S232607

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR ALVARADO

Plaintiff, Appellant, and Petitioner

vs.

DART CONTAINER CORPORATION OF CALIFORNIA

Defendant and Respondent

After Decision by the Court of Appeal Fourth Appellate District Case No. E061645
APPEAL From the Superior Court of Riverside County. Hon. Daniel A. Ottolia (Superior Court Case No. RIC1211797)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

(Service on the Attorney General and District Attorney pursuant to Bus, & Prof. Code §§ 17209, 7536.5)

*HOWARD GOLDS, Bar No. 112626
ELIZABETH A. HAN, Bar No. 274578
BEST BEST & KRIEGER LLP
3390 University Avenue, 5th Floor
Riverside, CA 92502
Telephone: (951) 686-1450
Facsimile: (951) 686-3083
Email: howard.golds@bbklaw.com
Email: elizabeth.han@bbklaw.com

Attorneys for Defendant and Respondent
DART CONTAINER CORPORATION OF CALIFORNIA

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3390 University Avenue, 5th Floor
Riverside, CA 92502
Telephone: (951) 686-1450
Facsimile: (951) 686-3083
Email: howard.golds@bbklaw.com
Email: elizabeth.han@bbklaw.com

Attorneys for Defendant and Respondent
DART CONTAINER CORPORATION OF CALIFORNIA

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I.

INTRODUCTION

This appeal is the culmination of an attempt by Plaintiff and Appellant Hector Alvarado to impose liability on his former employer, Defendant and Respondent Dart Container Corporation of California ("Dart"), for supposedly not computing overtime pay in a proper manner although the employer's overtime methodology violated no California statute, rule or regulation. Because of the lack of any real authority, Alvarado bases his argument here, as he did below, on nothing more than unsupported and ultimately inapplicable policy.

That policy claim, however, does not resolve Alvarado's problem that there is simply no California law applicable to the calculation of overtime pay when an employee is paid a bonus in the same pay period in which it is earned. In the absence of state law, California courts have repeatedly endorsed the use of federal law by employers, which Dart unequivocally followed here. Dart's formula for determining the regular rate of pay and the overtime due on the Attendance Bonus precisely complied in all respects with federal law. In fact, federal law recognizes that "[n]o difficulty arises" if the bonus is paid within the same pay period in which it is earned. The amount of the bonus is merely added to the other earnings of the employee and the total divided by the total hours worked, including overtime hours. The resulting amount is then multiplied by the number of overtime hours worked and again by 0.5 to calculate the amount due to the employee. (29 C.F.R., § 778.209(a); 778.110.) As this is precisely what Dart did when it paid Alvarado, Dart's actions are completely legal under existing California precedent.

The Court of Appeal below not only recognized this principal, it also directly addressed Alvarado's policy arguments, and flatly rejected them: "Even though the federal formula for computing bonus overtime may not

comport with state policy discouraging overtime, defendant's use of the federal formula is lawful because it is based on federal law, and there is no state law or regulation providing an alternative formula." (Court of Appeal Opinion ("Slip Op."), p. 25.)

The problem for Alvarado is that nowhere is his desired method for computing the regular rate for overtime pay actually codified. It does not appear in the California Labor Code, nor the Code of Regulations, nor in any applicable wage order. Rather, it appears only in a section of the Department of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual ("Manual"), which is indisputably based solely on public policy and not on any statutory or regulatory touchstone. Without any actual authority, the DLSE Manual as a matter of law cannot be used to impose liability on Dart.

In a clear recognition of this, Alvarado has, at each stage of this proceeding, formulated vastly different legal arguments and invented new facts. The Opening Brief herein continues this practice as Alvarado improperly attempts to retract his signed stipulation submitted to the Trial Court that the bonus paid by Dart was a bonus. Instead, he now argues that it was a "salary." Alvarado's machinations are both improper and ultimately unavailing as no authority actually supporting his position exists.

Rather, Alvarado's latest revisions are part of an unsuccessful attempt to now apply the holding in *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, to the instant litigation. That case, however, is factually inapposite and the policy discussed by the court of appeal therein is inapplicable. Specifically, the *Skyline* court found that salesmen paid a weekly salary for a fluctuating workweek were nonetheless entitled to overtime when they worked more than eight hours in any given day and that the overtime calculation of their "regular rate" should be based on a workweek of forty hours, not the total number of

hours worked by the employees in a given week.

The fact is that that bonus at issue here was not paid for overtime work, which is fundamentally different than *Skyline*. Dart paid an "Attendance Bonus" to employees if they appeared for certain designated weekend shifts. The amount of the bonus was entirely unrelated to how many hours the employee worked in a given day or week and was paid in the same amount whether or not the employee worked any overtime. Its inclusion in the calculation of overtime compensation by Dart did not directly encourage or discourage overtime and there is no logical connection between the payment of the Attendance Bonus and whether the employee receiving the bonus ultimately worked overtime in the same given week. This is entirely unlike the facts of *Skyline* wherein the direct issue was how to calculate pay for the overtime hours that were the subject of that litigation.

Furthermore, the Attendance Bonus was intended to encourage Dart's workers to appear for less desirable shifts. By ensuring that more workers actually reported for their shifts, the Attendance Bonus *discouraged overtime* by helping reduce the number of overtime hours that would have to be worked by other employees who would have to cover shifts not worked by absent employees. This goal is ignored by Alvarado in his brief and is entirely inconsistent with the concept of using the policy enunciated in *Skyline* to impose liability on Dart. Additionally, by paying the Attendance Bonus, Dart intentionally increased the amount it had to pay for any overtime an employee receiving the bonus worked, as the Attendance Bonus necessarily had to be included in Dart's calculation of the "regular rate." Dart undertook this expense, however, so that workers would report as scheduled. How this "encourages" Dart's assignment of overtime is not explained by Alvarado, nor can it be.

Attempting to buttress his policy arguments, Alvarado cites to a

variety of inapplicable and dated California authorities in an attempt to create law where none exists. He begins with authorities that do not have the force of law, including a 1957 Attorney General Opinion and IWC Findings. The 1957 opinion actually includes an overtime calculation example, and incorporating those same figures into Dart's formula yields the same result the Attorney General deemed proper. The IWC findings were premised on salaried employees earning weekly sums, and are therefore factually inapplicable.

Turning to six cases decided after *Skyline*, namely *Alcala v. Western AG Enterprises*, *Hernandez v. Mendoza*, *Ghory v. Al-Laham*, *Lujan v. Southern California Gas Co.*, *Ramirez v. Yosemite Water Co.*, and *Huntington Memorial v. Superior Court*, Alvarado again misses the point. These cases either concerned the non-payment of overtime wages for employees who were paid on a salary, as opposed to an hourly basis, or proper payment for outside sales persons. Not one of these is factually or legally relevant to the issue here: the calculation of overtime owed to an hourly employee when a bonus is earned and paid within the same pay period.

Alvarado's reliance on *Marin v. Costco Wholesale Corporation*, 169 Cal.App.4th 804, cannot save him, either. Although *Marin* is the first and only California case to address overtime on a bonus, it is factually distinguishable because it concerned a production based formula that was deferred, not the flat rate bonus here that was paid in the same pay period in which it was earned. The Court of Appeal expressly agreed, stating "*Marin* is not dispositive here." (Slip Op., p. 24.)

The Court of Appeal carefully considered Alvarado's arguments and concluded that "[i]n 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 [on] plaintiff's bonuses, other than the applicable federal regulation, CFR section 778.209(a)." This remains true. This Court should affirm the Court of Appeal's decision, and uphold the Trial Court's grant of Dart's motion for summary judgment.

II.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The facts were undisputed in the proceedings below. (See Appellant's Appendix ("AA"), p. 068-072 [Joint Statement of Undisputed Material Facts].)

