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 OPENING BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. ISSUES PRESENTED

The issues presented 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.

(Issues 2-4 are subsumed in Issue 1)

II. INTRODUCTION

The Court of Appeal issued a decision that, if not reversed, threatens to sweep away, in one stroke, years of firmly-established California case law that distinguishes the Federal means from the California means of calculating overtime when an employee's wages include a fixed dollar amount that is paid irrespective of whether and how much overtime is worked. Reversal is imperative to protect decades of substantive overtime rights from erosion through pay schemes that reduce, with each additional minute of overtime worked, the hourly rate upon which overtime must be calculated.

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 close to 60 years of authority rejecting that approach. Beginning with an AG's Opinion provided to the Industrial Welfare Commission ("IWC") in 1957, continuing with the IWC's rejection of the "fluctuating workweek approach in "Findings" in 1963, California has rejected overtime calculation methods that benefit employers. Case law that followed similarly rejected application of "fluctuating workweek", beginning with *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239 ("*Skyline*"), disapproved on other grounds *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, and

culminating in *Marin v. Costco Wholesale Corp.* (2008) 169 CA 4th 804, 817-818 that, in its analysis of "regular rate" applied *Skyline* to a fixed payment "bonus" in a context where employees, as in this case, also earned hourly wages.

The Court of Appeal in this case rejected *Skyline, supra,* not by confronting and disagreeing with its holding and rationale, but rather, by claiming *Skyline* is inapplicable because a fixed amount of wages characterized as a "bonus" paid week in and week out for weekend work is different than a fixed amount of wages characterized as a "salary" paid week in and week out, for the purpose of "regular rate" application. (Slip Opinion 13-15)

In taking this approach, the Court of Appeal ignored California authority, putting blinders on to the fact that, for overtime calculation purposes, the flat amount "bonus" in this case is, as a matter of substance, no different than flat amount salaries in California cases that have rejected the "fluctuating workweek" approach to calculation of overtime.

The issues presented by this case, centering on how to calculate the "regular rate" 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, that has consistently been declared illegal by every other Court of

Appeal decision that has had occasion to consider it. Absent rejection of the Court of Appeal approach, California employers will be licensed to adopt pay schemes that emphasize "fixed bonuses" and limit hourly wages, and, thereby, through subterfuge, avoid payments of overtime premiums contemplated by the law.

III. STATEMENT OF CASE AND PROCEEDINGS BELOW

1. FACTS

Dart Container corporation of California ("Dart") is a producer of food service products, including cups and plates. Appellant Alvarado is one member of a putative class of hourly paid Dart employees who, in addition to receiving hourly pay, receive a fixed amount of pay every pay period they perform weekend work, at the flat rate of $15 per weekend day, which works out to a maximum fixed amount of $60 for four weekend days in a two week pay period. The bonus for Saturday and Sunday work is, irrespective of the number of hours worked during a week or pay period, $15 per day. (Appx. 68-70).

Mr. Alvarado began working for Dart in September 2010 as a warehouse associate. His employment ended in January 2012. (Slip Op. 2)

Dart characterized the fixed payment element of wages as an "attendance bonus" paid to any employee who is scheduled to work a weekend shift and completes the shift. (Slip Op. 2). The payment plan does not differentiate between days or weeks that would trigger overtime

obligations, and those that would not. It necessarily results in different amounts per overtime hour each pay period depending on the number of overtime hours worked in the pay period. (Appx.68-70).

Dart calculates the amount of overtime paid during a 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, Appx. 68-70)

During Appellant's employment, he worked varying amounts of hours each pay period, and, at times, Saturdays and Sundays during weeks he

worked overtime and sometimes double time. He was paid overtime pay pursuant to Dart's policy. (Slip Op. 3; Appx. 116-126)

The Dart formula, by dividing the combined fixed wages and the hourly wages by a varying number of hours from pay period to pay period, operates in a manner consistent with the fluctuating work week methodology rejected by the watershed case of *Skyline, supra* 165 Cal.App.3d 239 ("*Skyline*").

