differences in "language or intent" can justify application of State law in a manner inconsistent with Federal law. As this Court recognized in *Ramirez, supra,* 20 Cal.4th 785,at 795 and 798, one case where this principle has been applied, is *Skyline, supra* where the State's meaning of the term "regular rate" diverged from the Federal meaning based on the "language" of the Wage Order providing for an 8 hour day standard, and the substantial difference in "intent" in the use of the words "regular rate" under Federal and California law.

In making the argument that *Skyline*'s analysis does not apply in the context of this case, Dart's Amici did not heed the requirement that the Court is to take into account the **"distinct language, history and function"** of the words *regular rate* in " the context of state wage law."

Dart's Amici did not contradict the findings of "intent" in *Skyline,* nor contradict, the evolution of the meaning of "regular rate" in California through the 1957 A.G.'s Opinion, the presumption that the IWC knew of that opinion when, over the years it repeatedly reenacted "regular rate" language unaltered, nor *Skyline*'s interpretation and holding as to the meaning and intent of "regular rate" under California law, followed by further unaltered use of "regular rate" by the IWC and Legislature in later enactments.

B. *Skyline* Revisited

The "intent" lesson of *Skyline* does not turn on whether something is called a "flat rate bonus", or a "production bonus", but rather on whether the flat rate payment is based on straight time and overtime work hours put in, or remuneration paid without regard to the amount of overtime worked.

As was emphasized in earlier briefs submitted on behalf of Appellant, under California law, given the "penalty" intent of the IWC, as stated in the 1980 Statement of The Basis of its Wage Orders, quoted in *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690,713, cited in *Skyline, supra* 165 CA 3d at 249-250, a flat sum payment

paid irrespective of work during both regular and overtime hours, cannot be used to discharge an employer's obligation to pay premium wage rates for overtime work.

In California, a "fluctuating work hours" method of calculating the regular rate of pay, where regular rate has the potential to fluctuate from week to week is prohibited in non-production bonus contexts when flat amounts are paid for non-overtime work. California law precludes an employer from treating any part of a flat sum that is not tied into total hours worked, as compensation for overtime work.

In *Skyline Homes, supra,* the court concluded that, given the legislative intent of the IWC, California law did not countenance a practice that progressively reduced the employee's regular rate of pay for the 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---the effect of Dart's practice here. Per *Skyline*, such a practice was contrary to California's core polices of discouraging and penalizing overtime work.

The *Skyline* court concluded that the federal "fluctuating workweek" method of calculation (i.e., dividing a *weekly salary* that meets the specific criteria of 29 CFR § 778.114 by total hours) reduces the employee's regular hourly rate with each overtime hour worked, and is incompatible with the overtime requirements imposed by the IWC wage orders . *Skyline,*

supra 165 Cal.App.3d at 245-249. As pointed out clearly in *Skyline*, one of the major differences between federal and state law in this area is the requirement in California that the premium pay for overtime is to be a penalty which creates a disincentive to employers to impose overtime on employees. See *Industrial Welfare Commission, supra* (1980) 27 Cal.3d 690,713. *Skyline* points out that "regular rate" under California law requires the employer, not the employee, to bear the costs of the additional compensation due for overtime work hours, otherwise, employers would be encouraged to work employees longer hours.

" [A] method of computation of overtime that would encourage patterns of employment using 10 or 12 hour days would be inconsistent with [IWC Wage Orders]." *Skyline, supra*165 CA 3d at 254.

Here that is exactly what Dart's formula does. By reducing the regular rate with each extra hour worked, just like in *Skyline*, the employer is encouraged to implement patterns of employment that increase employee overtime.

As the number of hours increased under the fluctuating workweek practice in *Skyline*, the divisor increased, and therefore, the "regular rate" decreased. With the fixed payments here, the same result is assured, it becomes less expensive for Dart, per hour, to work their employees longer hours as the hours add up. This system, condemned in *Skyline*, is

unquestionably a benefit to employers, lowering their costs per hour worked as overtime increases.

The regular rate on a $30 flat sum for a Saturday and Sunday, when an employee works 41 hours in a week is $0.71 per hour. ($30 divided by 41). If the same employee works 51 hours, the regular rate on the flat sum is reduced to $0.59,under Dart's system. ($30 divided by 51). California law does not, per *Skyline's* well reasoned, and time honored decision, countenance employers receiving the benefit realized by a diminishing "regular rate".

Per the result in *Skyline*, no part of the flat sum could serve to compensate the employee for the overtime hours and the flat sum constituted compensation solely for the non-overtime hours. 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 per week. The employer was obligated to use additional funds exclusive of the flat sum to pay the premium wage rates due for the overtime hours. The court in *Skyline* came to its conclusions independently, but also referenced a DLSE interpretation which, per *Augustus v. ABM Security Services, Inc.*,___Cal. 5th____, December 22, 2016, 2016 WL 7407328 could inform this court's decision making.