Dart is a producer of foam food service products, including cups and plates. (AA, p. 069, ¶ 1.) Alvarado began working for Dart on September 14, 2010 as a Warehouse Associate and was terminated on January 19, 2012. (AA, p. 069, ¶ 2.) Alvarado was an hourly, not a salaried employee, who was paid between $15.00 and $16.00 per hour. (AA, p. 116-126; Alvarado's Opening Brief on the Merits ("Opening Brief"), p. 4.)

According to Dart's written policy, an attendance bonus ("Attendance Bonus") was paid to any employee who was scheduled to work a weekend shift and completes that full shift. (AA, p. 069, ¶ 3.)[1] The bonus is $15.00 per day ($15 per Saturday and $15 per Sunday) regardless of the number of the hours the employee might work above the normal scheduled length of a shift. The maximum total for a two day Attendance Bonus is $30.00. (AA, p. 069, ¶ 3.)

Alvarado conceded in the Joint Statement of Undisputed Material

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[1] Contrary to Alvarado's Opening Brief, employees do not earn an attendance bonus merely by working a weekend shift; they must be regularly scheduled to work that weekend shift to be eligible for the bonus. (AA, p. 069, ¶ 3a; Opening Brief, p. 4.)

Facts filed concurrently with Dart's Motion for Summary Judgment, which is what this Court is presently reviewing, that the Attendance Bonus is a bonus, not a salary. (AA, p. 069, ¶3.) This concession is consistent with Alvarado's Complaint, wherein he alleged that Dart was liable for "[f]ailure to pay overtime . . . by failing to include . . . bonus compensation in calculating the regular rate of pay," and has been undisputed in the proceedings below. (AA, p. 4, ¶ 15.) Alvarado's new contention before this Court that the Attendance Bonus is a salary therefore directly contradicts his prior signed stipulation that the Attendance Bonus is a bonus, and all his prior arguments and facts in the proceedings below wherein he asserted that the Attendance Bonus was a bonus.

Dart paid its employees overtime for hours worked in excess of eight in a day and 40 in a week. In calculating overtime owed, it is undisputed that Dart included the Attendance Bonus in the regular rate of pay, and paid the Attendance Bonus in the same pay period in which it was earned. (See AA, p. 068-072.) The issue is whether the formula Dart used to calculate overtime owed on the Attendance Bonus was lawful. (Slip Op., p. 2; Opening Brief, p. 1 ["Issues 2-4 are subsumed in Issue 1"].) As found by both the Trial Court and Court of Appeal, Dart used the correct formula, and the Trial Court's ruling granting Dart's Motion for Summary Judgment must be upheld.

B. Procedural History

Alvarado filed his Complaint on August 2, 2012, in the Riverside Superior Court, alleging four wage and hour causes of action against Dart. (AA, p. 001-018.) The causes of action pled included: (1) failure to pay proper overtime in violation of Labor Code sections 510 and 1194; (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 section 201, 202 and

203; and (4) unfair business practices in violation of Business and Professions Code section 17200, *et seq.* (AA, p. 001-018.) Each cause of action was predicated on the formula Dart used to calculate overtime during pay periods in which an Attendance Bonus was earned. (AA, p. 001-018, see specifically AA, p. 004-006, ¶¶ 14-23.)

On October 19, 2012, Alvarado filed a First Amended Complaint that added a fifth cause of action for civil penalties pursuant to Labor Code section 2698, *et seq.*, i.e., the Private Attorneys' General Act. No other changes were made. (AA, p. 019-040.) Dart filed its Answer to Alvarado's First Amended Complaint on November 13, 2012. (AA, p. 041-048.)

On January 9, 2014, Dart filed a Motion for Summary Judgment or, Alternatively, Summary Adjudication as to all causes of action in Alvarado's First Amended Complaint (hereafter "Motion"). (AA, p. 049-067.) As the facts were not in dispute, the parties together drafted and signed a Joint Statement of Undisputed Material Facts and Dart filed it concurrently with the Motion. (AA, p. 068-072.) Both parties relied on these undisputed facts in arguing Dart's Motion. (See AA, p. 049-067, 098-112, 128-142.)

After oral argument at the hearing on Dart's Motion, the Trial Court granted summary judgment in Dart's favor on Alvarado's First Amended Complaint in its entirety, as to all causes of action. (AA, p. 143.) The Trial Court found that: (1) there is no California law applicable to the calculation of overtime pay owed when an employee is paid a bonus in the same pay period in which it is earned; (2) that *Marin v. Costco Wholesale Corporation* (2008) 169 Cal.App.4th 804, which Alvarado almost exclusively relied upon, is inapplicable because it concerned a deferred production bonus whereas Dart's bonus was neither deferred nor was it a production bonus and the portions of the decision Alvarado relied upon were dicta; (3) that sections 49.2.4.2 and 49.2.4.3 of the DLSE Manual

regarding flat sum bonuses upon which Alvarado relied do not have the force of law and are void regulations because they have not been promulgated in compliance with the Administrative Procedures Act; (4) that in the absence of controlling California law, federal law must be followed, and the Code of Federal Regulation's formula for calculating overtime owed when an employee is paid a bonus in the same pay period in which it is earned is identical to Dart's formula (see 29 C.F.R., §778.209(a); 778.110); and (5) as Dart's formula is lawful, all causes of action in Alvarado's First Amended Complaint fail. (AA, p. 154-158.)

The Trial Court formally entered judgment in favor of Dart and against Alvarado on May 23, 2014. (AA, p. 150-153.) Alvarado then filed a Notice of Appeal on July 31, 2014. (AA, p. 165-167.)

The appeal raised "the sole question of law of whether defendant's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful." (Slip Op., p. 2.) The Court of Appeal made the following findings:

(1) Alvarado's reliance on *Skyline* was misplaced because *Skyline* is not dispositive here, where the issue is computing an hourly employee's bonus overtime (*Id.* at 16);

(2) the Trial Court could not be forced to comply with the formula provided in DLSE Manual section 49.2.4.2 because it does not have the force of law and it is not supported by any statute, regulation, court decision, opinion letter, or "Administrative Decision" or "Precedent Decision" of the Labor Commissioner, only public policy (*Id.* at 22);

(3) "enacting the formula in DLSE Manual section 49.2.4.2 as enforceable law falls within the domain of the Legislature and IWC, not this court" (*Id.* at 23);

(4) *Marin* is not dispositive because it concerned a deferred, semi-annual, formulaic bonus which is primarily a production bonus and was not

paid in the same pay period earned (*Id.* at 24);

(5) California has not enacted any legislation or regulations specifying a formula for computing overtime paid on bonuses (*Id.*); and

(6) here, there is a directly applicable federal regulation, namely Code of Federal Regulations, section 778.209(a) (*Id.*).

The Court of Appeal also recognized Alvarado's policy arguments and squarely rejected them: "Even though the federal formula for computing bonus overtime may not comport with state policy discouraging overtime, defendant's use of the federal formula is lawful because it is based on federal law, and there is no state law or regulation providing an alternative formula." (Slip Op., p. 25.)

The Court of Appeal concluded that "[i]n 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 [on] 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. [*citation omitted.*] 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., p. 25.)

Alvarado filed a Petition for Review with this Court on February 23, 2016, which this Court granted on May 11, 2016. Alvarado's Opening Brief on the Merits was deemed filed on July 28, 2016.

III.

STANDARD OF REVIEW

Alvarado appeals summary judgment on the ground the Trial Court and Court of Appeal erred as a matter of law in ruling that Dart's formula

for calculating overtime on flat sum bonuses was lawful. As Alvarado and Dart agreed to a Joint Statement of Undisputed Material Facts in conjunction with the summary judgment briefing and hearing, there are no disputed material facts. Accordingly, on appeal from the order granting summary judgment, this Court determines *de novo* whether Dart is entitled to summary judgment as a matter of law. (See Code Civ. Proc., §437c(c); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 444.)

IV.