Illustrative, is application of the Dart formula to a hypothetical employee working 16 hours of overtime one pay period and 32 the next pay period.

Assume the hypothetical employee works pay periods that last two weeks at Dart and, during one two week period, he works 80 regular hours, and 16 overtime hours, and during the next pay period he works 80 regular hours, and 32 overtime hours. His hourly rate is $15.22 per hour. During each of the pay periods, the hypothetical employee works four weekend days.

Application of Dart's overtime calculation methodology when 16 hours of overtime are worked:

Step 1. 16 hours of OT x $15.22 (straight time rate) = $243.52

Step 2. (a) 80 hours of non-overtime x $15.22= $1,217.60 plus (b) $60.00 fixed amount for working on two Saturday and two Sunday plus (c) $243.52 from step 1 = $1,521.12. Dividing total by 96 hours =$15.845 per

hour-"regular rate" under the Dart formula.

Step 3. 16 OT hours x $15.845= $253.52 divided by 2 to get "overtime premium amount" = $126.76

Step 4. Adding step 1 to step 3 equals $370.28 in overtime pay under Dart's formula .

As a mathematical certainty, under Dart's formula, the more overtime hours worked, the less is paid per overtime hour. The regular rate decreases as the number of overtime hours increases.

Application of Dart's overtime calculation methodology when 32 hours of overtime are worked:

Step 1. 32 hours of OT (instead of 16) x $15.22= $487.04

Step 2. (a) 80 hours of non-overtime x $15.22= $1,217.60 plus (b) $60.00 fixed amount for working on two Saturday and two Sunday plus (c) $487.04 from step 1 = $1,764.64 . Dividing total by 112 hours=$15.755 per hour-"regular rate" under the Dart formula, **9 cents per hour less than the regular rate when the same employee worked 16 instead of 32 hours of overtime during the pay period.**

Step 3. 32 OT hours x $15.755= $504.16 divided by 2 to get "overtime premium amount" = $252.08

Step 4. Adding Step 1 to step 3 equals $739.04 in overtime pay under Dart's formula.

As demonstrated above, the amount paid per overtime hour decreases, as the amount of overtime hours increases when Dart's formula is applied.

Appellant contends that, given *Skyline*'s rejection of the "fluctuating workweek" formula, and adoption of a calculation method that divides fixed wages by regular hours only, not overtime hours, the method of calculation set forth in the Division of Labor Standards Enforcement ("DLSE") Enforcement Manual should apply here. It 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. [two week 80 regular hour pay period at Dart]. 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. " DLSE Manual at 49.2.4.2 (Emphasis added) .

Applied to the above hypothetical, if the employee worked 16 overtime hours in a two week period when she was paid $15.22 per hour, and $30 in

weekend attendance bonuses each of the two weeks ($60 total from above hypothetical), under the DLSE formula, she would earn $383.28 in overtime pay, $13 more than the Dart formula.

($15.22 per hour x 1.5 x 16 hours=$365.28 in hourly overtime pay, plus $18 in overtime pay based on bonus overtime calculated as follows: $60 divided by 80 **regular non-overtime** hours during the two week pay period = $.75 regular rate per hour earned in bonus x 1.5 premium rate for overtime = $1.125 x 16 hours= $18.).

2. PROCEEDINGS IN THE TRIAL COURT

Plaintiff-Petitioner Hector Alvarado brought this wage and hour class action and PAGA representative action against Defendant-Respondent Dart on August 2, 2012. The complaint, for damages, penalties, and restitution, alleges that Defendant had not properly computed bonus overtime under California law. Plaintiff's complaint, as amended, 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 when there was a flat amount element of wages, was lawful, and there was no legal basis for plaintiff's proposed alternative formula. (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 the 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 decision, expressly finding:

"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 (sic) 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.4th 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." (Slip Op. 25)

IV. SUMMARY OF ARGUMENT

" '[P]ast decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702" *Ramirez v. Yosemite Water* (1999) 20 Cal. 4th 785,794.