In *Skyline*, the Court stated, inter alia,

"The DLSE interpretation equates 'regular rate' with normal, and

therefore, overtime should not be used in the computation of 'regular rate of pay.' Under this interpretation, the employee's weekly salary is considered straight time compensation for the employee's 'regular hours', i.e., non-overtime hours of no more than 40 in a week." *Skyline, supra,* 165 Cal.App.3d at 239.

Skyline was subsequently followed in other Court of Appeal decisions, referenced in prior briefing, including *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 72, *Alcala v. Western Ag Enterprises* (1986) 82 Cal.App.3d 546, and *Lujan v. Southern California Gas Co.* 96 CA 4th 1200 (2002). Each case held that a flat sum payment for fluctuating work hours could not serve to compensate the employee for overtime work but only constituted compensation for the non-overtime work hours. The employer was precluded from using part of the flat sum to discharge its premium wage rate obligations for overtime work.[3]

Additionally, post *Skyline,* the IWC reenacted overtime provisions, using the words "regular rate" without modification. Amici did not address the implications to the outcome of this case, of the A.G. Opinion interpreting "regular rate" in the face of pre-*Skyline* post -A.G. Opinion IWC reenactments. Nor did they address the implications of IWC

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[3] Amici CELC contended that post-*Skyline* precedent was only applied in contexts when employees wages were exclusively a weekly salary.(CELC Brief 14). This assertion is erroneous. See *Lujan, supra* 96 CA 4th 1200.

reenactments of the words "regular rate" after *Skyline*.declared the purpose and meaning of California's "regular rate" language.

In implementing the specific intent of the IWC, an intent first officially discerned in 1957 (see 29 Ops.Cal.Atty.Gen. 168 (1957)), *Skyline* and its progeny have uniformly prohibited the "fluctuating work" practice that the Court of Appeal decision now seeks to legitimize and insinuate into California law. This court is well acquainted with the *Skyline* decision and in prior opinions has cited the *Skyline* substantive holding with approval. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592 *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795 The Court of Appeal decision in this case upsets this settled state of the law and opens the door to questionable employment practices that have been unequivocally rejected.

C. This Court's Views Can Clearly Be Informed By The DLSE

Dart's Amici seemingly take the position that this Court must ignore the DLSE's position. (CELC Brief 10-13), and they do not acknowledge how their position is at odds with the purpose of California's wage laws.

In *Augustus v. ABM Security Services, Inc.*,___Cal. 5th____, December 22, 2016, 2016 WL 7407328, this Court explained:

"When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. (*Brinker, supra,* 53 Cal.4th at pp. 1026–1027; *Murphy v. Kenneth*

Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1103 Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code. [cites omitted]. In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees. (E.g., *Brinker*, at pp. 1026–1027, *Murphy*, at p. 1103, ['statutes governing conditions of employment are to be construed broadly"'].) In doing so, we accord the IWC's interpretations 'considerable judicial deference' (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801) **and take account of interpretations articulated by the Division of Labor Standards Enforcement (DLSE), the state agency that enforces wage orders, for guidance** [cite omitted]." *Augustus, supra* 2016 WL 7407328 at 5-6 (emphasis added).

Appellant agrees with Dart's Amici, that the DLSE Manual provisions are not regulations. However, as this Court recognized in *Peabody v. Time Warner* (2014) 59 Cal.4th 662, fn 5, and *Brinker v. Superior Court,* (2012) 53 Cal.4th 1004, 1029, fn. 11, because the DLSE is the agency empowered to enforce California's labor laws, including wage orders, the opinions of the DLSE constitute a body of experience and informed judgment to which courts and litigants may resort for guidance.

D. Dart's Amici Misapprehend Labor Code § 515 (d) (1)

In their Amicus Brief, CELC argues that Labor Code § 515(d)(1) precludes application of *Skyline* to flat sums that qualify as salaries but are not weekly salaries (CELC Brief 16-18). This argument is not well taken. The Legislature did not scrap the rationale and rulings of *Skyline.*

A "salary" is defined much broader than a "weekly amount" that comprises all of an employee's wages for a week.

Amici CELC acknowledges the following definition, then fails to apprehend its implications in this case:

29 CFR § 541.602 provides that an "employee will be considered to be paid on a 'salary basis' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, **a predetermined amount constituting all or a part of the employee's compensation,** which amount is not subject to reduction because variations in the quality or quantity of work performed." (Emphasis added) *Negri v. Koning & Assocs.* (2013) 216 CA4th 392, 397, and CELC Brief 14-15 .