ARGUMENT

Alvarado's legal authority and arguments varied significantly before the Trial Court, Court of Appeal, and in his Opening Brief here. These moving targets demonstrate that Alvarado is attempting to create law where none exists to support his clear *policy* goals, proving time and again that his proposed formula is not based on controlling California law, regulation or constitutional provision.

Before the Trial Court, Alvarado's argument centered on the fact that the Attendance Bonus was a flat sum bonus, not a production bonus, and pursuant to the DLSE Manual, the regular rate on flat sum bonuses was to be determined by dividing total amount paid by 40 hours rather than the total hours worked. (See AA, p. 105-110.) In response to Dart's argument that there was no California law on point, Alvarado argued that *Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, was "the controlling law in California since its decision is precisely on point and deals with the exact same issue in this case: bonuses and calculation of Regular Rate of Pay!" (AA, p. 105, lines 8-11 [*emphasis in original*].)

Apparently recognizing the weakness of his *Marin*-based arguments, Alvarado changed horses mid-stream. Before the Court of Appeal,

Alvarado referenced *Marin* only in passing, omitted discussion of flat sum and production bonuses almost entirely, and focused mainly on *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239. Alvarado argued that *Skyline* shows the California legislature's *intent* that the regular rate of pay should not be "diluted" as the number of overtime hours increases. (Alvarado's Appellate Brief, p. 10-19.)

Now, before this Court, Alvarado improperly retracts his concession and stipulation that the Attendance Bonus at issue is a bonus, argues that it was a salary instead, and claims that the "salary" violates *Skyline*'s rejection of the application of the "fluctuating workweek."

Yet not once in the history of this case has Alvarado alleged that Dart actually violated a controlling California law, regulation or constitutional provision in calculating overtime on the Attendance Bonus. That is because no such law exists. As stated by the *Marin* court, decided twenty-three years after *Skyline*, "no California court decision, statute, or regulation governs bonus overtime, the [DLSE] Manual sections on the subject do not have the force of law, and the DLSE opinion letters on the subject are not on point. Thus, there is no controlling California authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay." (*Marin, supra*, 169 Cal.App.4th at 815-816.) The same is true today. In the absence of controlling California law, federal law must be followed, and that is exactly what Dart did, as found by both the Trial Court and Court of Appeal.

A. The Trial Court And Court Of Appeal Correctly Found That Dart's Formula Complies With The Only Controlling Law Applicable: Federal Law

California law mandates that employees are entitled to "no less than one and one-half times the regular rate of pay" for work in excess of eight hours in one workday. (Lab. Code, § 510(a); 8 C.C.R., § 11070.) As noted

by the Court of Appeal here, "[i]n this respect, California law is more protective of workers than the federal 'fluctuating workweek' law, which requires one and one-half time overtime compensation only after an employee works more than 40 hours in a workweek." (Slip Op., p. 8.)

There is, however, no California law that addresses how overtime should be determined for bonuses: "no California court decision, statute, or regulation governs bonus overtime, the [DLSE] Manual sections on the subject do not have the force of law, and the DLSE opinion letters on the subject are not on point. Thus, there is no controlling California authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay." (*Marin, supra,* 169 Cal.App.4th at 815-816.) This was confirmed by the Court of Appeal, which also noted that neither the California Labor Code, nor the California Code of Regulations, nor the Industrial Welfare Commission's ("IWC") applicable Wage Order have any provisions regarding the method of calculating overtime on a bonus. (Slip Op., p. 8-10.) In its thorough analysis of the interaction between federal and state law on bonus overtime, the Court of Appeal found that:

> "federal and state laws regarding overtime, as applied to bonuses, *do not actually conflict*; primarily because *there is no express state law providing a formula for calculating bonus overtime.* Even though federal law does not preempt state law here, this does not preclude applying federal law where there is no state law regulating bonus overtime." (Slip Op., p. 13, [*emphasis added*].)

In the absence of any California authority, the Trial Court, the Court

of Appeal, and Dart used the formula delineated in federal law to compute overtime on bonuses, which is exactly what they are supposed to do. Indeed, as summarized by the Court in *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 817, California courts must look to federal law when there is no California authority on point:

> 'Federal decisions have frequently guided our interpretation of state labor provisions the language of which parallels that of federal statutes.' (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658.) 'Because the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance.' (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555.) 'California courts have recognized that California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance to state courts.' (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal. App.3d 16, 31.) (*Bell, supra*, 87 Cal.App.4th at 817.)

Furthermore, the DLSE *encourages* adherence to federal standards when analyzing the term "regular rate," which is the exact issue here:

> "[The] DLSE takes the position that the failure of the IWC to define the term 'regular rate' indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the

> regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law." (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902-903.)

Based thereon, when analyzing the term "regular rate," a term California law has failed to define, as conceded by Alvarado (see Opening Brief, p. 15-16), the use of federal law is especially endorsed.

Federal law requires that overtime must be paid for hours worked in excess of 40 in a workweek at a "rate not less than one and one-half times the regular rate at which he is employed." (29 U.S.C. § 207(a).) Though California has opted to be more protective of its employees by requiring overtime payment for work in excess of eight hours in one workday (in addition to hours in excess of 40 in one workweek), it requires the same calculation for payment of overtime that federal law requires – "no less than one and one-half times the regular rate of pay." (Lab. Code, § 510(a); 8 C.C.R., § 11070.)[2] Because California law borrows from federal law with respect to the proper calculation of overtime pay, and given there is no California law on point, this Court must look to federal law to determine the proper formula for computing overtime payments on bonuses.

Pursuant to the federal regulations promulgated under the Federal Fair Labor Standards Act ("FLSA") (29 U.S.C. § 201, *et seq.* and specifically § 207), where a bonus is paid as part of an employee's regular

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[2] "[E]ven though this case involves California law—the payment of overtime for work in excess of eight hours in *one day*—and federal law requires overtime pay only for work exceeding 40 hours in *one workweek*, federal authorities still provide useful guidance in applying state law." (*Huntington Memorial, supra*, 131 Cal.App.4th at 903, [*emphasis in original*].)

weekly pay check, the calculation of the applicable regular rate of pay is straightforward. "No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period.[3] The amount of the bonus is merely added to the other earnings of the employee . . . and the total divided by *total hours worked.*" (29 C.F.R., § 778.209(a) [*emphasis added*]; see also *Parisi v. Town of Salem*, No. 95-67-JD (D.N.H. Feb. 20, 1997), AA, p. 083-087 [noting that where a bonus payment covers only one pay period, "[t]he amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by the total hours worked."].) "The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to *one-half* of the hourly rate of pay allocable to the bonus for that week, multiplied by the number of statutory overtime hours worked during the week." (29 C.F.R. §778.209,(a) [*emphasis added*].) Thus, federal law requires that Dart determine the regular rate of pay by dividing total remuneration by the total hours worked, including overtime hours. The resulting amount is then multiplied by the number of overtime hours worked and again by 0.5. The result is the amount of overtime compensation due on a bonus. This is precisely what Dart did in regards to Alvarado's pay.[4]

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[3] Though the regulation refers to a "weekly pay period," it applies with equal force to payments made for a pay period longer than one week, provided those payments are made on the regular pay day: "There is no requirement in the [FLSA] that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." (29 C.F.R., § 778.106.)

[4] Dart calculates the amount of overtime owed to its employees in a particular pay period using the following four steps. (AA, p. 069-070, ¶ 4.) First, Dart multiplies the number of overtime hours worked in a pay period by the straight hourly rate ("First Step"). (AA, p. 069, ¶ 4a.) Second, Dart adds the total amount owed in a pay period for regular non-overtime work,

Title 29 of the Code of Federal Regulations, section 778.110 ("Section 778.110") applies the calculation set forth in Title 29 of the Code of Federal Regulations, section 778.209(a) ("Section 778.209") to hourly rate employees who receive bonuses in a 40-hour work week: "If the employee [who works 46 hours in a week] receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50)." (29 C.F.R., §§ 778.110, 778.209.) Dart's formula for calculating overtime on its Attendance Bonus is exactly the same. (AA, p. 069-070, ¶ 4.) This Court, as did the Trial Court and Court of Appeal, must look to federal law for the proper calculation of overtime on bonuses, which unequivocally support Dart's formula.