1. California has championed the 8 hour day and 40 hour workweek for over 100 years. Nearly 60 years of authority establishes that in adopting premium pay requirements for workdays over eight hours, and workweeks over forty hours, the Industrial Welfare Commission intended to provide for the health and welfare of California workers by penalizing employers with premium pay requirements.
2. *Skyline, supra,* 165 Cal.App.4th 239 definitively rejected, as inapplicable under California law, the Federal overtime pay practice of calculating overtime pay on fixed amounts of wages by dividing the fixed amounts by total hours worked, including overtime hours, because the Federal "fluctuating workweek" methodology rewards, rather than penalizes employers for working their employees increasing amounts overtime hours.

3. Subsequent to the *Skyline* decision, the IWC continued to enact Wage Orders with the same "regular rate" language, not altering the language in light of *Skyline*'s definitive interpretation of regular rate as applied to fixed amounts, and rejection of Federal law. Several Court of Appeal decisions subsequent to *Skyline* have recognized its applicability to fixed wage contexts. This court, in " *Ramirez v. Yosemite Water, supra* 20 Cal. 4th at 795 acknowledged *Skyline*'s rejection of "fluctuating workweek" as an example of how California overtime law differs from federal law.
4. The similarities between the fixed amount wage practice at issue in *Skyline,* and the fixed amount wage practice at Dart compel application of the *Skyline* decision to the instant case.
5. The Court of Appeal analysis that the DLSE Manual position, and Appellant's position as to how overtime should be calculated on the flat sums at issue in this case, is not tethered to law or precedent, but just public policy, is incorrect. A proper reading of the DLSE Manual establishes that the Manual provisions at issue are supported by law and precedent expressly referenced in the Manual.
6. The Court of Appeal failed to assess the full spectrum of applicable Code of Federal Regulation ("CFR ") provisions in its application of Federal law. Had it done so, it would have concluded that, given weekend work provisions in the CFR's, and provisions on what

truly constitutes a bonus, it would have recognized that its reliance on 29 CFR 788.209 was misplaced.

7. Absent reversal, employers will be licensed to turn California overtime law on its head by reducing hourly wages of employees to bare minimums, and paying the balance of the market rate for their non-overtime work with fixed bonuses.

V. ARGUMENT

1. THE REQUIREMENTS OF CALIFORNIA OVERTIME LAW.

"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.] " *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 581. For decades the IWC has enacted, revised and reenacted Wage Orders.

In 1999, after the IWC eliminated the 8 hour day from certain wage orders, the Legislature restored it almost immediately. In restoring it, the Legislature referenced the history of overtime law in California.

"THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. This act shall be known and may be cited as the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999."

SECTION 2. The Legislature hereby finds and declares all of the

following:

(a) The eight-hour workday is the mainstay of protection for California's working people, and has been for over 80 years.

(b) In 1911, California enacted the first daily overtime law setting the eight-hour daily standard, long before the federal government enacted overtime protections for workers.

(c) Ending daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime.

(d) Numerous studies have linked long work hours to increased rates of accident and injury.

(e) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis.

(f) In 1998 the Industrial Welfare Commission issued wage orders that deleted the requirement to pay premium wages after eight hours of work a day in five wage orders regulating eight million workers.

(g) Therefore, the Legislature affirms the importance of the eight-hour workday, declares that it should be protected, and reaffirms the state's unwavering commitment to upholding the eight-hour workday as a fundamental protection for working people."

The Act went on to make overtime pay for over eight hours in a day and over forty hours in a week, part of the Labor Code. Labor Code §510.

IWC Wage Order No. 1, adopted in 2001, codified at title 8

California Code of Regulations section 11010(CCR), concerns the manufacturing industry and is therefore applicable in the instant case. It provides, like the Labor Code, as to employees not exempt from overtime entitlement, 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." (Italics added).