This matter involves a "salary" paid to those workers who work weekends, "a predetermined amount constituting...a part of the employee's compensation that is not subject to reduction because of variations in the quantity and quality of work."--$15 per weekend day whether the employees who are scheduled for weekend shifts work 40, 50, or any other number of hours during the 7 day week. Critically forgotten in CELC's

analysis of Labor Code 515 (d) is that a salary can be one of a number of elements of remuneration paid to an employee during a week.

In 2012, Labor Code § 515 was amended to add § 515 (d) (2) to § 551 (d) (1) not focusing, as (d) (1) did, on a "weekly salary". It is applicable here, where the salary at issue is not a weekly salary, but nonetheless, a salary, "a predetermined amount constituting all or a part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.

Labor Code § 511(d) (2) applies directly to Dart's payment program:

"Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary." (Emphasis added).

Here, there is no question that the Dart employees that are the subject of this action, those scheduled for weekend work, are "non-exempt", and there is no question that they are paid a "salary" as part of their compensation. *Negri, supra,* 216 CA4th at 397, and 29 CFR § 541.602. The fact that the salary is only $15 or $30 during the weeks it is paid is inconsequential--- per Labor Code § 515 (d) (2), no part of the salary can be used to fund overtime.

Even if Labor Code § 515 (d) (2) was not enacted, § 515 (d) (1) does

not evidence legislative intent to change the meaning of California law as declared in *Skyline*. *Skyline*'s findings were based on the differences in intent in enactment of overtime laws by the IWC generally, not just for weekly salaried employees, and the DOL enactment allowing a "fluctuating workweek" approach for employees paid exclusively on a salary basis. Unquestionably, the entire basis of the *Skyline* decision would apply to any flat amount paid to an employee without regard to total hours worked, whether called a "weekly salary", a "premium payment", or a "bonus".

The principle that such payments could not lead to diminishing "regular rates" as an employee's overtime increases was, and remains the essence of the *Skyline* case, and it has stood the test of time. Dart, nor its Amici, made a logical argument as to why the teachings of *Skyline* would only apply to fixed amounts that are 100% of wages, but not fixed amounts that are a lesser percentage of weekly wages.

Passage of Labor Code § 515 (d) (1) did not dilute the rationale of *Skyline,* nor the applicability of its *no diminishing regular rate* holding to a myriad of fixed wage types.

Although Labor Code § 515 (d) (1) presumes a context where the only wages an employee earns in a week is a salary, using the expressions "full time salaried employee" and "1/40th of the employee's weekly salary", the impact of that focus by the Legislature is not, as Amici assert, a Legislative limitation of the *Skyline* decision to the particular fixed wage

context that the *Skyline* case presented. If § 515 (d) (1) contemplated a *Skyline* factual context, it did not do so to the exclusion of other fixed rate contexts. The passage of Labor Code 515(d) (2) reinforces this fact.

Dart's Amici clearly read too much into the enactment of Labor Code § 515 (d) (1) in asserting an intent of the Legislature's to allow "fluctuating workweek" to apply except when the only wage an employee receives is a weekly salary.

Historical context is important. Labor Code § 515(d)(1) was passed as part of AB 60, which restored the "8 hour day" provisions of California law after a renegade IWC eliminated them. When the IWC, pre-passage of AB 60, eliminated the 8 hour day, it, at least temporarily, effectively eliminated the 8 hour day penalty rationale set forth in *Skyline*, and in the 1980 IWC Statement of Basis for California overtime laws referenced in *Skyline*. The renegade IWC, for a short time, embraced Federal law. When AB 60 was enacted, a newly constituted IWC had not yet enacted new regulations bringing back, as part of Administrative legislation, the 8 hour day. Since *Skyline*'s analysis was tied completely to the "regular rate" language in IWC Orders and an IWC Statement of Basis for Wage Orders that existed when *Skyline* was decided, there was a gap when AB 60 was enacted. To fill that gap, the Legislature codified the result of *Skyline,* and thereby fended off any arguments that *Skyline* cannot apply because of its origins in Wage Orders that had been repudiated. After AB 60 was enacted,

the reconstituted IWC went back to the "regular rate" language that had existed for decades, thereby reviving *Skyline* and its progeny.[4]

Passage of Labor Code §515(d) (1) reflected the effort of a cautious Legislature intent to preserve the *Skyline* result in a *Skyline* factual context, until the IWC once again returned to the history and language upon which *Skyline* was decided. It was not, as Dart and its Amici would assert, to license employers to come up with "regular rate" schemes wherein the more overtime an employee works, the less an employer has to pay per hour of overtime. AB 60 was enacted to restore employee rights, and revive a public policy that had been hijacked, not to eliminate the rights or policy.