Realizing the inescapable application of the federal regulation directly on point, Alvarado for the first time in these entire proceedings attempts attack such application by alleging that the Attendance Bonus is not a bonus pursuant to the Code of Federal Regulations. (Opening Brief, p. 37-39.) Such argument is meritless. Title 29, section 778.502 of the

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extra pay like Attendance Bonuses and the overtime due from the First Step, and then divides that sum by the total number of hours worked in the pay period. The result is the employee's Regular Rate. (AA, p. 069, ¶ 4b.) Third, Dart multiplies the number of overtime hours worked in a pay period by the employee's Regular Rate determined in the Second Step and then multiplies that amount by .5 to arrive at the "overtime premium" ("Third Step"). (AA, p. 069, ¶ 4c.) Fourth, Dart adds the amount from the First Step to the Third Step. The result is the total amount of overtime owed in a pay period to an employee who earned an Attendance Bonus and worked overtime during that pay period. (AA, p. 070, ¶ 4d.)

Code of Federal Regulations state that the "term 'bonus' is properly applied to a sum which is paid as an addition 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 inappropriately applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract." (29 C.F.R., § 778.502(a).) Dart's employees are not guaranteed the Attendance Bonus as part of their wages each week; they have to earn the Attendance Bonus by showing up to their regularly scheduled weekend shifts. It is paid in addition to their straight hourly wages as a reward for their loyalty in service by not calling off work on weekends. The employees are also not contractually entitled to receive the Attendance Bonus indefinitely as it is a voluntary policy that Dart can alter within its discretion. The Attendance Bonus falls squarely in line with the definition of bonuses in the federal regulations. (29 C.F.R., § 778.502(a).)

Alvarado and Dart actually agree on Alvarado's next point, which is that the Attendance Bonus is not considered "premium pay" for work on weekends under Title 29 Section 778.203 of the Code of Federal Regulations. (29 C.F.R., § 778.203; Opening Brief, p. 39-40.) The Attendance Bonus ($15) is less than time and one half of Alvarado's wages for work on Saturdays and Sundays ($22.83). (See 29 C.F.R., § 778.203; AA, p. 116.) Accordingly, the Attendance Bonus "must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due . . . ." (29 C.F.R., § 778.203.) This is exactly what Dart did. Dart included the Attendance Bonus in the regular rate of pay and did not use the Attendance Bonus as a credit against the amount of money Alvarado was owed for overtime wages. Alvarado's line of argument actually supports the application of Dart's formula.

As found by the Court of Appeal, "[t]his is not a situation in which state and federal labor laws substantially differ and therefore reliance on

federal law is misplaced." (Slip Op., p. 25.) "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 [on] plaintiff's bonuses, other than the applicable federal regulation, CFR section 778.209(a) . . . . 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," and in turn this Court should affirm the Court of Appeal's ruling. (Slip Op., p. 25.)

B. Alvarado's Bonus Formula Is Based Upon Public Policy, Not California Law

Alvarado's entire argument is premised on the purported policy that when calculating the regular rate for overtime purposes, the divisor is 40 hours worked (or straight time) rather than the total hours worked, in order to prevent the dilution of the regular rate of pay when the number of overtime hours worked increases. However, policy has no legal impact unless it is rooted in statute, and here there is no such California law governing overtime on a bonus, or prohibiting dilution of the regular rate in all instances. As found by the Court of Appeal, "[e]ven though the federal formula for computing bonus overtime may not comport with state policy discouraging overtime, defendant's use of the federal formula is lawful because it is based on federal law, and there is no state law or regulation providing an alternative formula." (Slip Op., p. 25.)

Alvarado created a formula based on this policy, which is identical to DLSE Manual section 49.2.4.2 regarding flat sum bonuses. However, the DLSE Manual provisions are void regulations which are unenforceable and not binding on this Court because they were not adopted in accordance with the Administrative Procedure Act. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573-576; *Marin, supra*, 169 Cal.App.4th

at 815; Slip Op., p. 18.) Accordingly, as found by the Court of Appeal here, this Court is not required to mandate compliance with the flat sum bonus formula provided in the DLSE Manual section 49.2.4.2. (See Slip Op., p. 22.) Section 49.2.4.2 is "a standard of general application interpreting the law the DLSE enforce[s],' and 'not merely a restatement of prior agency decisions or advice letters.'" (*Marin, supra*, 169 Cal.App.4th at 815.) Furthermore, section 1.1.6.1 of the DLSE Manual states that if the source of the interpretation is a statute, regulation, court decision, opinion letter, or "Administrative Decision" or "Precedent Decision" of the Labor Commissioner, that source will be identified in the DLSE Manual. (*Id.*) However, "[n]o such sources are mentioned in section 49.2.4.2. The only source cited for the flat sum bonus rule is 'public policy.' Accordingly, section 49.2.4.2 does not have the force of law." (*Id.*; Slip Op., p. 22.) In other words, it is the DLSE creating its own interpretation of the law based on what it believes public policy should be.

As found by the Court of Appeal, section 49.2.4.2 "not only has no precedential value, it carries very little, if any, persuasive value because the DLSE Manual section 49.2.4.2 *does not cite any supporting legal authority.* This lack of any citation to supporting binding California law is because there is none. There is no state law specifying a formula for overtime applied to bonuses, particularly flat sum bonuses." (Slip Op., p. 22 [*emphasis added*].) As it has not "been enacted as enforceable law," the Court of Appeal concluded that it could not "enforce it." (Slip Op., p. 23.) The Court of Appeal continued: "Furthermore, enacting the formula in the DLSE Manual section 49.2.4.2 as enforceable law falls within the domain of the Legislature and the IWC, not this court." (*Id.*) This part of the Court of Appeal decision is key. Alvarado and the DLSE are attempting to legislate through this Supreme Court. This is wholly improper. Enacting legislation is in the province of the California State Legislature, not the

courts. There is clearly a void in California law here, and that void can only be filled by the Legislature enacting new laws, not the courts stretching unsupported public policy across the gap, especially when federal law perfectly fills the void.

1. Violation Of Such Policy Cannot Lead To Liability In The Absence Of A Statutory Touchstone, Which Is The Case Here

The DLSE is not authorized to base a rule on public policy where, as here, there is no constitutional or statutory or regulatory provision to which the purported public policy is tied.

In fact, courts do not have the authority to implicitly enact prohibitions that the legislature has failed to enact explicitly. For example, in *Carter v. Escondido Union High Sch. Dist.* (2007) 148 Cal.App.4th 922, 925, the court held that for an employer to be liable for wrongful termination of public policy, the employer's conduct must violate a policy that is "fundamental," "well-established," and "carefully tethered" to a constitutional or statutory provision. The court held that the public policy upon which liability was premised, characterized as "the policy against teachers recommending weight-gaining substances to students," failed to satisfy these requirements. Although there may be sound policy reasons to bar this practice, there is no law that does so, and "any such prohibition must be enacted explicitly by the Legislature, not implicitly by the courts." As the practice was neither prohibited by law nor in contravention of well-established public policy, there was no basis for liability. (*Id.* at 925-926; see also *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095 ["A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public."].)