Previous Wage Orders adopted by the IWC, over decades, contained the same unmodified substantive requirement of overtime hours times "regular rate" without any road map as to how to determine "regular rate" when dealing with fixed sum wages. See 1989 Wage Order overtime language in *Lujan v. Southern California Gas Co.* (2002) 96 CA 4th 1200,

1204; 1980 Wage Order language referenced in *Hernandez v. Mendoza* (1988) 199 CA 3d 721,726; 1976 Wage Order referenced in *Skyline, supra* 165 CA3d at 244.

The IWC never enacted any express provisions specifically indicating how to calculate "regular rate" when there is a fixed wage component element to a compensation program, such as a "salary", like the one in *Skyline*, or the "attendance bonus" that the Dart program utilizes. Given that reality, Courts have been tasked with determining the meaning of "regular rate" as applied to wage practices that include fixed payments.

In *Skyline*, the court found that the IWC never intended that the Federal "fluctuating workweek" methodology be used in determining "regular rate". *Skyline, supra* passim. In this case, the Court of Appeal ignored the quasi-legislative intent of the IWC, as determined in *Skyline*, claiming the Federal methodology must apply because, although the Legislature and IWC used the words "regular rate", they never specifically addressed how to calculate "regular rate" on fixed "attendance bonuses". (Slip Op. 25)

2. THE PROPER MEANS FOR CALCULATING OVERTIME UNDER CALIFORNIA LAW IN THE CONTEXT OF FIXED WAGE PAYMENTS IS GROUNDED IN NEARLY SIXTY YEARS OF AUTHORITY.

For over 60 years California authority has rejected the Federal law application of the fluctuating workweek methodology for calculating

overtime on fixed wage payments.

A. The Attorney General Advised The IWC In 1957 That The Federal "Fluctuating Workweek" is Antithetical to "Regular Rate" Analysis Under California Law.

As far back as 1957, California's Attorney General deemed Dart's method of determining "regular rate" inapplicable to California law. 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 with "regular rate" terminology] 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"? (Emphasis added)

In response, the Attorney General expressly rejected this "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.[1] 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 the above 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 its view of "regular rate" under California law, contrasts with the application of the "fluctuating work week" approach by Federal Courts in connection with Federal law, the FLSA. *Id*, pgs.170-172.

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

"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

[1] It was not until the 1970's that Wage Orders were applied to men as well as women and children.

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, *Skyline*, as will be discussed in more detail, infra, rejected the Federal "fluctuating workweek methodology" in application of California law. Since the 1985 decision in *Skyline*, the IWC, as a quasi-legislative body, continued to enact replacement Wage Orders with changes in some substantive provisions, including minimum wage rates, but never changed to the "regular rate' language in a manner that would counter the A.G. Opinion and *Skyline's* rejection of "fluctuating work week" in regular rate determinations.

A legislative body is presumed to know of judicial decisions that predate its enactments. *In re W.B. Jr.* (2012) 55 Cal. 4th 30, 57; *Busse v. United PanAm Finance Corp.* 22 CA 4th 1028, 1038. Therefore, current Wage Orders and the "regular rate" provision in the Labor Code, must be read consistent with *Skyline*. Since neither the IWC, nor Legislature embraced "fluctuating workweek" methodology in post-*Skyline* enactments, it was erroneous for the Court of Appeal to do so here.

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 that followed, having been on notice of the *Skyline* decision and the A.G.'s Opinion letter.

B. The Court of Appeal's Decision Herein Conflicts With "Findings" of the IWC Explaining Its Overtime Regulations.

In 1963, the IWC made clear in "Findings" that the "fluctuating workweek" methodology was contrary 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." 2002 DLSE Enforcement Manual Page 48-2. (Emphasis added).