IV. THE VARIETIES OF BONUS SCHEMES REFERENCED BY DART'S AMICI ARE NOT BEFORE THIS COURT.

This case is focused on fixed wage payments that are paid to employees no matter the number of non-overtime and overtime hours worked, whether those payments are premium wages, non-discretionary bonuses, or weekly, daily, monthly or yearly salaries paid to non-exempt employees.

The CELC Brief references a number of wage payment practices such as production bonuses, safety bonuses, and profit sharing bonuses,

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[4] Reports during that era suggested that Governor Wilson stacked the IWC with opponents of the 8 hour day in order to eliminate it, and when Governor Davis replaced Governor Wilson, AB 60 codified and thereby "restored" the 8 hour day to avoid future incursions by political appointees.

where the criteria for the bonuses are tied into all hours worked—overtime and non-overtime hours worked. (CELC Brief 27-28). Those types of bonuses are not before this Court.

An example elucidates the difference between those types of wages, and those at issue here. A different "regular rate" formula might apply in a situation where a team of 20 workers received, at the end of the year $2,000 each for a perfect safety record based on safe performance during all hours, non-overtime and overtime hours, and received a production bonus of $2,000 each for producing 10,000 widgets during their overtime and non-over time hours. Deciding how to calculate "regular rate" in the context of those possibilities was not before the Court here. A different analysis might apply. See DLSE at 49.2.4. Since those types of wages were not properly before this Court, nor briefed in the lower Courts, prudence dictates that the focus here should be on the pending issue. How should "regular rate" be calculated when employees receive fixed wage payments that are not tied into the combined number of non-overtime and overtime hours worked?

V. THE DUE PROCESS AND MASSIVE LIABILITY CONTENTIONS OF AMICI ARE NOT WELL TAKEN

CELC and Manufacturers both make due process arguments (CELC Brief at 33-37; Mfr. Brief 14-20). These arguments are fatally flawed. There is no question that the United States Department of Labor Regulations, referenced, supra, clearly articulate how Dart should have

calculated overtime, therefore the public was on notice of the law's requirements. If, the law is as clear as Amici assert, in connection with the use of Federal to interpret State Law, the interpretation of "regular rate" and "salary" in the CFR's gave employers, statewide, notice of how they should calculate "regular rate" in weekend premium contexts. The CFR's advised employers that premium payments like those made by Dart are not "bonuses", they advised employers who pay Saturday and Sunday premiums, exactly how those premiums are to be factored into the "regular rate", and they spelled out how to calculate "regular rate", citing Supreme Court cases. The Federal regulations clearly defined "salary". When that definition of salary is applied to California Labor Code 515(d)(2), there can be no doubt as to how Dart should have paid its employees.

Additionally, the IWC, *Skyline* and Federal Court cases dating back to the 1940's, cited supra, made clear for decades, that dividing fixed amounts that are paid for non-overtime work by both overtime and non-overtime hours, is not the way to ascertain "regular rate" under either California or Federal law.

The prospect of massive liability asserted by CELC is preposterous. There has been no evidence of massive disregard of the clear rule of law that is applicable here.

VI. CONCLUSION

The decision of the Court of Appeal in this matter was clearly wrongly decided and it should be reversed.

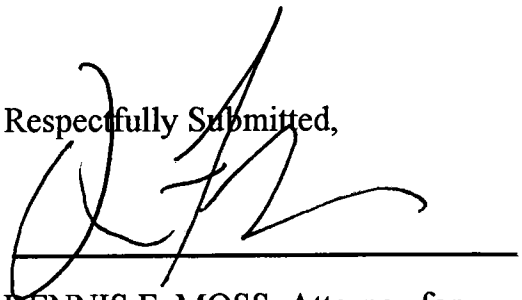
Absent reversal, mischief will ensue that will undermine California's longstanding labor policies., giving employers the freedom to emphasize "fixed rate wages" in compensation schemes, that will reduce overtime payment obligations.

"Regular Rate" in California has definitely not contemplated, since at least the 1950's, through the repeated enactments of the expression by the IWC before and after the watershed case of *Skyline Homes.*

The position that Dart's Amici has taken should be addressed by legislative bodies, not the courts.

Dated: January 17, 2017

Respectfully Submitted,



DENNIS F. MOSS, Attorney for
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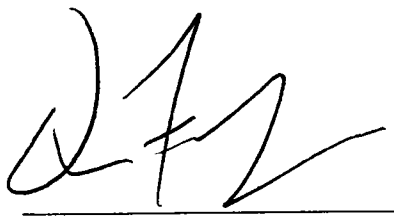
RULE 14 CERTIFICATE OF COMPLIANCE

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 8,884 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: January 17, 2017



Dennis F. Moss

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 January 17, 2017 declarant served the APPELLANT'S REPLY BRIEF 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 17 January 2017 at Sherman Oaks, California.

Lea Garbe

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