While California law mandates that employees are entitled to "no

less than one and one-half times the regular rate of pay" for work in excess of eight hours in one workday (Lab. Code, § 510(a); 8 C.C.R., § 11070), there is no California constitutional, statutory or regulatory provision outlining any particular method for paying bonus overtime. (*Marin, supra,* 169 Cal.App.4th at 815-816.) Furthermore, the general overtime provisions in the Labor Code and Code of Regulations in no way support Alvarado's "rules" on bonus overtime. There is clearly a void in the law, and Alvarado advocates filling in that void with a self-serving policy that has no basis in any legislative enactment or constitutional provision. Alvarado fails to understand that where California law is silent, the courts, and by extension non-rulemaking administrative agencies such as the DLSE, are not empowered to declare public policy. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 134-36 [even though a public policy against age discrimination appears in various former statutes and in the Fair Employment and Housing Act, there still could be no common-law claim for wrongful discharge of an employee in violation of a public policy based on age discrimination, where the employer, employing fewer than five employees, was expressly exempted from the FEHA's ban on age discrimination].)

2. Imposing Liability Premised Solely On Public Policy And Not On Violation Of Any Applicable Law Or Regulation Violates Dart's Due Process Rights

Alvarado's proposed public policy and the means by which he seeks to impose it against Dart and collect substantial penalties violates Dart's due process rights.

The United States Supreme Court has repeatedly held that vagueness in a criminal statute violates due process if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 56; *see also Hill v. Colorado* (2000) 530 U.S. 703, 732. "[B]ecause we assume that

man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; *see also Morales, supra*, 527 U.S. at 56 [fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law]prohibits"].) Punishment therefore may not be predicated on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*United States v. Lanier* (1997) 520 U.S. 259, 266.)

The United States Supreme Court never limited the vagueness doctrine to criminal penalties; on the contrary, it has consistently applied the doctrine to civil statutes that are punitive in nature. (*See e.g., Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, 499 [employing strict vagueness scrutiny for statute that imposed quasi-criminal penalties]; *Giaccio v. Pennsylvania* (1966) 382 U.S. 399, 402 ["[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"]; *Champlin Ref. Co. v. Corp. Comm'n* (1932) 286 U.S. 210, 241 [holding penalty statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment."]; *A.B. Small Co. v. American Sugar Ref. Co.* (1925) 267 U.S. 233 [holding statute unconstitutionally vague in civil case]; *Sw. Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482 [$6,300 civil penalty violated due process]. Nor is the doctrine limited to statutory civil punishments. Indeed, with specific reference to punitive damages, the United States Supreme Court observed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment." (*State Farm Mut. Auto. Ins. Co. v.*

Campbell (2003) 538 U.S. 408, 417 [quoting *BMW of N. Am. v. Gore* (1996) 517 U.S. 559, 574].)

Alvarado proposes to require Dart to comply with an obscure and alleged public policy that is indisputably not grounded in any California law, regulation or constitutional provision. As Alvarado's policy goals have no statutory touchstone, Dart never had a reasonable opportunity to know that its conduct was prohibited. This extends beyond an impermissibly vague statute leading to liability, this is an imposition of liability in the complete absence of any statute at all, forcing Dart to not merely "guess at [a statute's] meaning," but rather read Alvarado's mind to discover a purported public policy and then guess at that policy's meaning. (See *Lanier, supra*, 520 U.S. at 266.)

3. Dart's Formula Does Not Encourage The Imposition Of Overtime

Alvarado's public policy-based argument that Dart's formula encourages the imposition of overtime has no basis in law (as shown above) and has no basis in fact. Here, *Dart's formula does not encourage imposition of overtime*. In fact, Dart's formula *discourages* overtime because it helps ensure that employees work their regularly scheduled shifts such that there is no need for other employees to work overtime to cover the absent employee's shift. Alvarado fails to even acknowledge this fact. Additionally, by merely offering the Attendance Bonus, Dart has in fact *discouraged* the imposition of overtime because overtime hours worked by those employees eligible for and receiving and Attendance Bonus are always more expensive than had the Attendance Bonus not been offered.

Finally, Dart's formula would at most affect how overtime is *allocated* among the employees. As to employees who are regularly scheduled to work weekend shifts, Dart pays overtime based on the hourly wage as well as the Attendance Bonus. As to employees who are *not*

regularly scheduled to work weekend shifts, Dart pays overtime based on the hourly wage alone, not the Attendance Bonus, because these employees are not entitled to the Attendance Bonus. The formula therefore at most encourages the shifting of overtime on those who are not regularly scheduled to work weekend days because those overtime hours cost Dart less money. When paying these lower overtime rates for employees who are not entitled to an Attendance Bonus, there is no alleged "diluted" regular rate of pay because the rate of pay, without additional payments such as bonuses, remains the same regardless of the number of overtime hours worked. And that rate of pay is always less than the rate of pay involved when a bonus is earned.[5]

This concept is rooted in case law. Specifically, in *Marin* the court noted that the employer's plan also did not encourage the imposition of overtime but rather impacted the allocation of overtime to those who were not eligible for the bonus. (*Marin, supra*, 169 Cal.App.4th at 818-819.)

C. The Trial Court And Court Of Appeal Correctly Found That Alvarado's Formula Is Not Supported By Any Controlling California Authority

In addition to unsupported public policy, Alvarado relies on dicta from inapplicable cases to support his bonus formula and attempt to impose liability on Dart. The problem is that the authorities Alvarado relies on never address the calculation of overtime on a bonus, and are therefore inapplicable to this case. None of Alvarado's attempts at finding a law to support his policy goals succeed.

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[5] Lawsuits such as this, predicated on an employer's choice to offer a bonus to employees as a reward, is what actually encourages the imposition of overtime because it encourages the elimination of such incentive payments and prevents the regular rate from ever increasing beyond the minimum hourly wages, making overtime cheaper overall.

1. As Found By The Trial Court And Court Of Appeal, *Skyline* Is Not Controlling And Does Not Render Dart's Formula Unlawful

Alvarado's argument hinges on *Skyline* and its rejection of the "fluctuating workweek methodology." Such reliance is in error as *Skyline* is neither controlling nor applicable as it was confined to salaried employees working a fluctuating workweek, did not address bonuses, and concerned an employer who failed to pay overtime for work exceeding eight hours in a day. (See *Marin*, *supra*, 169 Cal.App.4th at 810-811.) The Court of Appeal similarly found *Skyline* inapplicable. (Slip Op., p. 15.)

Specifically, in *Skyline*, the employees worked a fluctuating workweek wherein they were paid a fixed minimum salary even though they worked varying hours per week. (*Skyline*, *supra*, 165 Cal.App.3d at 243-244.) The employees were also paid overtime for all work performed over 40 hours in any given workweek, but not for work performed over eight in a workday. (*Id.*) The issue was whether the employer used the correct method in calculating such overtime. (*Id.*)

Central to the *Skyline* decision was the fact that there was stark difference between governing federal and California law with respect to fluctuating workweeks. (*Id.* at 247-248.) Pursuant to the FLSA, overtime is owed whenever an employee works over 40 hours in a workweek. (*Id.*, citing 29 U.S.C., § 207(a)(1).) Conversely, the then-applicable California wage order required overtime whenever an employee worked over 40 hours in a workweek or over eight hours in a work day. (*Id.* citing former Admin. Code, Title 8, § 11180 [Labor Code section 510 had yet to be enacted].) The court illustrated the benefit of using the wage order's method with reference to an employee with a weekly salary of $350 who worked 12 hours Monday, eight hours Tuesday, nine hours Wednesday, and 10 hours Friday, for a total of 39 hours for the week. Under the employer's formula

the employee was entitled to no overtime compensation because he or she "failed to exceed 40 hours in the week." (*Skyline*, *supra*, 165 Cal.App.3d at 248.) But under the wage order, the employee, who had worked overtime pursuant to California's standard of over eight hours in a workday, was entitled to overtime compensation for seven hours at "time and one-half." (*Id.* at 249.)

The *Skyline* court noted that, "[u]nless 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." (*Id.* at 248.) The *Skyline* court concluded California law's eight-hour day limitation was incompatible with the federal law's fluctuating workweek method of calculating the regular pay rate and overtime, which relies solely on the 40-hour workweek, without taking into account an eight-hour day limitation. (*Id.* at 248, 255.)