C. Precedent that Predates *Alvarado v. Dart* Has Consistently And Properly Rejected "Fluctuating Workweek" Methodologies.

i. *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239

In 1985, in the watershed case of *Skyline Homes, supra* 165 Cal.App.3d 239 ,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* , *supra* 165 Cal.App.3d at *passim*. By agreeing with and adopting the DLSE's overtime calculation formula, the *Skyline* 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. 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 explained that "Under the [fluctuating workweek] method the more hours an employee works overtime, the lower the 'regular rate becomes." *Skyline, supra* 165 CA3d at 245.

Relying on the daily overtime difference in California law, and the Statement of Basis of the Wage Orders, as well as *Industrial Welfare Commission v Superior Court* (1980) 27 Cal. 3d 690, 713, *Skyline* recognized a difference between Federal law and State law, that warranted inapplicability of an overtime system that rewarded employers.

"In *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690 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 CA3d at 249.

The essence of *Skyline*'s rejection of the "fluctuating workweek" is that to reward employers with a decreasing "regular rate" as more hours are worked, is at complete odds with the "penalty" purpose of California overtime premiums.

"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 CA3d at 248.

" Amicus argues that the purpose and intent of federal and state law is to spread work more evenly throughout the work force by discouraging employers from requiring more than 40 hours work and to compensate employees for the strain of working long hours, and that the fluctuating workweek comports with this purpose. **This argument ignores the fact that in 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."** *Skyline, supra* 165 CA3d at 254. (Emphasis Added)

"This argument [that the "fluctuating workweek" does not conflict with the IWC Order] again fails to take into account the fact that a purpose of the overtime premium pay 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. Clearly, a method of computation of

overtime ["fluctuating workweek"] that would encourage patterns of employment using 10 or 12 hours days would be inconsistent with wage order 1–76." *Skyline, supra* 165 CA3d at 249.

The Dart pay system, that also reduces the regular rate as overtime hours increase, is as much in conflict with California law, as the system condemned in *Skyline*. Since both the *Skyline* "salary" program, and Dart "attendance bonus" program both require analysis of the propriety of nearly identical calculation formulae, the sound *Skyline* analysis was improperly ignored by the Court of Appeal.

The *Skyline* holdings and rationale apply whether or not 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, without specific reference to the form of the fixed wage at issue: "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".

Cases that followed *Skyline* are also in direct conflict with the result of the Court of Appeal's decision herein. They have cited *Skyline* as binding authority, and are 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.

***ii. Alcala v. Western Ag Enterprises* (1986) 182 CA 3d 546, 551**

"[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* expressly adopts the *Skyline* calculation methodology and rejects the fluctuating workweek methodology. *Id,* at 551

***iii. Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721**

"[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." *Id,* 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....". Id,* 199 Cal.App. 3d at 728.

***iv. Ghory v. Al-Laham* (1989) 209 Cal.App.3d 1487**

"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.

***v. Lujan v. Southern California Gas Co.* (2002) 96 Cal.App.4th 1200**

"*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.

***vi. 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].)" *Ramirez, supra* 20 Cal. 4th at 795 (Brackets in original).

***vii. Marin v. Costco Wholesale Corp.* (200) 169 CA 4th 804, 817-818 Declares that *Skyline* Applies to Calculation of Overtime In Wage Schemes That Include A Flat Rate "Bonus".**

Marin, supra 169 CA4th 804, 817-818 in dicta marked by comprehensive analysis, applies *Skyline* to a flat rate "bonus" context where an employer has an incentive to work employees longer hours by virtue of a decreasing regular rate.

"[T]he 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)

Thus, *Marin* did what the court here should have done, analyzed the "regular rate" language as applied to a flat rate bonus against the well reasoned analysis and rationale articulated in *Skyline*.

The Court of Appeal decision herein, then expressed its misplaced 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).