Here, Dart does not employ the fluctuating workweek methodology because it pays its employees overtime for hours worked in excess of 40 in a week *and eight in a day*. In fact, Alvarado has never alleged that Dart failed to pay overtime for hours worked in excess of eight in a day. *Skyline* also does not identify any California court decision, statute or regulation that shows Dart's formula for calculating bonuses is unlawful. Indeed, it did not mention, much less analyze, overtime due on bonuses. It also does not dispute that in the absence of California law or regulation to the contrary, federal law should be followed. (See *Skyline*, *supra*, 165 Cal.App.3d at 246-247.) Furthermore, Dart's formula does not conflict with the bedrock of principle of *Skyline*, namely that California employees are entitled to overtime for work in excess of eight hours in a day and 40

hours in a week.

a. *Skyline*'s Decision Was Based On A Directly Applicable California Law; Here Alvarado Has No Statutory Touchstone

Additionally, *Skyline* is distinguishable from this case in one key respect. The *Skyline* court reached its decision in reliance on the express terms of the applicable wage order, which were directly applicable and dispositive to the case. Here, Alvarado's formula is not predicated on *any* statutory touchstone that is at odds with Dart's formula. Unlike *Skyline*, there is no conflict of California and federal law here because there is no California law on point.

b. The *Skyline* Court Admitted It Did Not Apply To Hourly Employees, Which Alvarado Concedes He Was

Furthermore, the *Skyline* court conceded that its ruling is not applicable to a case like this involving hourly employees receiving bonuses: "[T]he method of computing overtime compensation for employees other than salaried employees is not before us. Plaintiffs' pleadings in the trial court specifically stated that 'The dispute in this case centers on the proper method of overtime computation for employees who receive a fixed salary but work a variable number of hours each week. This case does not concern employees working on a commission, piece rate, or other wage basis.'" (*Id.* at 254.) This was key for the Court of Appeal, which found that because of this very language, "*Skyline* is not dispositive in the instant case, which concerns computing an hourly employee's bonus overtime." (Slip Op., p. 16.) There is no reason for this Court to overrule the Court of Appeal here. As much as Alvarado wants *Skyline* to reach beyond salaried employees, *Skyline*'s express language prevents that from happening.

Skyline's holding was later codified in Labor Code section 515, subdivision (b), which provides: "For the purpose of computing the

overtime rate of compensation required to be paid to a nonexempt full-time *salaried* employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly *salary*." (Lab. Code, § 515(b) [*emphasis added*]; *Marin, supra*, 169 Cal.App.4th at 812.) This further confirms the narrow and tailored holding of *Skyline*, which the Legislature and Court of Appeal correctly interpreted to be confined only to salaried employees. That is why the statutory provision enacted because of *Skyline* is applicable to only nonexempt full-time *salaried* employees. Had the Legislature wanted to enact a statute reflecting Alvarado's policy argument that an employee's regular rate should not decrease as the number of overtime hours worked increases, the Legislature certainly had the opportunity to do so when amending Labor Code section 515(b). The Legislature's decision not to do so further signifies that Alvarado's policy argument is not based on actual law.

Moreover, Alvarado's Complaint is not about a salary; it alleges that Dart is liable for the "[f]ailure to pay overtime at the legal overtime rate by failing to include shift differential pay and/or bonus compensation in calculating the regular rate of pay for purposes of paying overtime." (AA, p. 004, ¶ 15.) Alvarado also concedes that he was an hourly, not a salaried employee, and that his Attendance Bonus was a bonus, not a salary. (AA, p. 068-070, 102-104, 116-126; Opening Brief, p. 4.) Alvarado's own pleadings and stipulations prove that this case is not about overtime for salaried employees, but rather how to properly pay for overtime for hourly employees when a bonus is earned and paid within the same pay period.

c. The *Marin* Court Correctly Found *Skyline* Inapplicable For The Same Reasons That Exist Here

Marin, decided 23 years after *Skyline* and which actually addressed the overtime owed when a bonus is paid, also concluded the *Skyline* was not applicable because: (1) *Skyline*'s analysis was confined to salaried employees [not hourly employees] and the specific problem of calculating a regular rate of pay when such employees work variable hours; (2) it did not address "bonuses in any respect"; and (3) it dealt with an employer that was failing to pay overtime to employees who worked more than eight hours in a day [which was not the case in *Marin* or here] and (4) *Skyline*'s formula encouraged the imposition of overtime because each overtime hour worked reduced the regular rate of pay and with it the cost of overtime hours to the employer[6]. (*Marin*, *supra*, 169 Cal.App.4th at 812-813.) For these same reasons, *Skyline* is inapplicable here. (See also Slip Op., p. 15 ["Plaintiff's reliance on *Skyline* is misplaced because it was confined to salaried employees working a fluctuating workweek, did not address bonuses, and dealt with an employer who failed to pay overtime for work exceeding eight hours in a day."].)

d. Alvarado's Application Of *Skyline* To This Case Violates *Marin*

Finally, Alvarado's flawed interpretation of *Skyline* leads to absurd results. If Alvarado's perspective is followed, then *Skyline* prohibits any calculation of bonus overtime where the regular rate is decreased when the number of overtime hours increases. This however, runs afoul of *Marin*, which Alvarado otherwise champions. In *Marin*, as discussed more fully below, the court adopted the DLSE Manual provisions and formula for overtime on production bonuses (section 49.2.4.1), concluding that it set

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[6] This is discussed in section B(3) above.

forth a valid formula. (*Marin, supra*, 169 Cal.App.4th at 815-816.) The formula for overtime on production bonuses functions the same way Dart's formula functions: "First, find the overtime due on the regular hourly rate . . . Then, separately, compute overtime due on the bonus: find the regular bonus rate by dividing the bonus *by the total hours worked* throughout the period in which the bonus was earned. The employee will be entitled to an additional half of the regular bonus rate for each time and one-half hour worked . . . ." (*Id.*, citing DLSE Manual section 49.2.4.1.) Accordingly, pursuant to *Marin*, an overtime calculation that uses a divisor of total hours worked rather than 40 complies with California law, even though it "dilutes" the regular rate of pay as the number of overtime hours increases. If this Court adopts Alvarado's mistaken terminology of a "fluctuating work week," and finds that Dart's bonus formula violates California law because it adopts a "fluctuating work week" methodology, then this Court is also declaring that *Marin* is no longer good law and must be overturned. Alvarado's position, when taken to its full logical application, is untenable.

e. Alvarado Cannot Force The Application Of *Skyline* Here By Re-Naming The Attendance Bonus A Salary Because A Bonus Is Not A Salary

"A salary is generally understood to be a fixed rate of pay *as distinguished from an hourly wage*." (*Negri v. Koning & Assocs.* (2013) 216 Cal.App.4th 392, 397 [*emphasis added*].) There, the employee was paid on basis of $29 per hour with no minimum guarantee, and based thereon argued that he did not receive salary and was not exempt. (*Id.* at 395.) In ruling that the employee was not paid a salary and therefore not exempt, the court noted that:

"Wage Order 4[7] refers to compensation in the

[7] Although Wage Order 1 is applicable here rather than Wage Order 4, the analysis is the same.

> form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. *A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage.* Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt. (*Negri, supra*, 216 Cal.App.4th at 397-398 [*internal citations omitted, emphasis added*].)

In turn, the federal wage and hour laws provide that an employee is paid on a salary basis if the employee: "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employees compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." (*Id.* at 398.)

In *Negri*, the defendant employer stipulated to the fact that it "never paid [plaintiff] a guaranteed salary" and that if he worked fewer claims "he made less money that if he worked more claims." (*Id.* at 400.)