Marin, supra got it right and the Court of Appeal decision herein got it wrong. Contrary to the rationale used in the *Alvarado* Court of Appeal decision, there were a series of operative laws enacted over many decades in the form of the duly enacted Wage Orders that require payment of 1.5 x the regular rate for overtime payments. There was a need for judicial interpretation of "regular rate" in the context of fixed wage payments because the IWC had not spelled out how it would apply to fixed wages. The *Skyline* court, recognizing its role to interpret and apply the law, looked at the intent of the California law, the mindset of the IWC in enacting it in light of the A.G.'s opinion, and then, in exercise of its judicial mission, discerned the meaning of "regular rate" when confronted with a fixed wage context. Therefore, contrary to the Court of Appeal's view, there is enforceable law in the form of IWC Wage Orders, and Labor Code 510 as interpreted and repeatedly applied by Courts, that, has never rejected *Skyline*'s interpretation and methodology for calculating "regular rate" in fixed wage contexts.

Obviously, *Marin* recognized that characterizing a *flat sum* as a "bonus", does not warrant deviation from *Skyline*'s well reasoned rejection of a system that rewards employers with a decreasing regular rate, nor warrant deviation from *Skyline*'s embrace of a DLSE methodology that fulfills the "penalty" intent of the law.

viii. 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 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 decreased the more hours they worked.

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 hours in which an employee works on weekend days.

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....' [Cites omitted]... '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....' " *Huntington, supra* 131 Cal.App.4th at 905.

3. THE UNCANNY SIMILARITIES BETWEEN A FIXED "SALARY" AND FIXED "BONUS" COMPELS APPLICATION OF *SKYLINE*

The Court of Appeal's adoption of the Federal "fluctuating workweek" methodology hinged upon the fact that the fixed amount at issue in this case was an "attendance bonus" paid in weeks that involved weekend work, and not the fixed amount salary at issue in *Skyline. (Slip Opinion , passim)* Reliance on such a distinction, since it is a distinction in form, not substance, compels reversal.

Skyline applies with equal force to any "regular rate calculation" that reduces the "regular rate" as hours of work increase. The *Skyline* analysis and holding cannot logically be limited to "salaries". It necessarily applies to any calculation of "regular rate" that rewards employers with "regular rates" that decrease as overtime work increases.

The employer in *Skyline* made the same argument that Dart makes here-- that Federal "regular rate" fluctuating workweek methodology

applies to fixed wages. The argument relied on by the Employer in *Skyline,* and Dart, is not the only similarity between the two cases.

In *Skyline,* as here, the employees worked a fluctuating amount of hours each pay period. *Id,* 165 CA3d at 245-246 and Appx.116-126.

In *Skyline,* as here, an element of the employees' wages was a fixed amount of pay. In *Skyline,* the fixed amount was 100% of wages. *Id.* Here, the fixed amount is a much smaller percentage of the overall wages. (Maximum of $60 every two weeks).

In *Skyline,* the methodology used by the employer involved dividing the fixed amount of pay, by the total hours, including overtime hours, worked during the pay period. *Skyline, supra,* 165 CA 3d at 245-246. The Dart formula similarly involves a calculation that includes dividing the fixed amount by the total hours, including overtime hours, worked during the pay period. (Appx. 68-70)

In *Skyline,* the methodology used by the employer resulted in a system where the more hours an employee worked, the lower the "rate" used in determining overtime pay. *Id.* The same happened here. (Appx. 68-70)

In *Skyline,* the fixed amount was paid in consideration of work performed during a period of time, a week. Here, the fixed amount is also paid in consideration of work during a period of time, weekend days worked in pay periods.