Accordingly, the plaintiff was not paid a predetermined amount that was not subject to a reduction based upon the quantity of work performed, and therefore not paid a salary. (*Id.*)

Similarly, here, Alvarado stipulated to the fact that the Attendance Bonus is a bonus, and that it was not guaranteed and clearly subject to reduction due to variations in the quantity of work performed as he had to be regularly scheduled to work a weekend shift and actually work that weekend shift in order to get the Attendance Bonus. (AA, p. 069, ¶ 4.) Alvarado also conceded that he was paid hourly wages, not a fixed rate of pay (i.e., a salary). (AA, p. 116-126; Opening Brief, p. 4.) Accordingly, Alvarado's assertion that the Attendance Bonus is a salary has no basis in fact or law.

2. Although *Marin* Is The Only Case To Address Bonus Overtime, It Is Inapplicable To The Overtime Calculations At Issue Here

Alvarado's reliance on *Marin* as authority for his proposed formula, to the extent that is what he is doing, is misplaced as *Marin* is fundamentally distinguishable. (See Opening Brief, p. 27-29.) As stated by the Court of Appeal "*Marin* is not dispositive here." (Slip Op., p. 24.)

In *Marin*, the court addressed the proper overtime formula when employees receive deferred (i.e. a bonus not paid in the same pay period in which it is earned), semi-annual bonuses paid based on hours worked. (*Marin*, *supra*, 169 Cal.App.4th at 804.) To determine the bonus, the employer, Costco, first calculated a regular hourly bonus rate "by dividing the employee's maximum base bonus by the minimum paid hours required to achieve that maximum bonus (1,000) to determine a regular hourly bonus rate." Costco then determined overtime owed on the bonus by multiplying the number of overtime hours worked during the bonus period by one-half of that regular hourly bonus rate. (*Id.* at 808.) The plaintiff

advocated for a formula that determined the regular bonus rate by dividing the employee's base bonus earned by the number of straight time hours worked. The plaintiff then argued the regular bonus rate should be multiplied by the total number of overtime hours worked and then by a 1.5 multiplier. (*Id.*) The court focused on the appropriate multiplier to be used in calculating the bonus: 0.5 or 1.5.

First, as set forth above, the court found that "no California court decision, statute, or regulation governs bonus overtime, the Manual sections on the subject do not have the force of law, and the DLSE opinion letters on the subject are not on point. Thus, there is no controlling authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay." (*Id.* at 815.)

With that blank slate, the court was free to determine whether Costco's formula was lawful. In finding the formula lawful, it borrowed from the DLSE Manual, stating that "we are persuaded that the Manual provisions for overtime on production bonuses set forth a valid formula." (*Id.* at 816.) The court characterized the deferred Costco bonus as a deferred "production bonus" and borrowed the DLSE's use of a 0.5 multiplier for production bonuses; it did not find (nor could it given the question presented) that the appropriate multiplier for an Attendance Bonus unrelated to production is 1.5. Nor did it say anything about how to calculate overtime on an Attendance Bonus paid in the same pay period during which it was earned instead of being deferred.

Finally, in *Marin*, the court found there were no federal regulations "directly on point," whereas here the federal regulations speak precisely to the instant situation and mandate Dart's formula. (*Id.* at 820.) This is also noted by the Court of Appeal, which stated that "in *Marin*, unlike in the instant case, there was no directly applicable federal regulation or statute...[and] [u]nlike in *Marin*, federal regulation CFR section

778.209(a), applies and provides a formula used by defendant for computing overtime on plaintiff's bonus." (Slip Op., p. 24.) Thus, *Marin* applies only to deferred bonuses based on an employee's production where no federal law applies. It has no bearing on an Attendance Bonus paid during the same period in which it is earned where federal law is precisely on point.

To the extent *Marin* applies at all, it endorses the use of a 0.5 multiplier to determine the amount of overtime to be paid on a bonus, not the 1.5 multiplier for which Alvarado advocates. In fact, the *Marin* court buttressed its conclusion by referring to the fact that while federal regulations in that case were not directly on point, federal law "is generally supportive of defendant's formula insofar as it contemplates an overtime-hour multiplier of 0.5, rather than 1.5, to compute the bonus overtime." (*Marin, supra*, 169 Cal.App.4th at 820.) Dart's formula uses the 0.5 multiplier that federal law requires.

3. DLSE Manual Provisions Do Not Have The Force Of Law And Should Not Be Adopted Here

Alvarado's reliance on DLSE Manual section 49.2.4.2 regarding flat sum bonuses is misplaced as this section "do[es] not have the force of law," as explained above. (*Marin, supra*, 169 Cal.App.4th at 815.)

While it is true that *Marin* adopted DLSE Manual section 49.2.4.1 regarding production bonuses even though the DLSE Manual did not have the force of law, there is no reason for this Court to adopt DLSE Manual section 49.2.4.2 regarding flat sum bonuses here. In *Marin*, the bonus at issue was "hybrid of the DLSE categories, but it functions for the most part like a production bonus," so it made sense to apply it. (*Marin, supra*, 169 Cal.App.4th at 816.) The bonus at is here, however, is not a flat sum bonus as described in DLSE Manual section 49.2.4.2. That section specifically notes that it applies to bonuses that "insure that the employee remain in the

employ of the employer." Dart's bonus payments for weekends are designed to reward employees for working during their regularly-scheduled weekend shifts (hence the name "Attendance Bonus"), not to ensure their continued employment. In addition, the example accompanying DLSE Manual section No. 49.2.4.2, found at section 49.2.4.3, assumes a deferred bonus paid at the end of the season to an employee who worked 640 hours. It simply does not apply to a bonus earned and paid within the same pay period, as is the case here. Additionally, in *Marin*, there was no directly applicable federal regulation or statute, as noted by the Court of Appeal. (Slip. Op., p. 24.) This is in stark contrast to this case, where there is an express federal regulation, coupled with a sample formula, that are directly applicable to the Attendance Bonus. Furthermore, as discussed above, Dart's formula does *not* encourage the imposition of overtime, and therefore it is not necessary to impose the "premium" associated with the DLSE's flat sum bonuses on Dart. Accordingly, the DLSE Manual sections have no bearing on the outcome of this case and there is no reason for the Court to adopt section 49.2.4.2 in deciding this case. Finally, as stated by the Court of Appeal, adopting DLSE Manual section 49.2.4.2 is essentially enacting it as enforceable law despite the fact that it is predicated solely on public policy and not on any statutory touchstone. This "falls within the domain of the Legislature and IWC, not this court." (Slip Op., p. 23.)[8]

[8] To the extent the State of California submits an amicus curiae brief in support of Alvarado's contentions, it should be noted that the Legislature itself has not actually enacted any legislation on point, which is why Dart is forced to defend itself against allegations that it violated public policy against a backdrop of supposed intent that the State very clearly *never acted upon.*

4. Although The 1957 Attorney General Opinion Does Not Have The Force Of Law, Dart Expressly Complied With It

Alvarado's reliance on a 1957 Attorney General opinion is a non-starter. This Court has plainly stated that Attorney General opinions are not of controlling authority and have no precedential value. (*People v. Shearer* (1866) 30 Cal. 645, 652-653; see also *Thorning v. Hollister School Dis.* (1992) 11 Cal.App.4th 1598, 1604.) The 1957 opinion is also ultimately irrelevant, as the Labor Code thereafter included a provision directly on point which mandated that employees are entitled to "no less than one and one-half times the regular rate of pay" for work in excess of eight hours in one workday. (Lab. Code, § 510(a); see also 8 C.C.R., § 11070.)[9] Moreover, the 1957 opinion never even mentions bonuses.