Ultimately, the Court of Appeal in *Skyline* held that the "regular rate" determination in the Employer's formula in that case was inconsistent with the overtime rights created by the IWC in calling for payment at time and one half or two times the "regular rate". Instead, the court decided that under California law, the fixed amount must be divided by 40 hours--the amount paid for non-overtime "regular" work hours to determine the regular rate. *Skyline, supra* 165 CA3d at 248-249

The mistake the Court of Appeal made in this case was to ignore how clearly analogous Dart was to *Skyline* by failing to focus on what constitutes the "regular rate" under California law, and focusing instead on the Dart characterization of the fixed amount payment as a "bonus". The Court of Appeal was mistakenly preoccupied with form, not substance. Had it looked at the substance of Dart's payment plan, the *Skyline* decision would have controlled. This is especially the case because, after the *Skyline* decision, the IWC did not, in reenacting Wage Orders, change the "regular rate" language on account of *Skyline.*

Since neither the IWC, nor Legislature embraced "fluctuating workweek" methodology post-*Skyline*, it was erroneous for the Court of Appeal to do so here.

The contention that *Skyline* does not apply cannot hold up to scrutiny given the factual similarities in "fixed rates" in the two cases, and more importantly the lack of a compelling reason in fact or in the Court of

Appeal decision, to deviate from the *Skyline* "penalty" analysis in the context of this case.

4. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE DLSE'S VALID INTERPRETATION OF HOW OVERTIME SHOULD BE CALCULATED, AN INTERPRETATION THAT ALIGNS WITH STATUTORY AND APPELLATE AUTHORITY EXPRESSLY REFERENCED IN THE DLSE MANUAL.

The Court of Appeal goes to great lengths in an effort to explain how Section 49.2.4.2 of the DLSE Manual (quoted supra) 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 23-25). 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. As it points out:

"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". (Slip opinion 10) Here, courts clearly have interpreted "regular rate"

consistent with the DLSE interpretation, and that interpretation is not by any means clearly erroneous or, as the Court expressly concedes, not unreasonable.

Section 49.2.4.2 of the DLSE Manual does not exist in a vacuum. There are two compelling reasons why the Court of Appeal's repudiation of DLSE Manual 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*, and the other cases cited above, 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 of 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.

At 49.2.4.2, consistent with *Skyline*, the DLSE makes clear that in calculating overtime on fixed "bonuses", the bonus must be divided by only those non-overtime hours worked during the pay period.(e.g. 80 hours in a two week period, 40 hours in a one week period.)

"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, the consistent application of *Skyline's* analysis in subsequent appellate decisions, referenced supra, and the IWC"S legislative endorsement of *Skyline* in reenactment of Wage Orders with the "regular rate" language unchanged notwithstanding *Skyline.*

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 entitled: "Calculation of Regular Rate of Pay and Overtime". Sections 48 and 49, given their titles and text, are inextricably intertwined with each other, with Section 49 "Calculation of Regular Rate" building off the "Basics" covered in Section 48.

Section 48 of the DLSE Manual 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 of the DLSE Manual 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".

5. FEDERAL REGULATIONS DO NOT SUPPORT THE OVERTIME PLAN ADOPTED BY DART

After erroneously ignoring applicable California precedent, the Court of Appeal turned to 29 CFR 788.209 (a) to justify Dart's application of the "fluctuating workweek" methodology. Even if one were to completely ignore California's "regular rate" jurisprudence, that reliance is misplaced. There are obviously bonuses for production, different than the so-called "bonus" herein, that justify the 29 CFR 788.209 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) utilized 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' " 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 incorrect even if the Court properly deferred to Federal law.

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 [e.g. 29 CFR 788.209] for determining overtime due on bonuses do not apply."

The Court of Appeal's error, in relying on the general language of 29 CFR 788.209 (a), is also exposed by 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 [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).

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. Mr. Alvarado was paid over $15.00 per hour. (Appx. 116-126) Time and one half his hourly pay is over $22.50 per hour. A Saturday premium of $15 for an 8 hour Saturday would be $1.87 per hour, far less than $22.50. Therefore, the Weekend Premium exception, under 29 CFR § 778.203, "**cannot be credited toward statutory overtime due**". Additionally, 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 [40 hours] applicable to such employee.

6. THE COURT OF APPEAL DECISION INVITES MISCHIEF THAT WOULD WIPE OUT THE PROTECTIONS OF CALIFORNIA OVERTIME LAW.

Absent reversal the consequences are dire. Employers throughout the State will be able to modify pay schemes to completely undermine the time honored requirement of paying employees overtime at 1.5 or 2 x their

true hourly rate for overtime, by converting hourly rates, in significant part, to bonuses.

An illustration speaks volumes: Assume an employee's wages are at a market rate of $25 per hour, and he is currently paid that rate, and 1.5 x that rate, or $37.50 per hour when she works over 40 hours in a week, or over 8 hours in a day. Also assume that in a particular week she works 40 hours of straight time, and 10 hours of overtime. Under the law as it has existed for decades, for the week, her pay would have been $1,000 in straight time ($25 x 40 hours), and $375 in overtime pay ($37.50 x 10) hours for a total of $1375.

Absent reversal, an employer could cut the hypothetical employee's hourly pay in half to $12.50 per hour, and give the employee a fixed bonus of $500 a week for any aspect of work (e.g. showing up to work 5 days in a week) to keep the employee at $1000 for forty hours of work. However, if the employee works 10 hours of overtime, absent reversal, her additional pay on account of overtime pay for 10 hours of overtime work would be reduced from $375 to $237.50. Under the fluctuating workweek methodology, she would receive her hourly overtime of $12.50 x 1.5= $18.75 x 10 overtime hours = $187.50, and overtime on the bonus calculated as follows: $500 divided by all 50 hours worked during the week = $10 x. ½ = $5.00 x 10 overtime hours = $50 + $187.50= $237.50 in overtime pay.

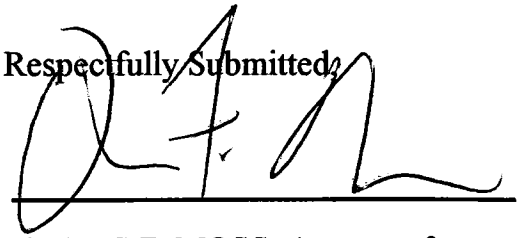
Absent reversal to preserve California's hallowed requirement to pay overtime premiums at 1.5 and 2 x true hourly rates, employers throughout the state will necessarily seize on opportunities, illustrated above, to convert significant portions of hourly rates to fixed bonuses, and thereby deprive their employees of the benefits of California law that have existed for decades.

VI. CONCLUSION

For the foregoing reasons, reversal of the Court of Appeal decision is essential. The Court of Appeal's error is monumental. It ignores substantial precedent, ignores the fact that a quasi-legislative body, the IWC, has repeatedly enacted Wage Orders informed by an A.G. Opinion, its own findings in the 1960's, and decades of precedent. It approves a system that rewards employers for working employees increasing amounts of overtime contrary to the purpose of California's overtime laws, and it invites the demise of hourly pay overtime requirements through the subterfuge of creative bonus plans. The employer disincentive at the heart of California overtime law will be obliterated if the Court of Appeal decision in this matter is embraced.

Dated: July 18, 2016

Respectfully Submitted,

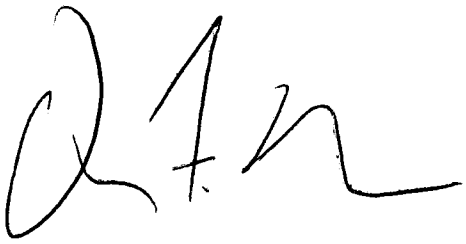


DENNIS F. MOSS, Attorney for
Plaintiff, Appellant Hector Alvarado

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 9634 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: July 18, 2016



Dennis F. Moss

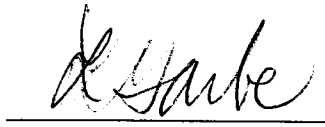
PROOF OF SERVICE

1, 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 July 18, 2016 declarant served the APPELLANT'S OPENING BRIEF ON THE MERITS 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 18th day of July, 2016 at Sherman Oaks, California.



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