Regardless, Dart's formula expressly *complies* with the formula proffered by the 1957 opinion. For example, in deciding the second question (i.e., do the IWC Orders preclude overtime payment on the basis of a "fluctuating work week"?), the Attorney General defined the operation of the "fluctuating work week." It stated that:

> "if a woman received eighty dollars ($80) per week for forty hours, i.e., eight hours a day, five days a week, time and a half would appear to be two dollars ($2) an hour plus one-half or one dollar ($1) per hour overtime, or a total of three ($3) per hour worked over forty hours. Thus simple arithmetic would show a gross of one hundred and four dollars ($104) for eight hours

[9] Furthermore, the Opening Brief ignores the fact that the wage orders themselves contain exceptions to the rule that overtime be paid for work in excess of 8 hours for such positions as nurses. (See, e.g., 8 C.C.R., § 11040(3)(B).)

of overtime in one week.

This is not so with the 'fluctuating work week', for here the arithmetic analysis fails. No longer is the woman working at a 'regular rate of pay' of eighty dollars ($80) per forty hour week – she is working a forty-eight hour week for eighty dollars ($80). This reduces the hourly rate from two dollars ($2) to one dollar and sixty-six and 6/100 cents ($1.666) per hour. Overtime is then computed as one and one-half times her adjusted 'regular rate of pay.' The employee does not receive twenty-four dollars ($24) for eight hours overtime, but nineteen dollars and ninety-nine cents ($19.99)."

(Opinion No. 57-29, p. 4.)

If we apply Dart's formula to the facts above, then Dart's formula exactly complies with the 1957 opinion's calculations for the non-"fluctuating work week" and yields the same result: $104.00. It does not provide the $19.99 in overtime from the "fluctuating work week" example above because it is not a "fluctuating work week" calculation:

1) 8 overtime hours x $2/hour regular hourly pay (overtime pay) = $16
2) 40 regular hours x $2/hour regular hourly pay ($80) + $16 overtime pay = $96 / 48 total hours = a Regular Rate of $2.00
3) 8 overtime hours x $2 = $16 x .5 = $8.00 (the overtime premium)
4) $16 (overtime pay) + $8 (overtime premium) + $80 (regular hourly pay) = $104.00 (the total amount due the employee). (See AA, p. 069, ¶ 4.)

In other words, Dart's formula complies with the 1957 opinion

because it pays its employees overtime for work in excess of eight hours in a day and forty hours in a week, and therefore does not use the "fluctuating work week" methodology.

5. IWC Findings Do Not Have The Force Of Law And Are Irrelevant To This Case

Alvarado relies upon what he refers to as "Findings" of the IWC. In reality, he is a referring to a footnote in the DLSE Manual, page 48-2, which provision does not have the force of law. (See DLSE Manual section 1.1.6.1 [if the source of the interpretation is a statute, regulation, court decision, opinion letter, or "Administrative Decision" or "Precedent Decision" of the Labor Commissioner, that source will be identified in the Manual. No such sources are mentioned in the quoted paragraph. The only source cited is the Commission's intent.]; see also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568- 577.)

Nor does Alvarado provide any citation to the 1963 "Findings" of the IWC archives upon which he directly relies (or attach a copy thereof). Since these "Findings" have not been codified in the California Code of Regulations, as are the Wage Orders, the "Findings" do not have the force of law and cannot be considered controlling California precedent.

Regardless, the "Findings" are irrelevant. They state, in part: "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." (Petition, p. 19-20 [*emph. added*].) As Alvarado was not a salaried employee, but rather was hourly, even if the IWC's findings were controlling (which they are not), they don't apply here. Dart always has paid its hourly employees overtime for hours worked in excess of eight in a day.

6. *Alcala v. Western AG Enterprises, Hernandez v. Mendoza, Ghory v. Al-Laham, Lujan v. Southern California Gas Co.,* And *Ramirez v. Yosemite Water Co.* Apply Only To Employees Working On A Salary, Not Hourly, Basis, And Made No Mention Of Bonus Overtime

Alvarado claims that the five below cases conflict with the Court of Appeal's decision, but in doing so completely misses the point. These five cases either concerned the non-payment of overtime wages for employees who were paid on a *salary*, as opposed to an hourly, basis, or proper payment for outside sales persons. In *Alcala v. Western AG Enterprises* (1986) 182 Cal.App.3d 546, 548-551, the employee was paid on a salary basis because the length of his shifts fluctuated from week to week, so the court found that the employee was owed overtime wages because the salary did not compensate him for overtime hours worked in excess of those required in the applicable wage order. In *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725), the employee was paid a fixed weekly salary, and the court stated that absent an explicit, mutual wage agreement, a fixed salary does not compensate employees for overtime. There was no such agreement, and accordingly the court found that the employee was not properly paid overtime for time worked in excess of eight in a day or forty in a workweek. (*Id.* at 726.)

In *Ghory v. Al-Laham* (1989) 209 Cal.App.3d 1487, 1489, the employee was not paid an hourly wage, but rather a weekly salary, and worked irregular hours. The court found that there was no explicit, mutual wage agreement wherein the fixed salary compensated for overtime, and that he therefore was required to comply with *Skyline*'s formula. (*Id.* at 1490-1492.) In *Lujan v. Southern California Gas Co.* (2002) 96 Cal.App.4th 1200, 1203 employee gas meter readers were subject to a collective bargaining agreement, which provided that meter readers would be paid a flat daily rate for working routes designed with the expectation

that they would be finished within an eight-hour period. Meter readers who took more than eight hours to finish the routes received overtime compensation for the additional hours according to a formula that divided the flat daily rate by the number of hours actually worked that day, in lieu of a fixed overtime rate. (*Id.* at 1204.) The court found that there was no preemption[10] or applicable collective bargaining exemption and remanded the matter to the trial court to set the matter for trial and adjudicate whether application of the compensation plan resulted in failure of the employer to pay a premium over the regular pay and to determine if a wage order was violated. (*Id.* at 1213.) The court's holding is inapplicable here.

In *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 790, this Court held that the trial and appellate court erred in determining that an employee was an outside salesperson because the courts incorrectly relied upon the federal regulation and interpretation of that regulation when construing the state's definition of "outside salesperson." The Court noted that the state had a regulation directly on point, which focused exclusively on quantity and substantively differed from the federal regulation. (*Id.* at 796-797.) This Court noted that by adopting its own distinct definition of "outside salespersons" the IWC evidently intended to depart from federal law. (*Id.* at 797.) This is clearly distinct from this case wherein there is no state regulation on point. Additionally, the dicta Alvarado relies on, namely a parenthetical wherein this Court describes the *Skyline* holding as the "regular rate of pay for overtime purposes calculated by dividing salary by

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[10] As found by the Court of Appeal, there is no federal law preemption here. "[F]ederal and state laws regarding overtime, as applied to bonuses, do not actually conflict; primarily because there is no express state law providing a formula for calculating bonus overtime. Even though federal law does not preempt state law here, this does not preclude applying federal law where there is no state law regulating bonus overtime." (Slip Op., p. 13.)

no more than 40 hours, notwithstanding federal rule authorizing use of fluctuating workweek" is again irrelevant. (See *Ramirez, supra*, 20 Cal.4th at 795; Opening Brief, p. 27.) Alvarado concedes that he was not paid on a salary basis and Dart did not employ a fluctuating workweek.

Not one of these cases addressed overtime on a bonus. Not one of these cases addressed employees who were paid on an hourly, as opposed to a salary, basis. Additionally, each case was decided before *Marin*, which, as shown above, is the first and only case to actually address overtime on a bonus. *Marin* did not find any of these cases relevant and in fact, never mentioned any of these cases in its opinion.

7. *Huntington Memorial v. Superior Court* Is Inapposite

In *Huntington Memorial*, the issue was whether a short-shift differential should be included in the regular rate of pay when calculating overtime. (*Huntington Memorial, supra*, 131 Cal.App.4th at 911.) In support of its arguments, the employees contended that if not included in the regular rate, the short-shift differential would be a subterfuge or artifice designed to avoid paying overtime and would impose a penalty on them, not their employer. (*Id.*) Here, it is beyond dispute that Dart included the bonus when calculating the regular rate of pay. Only the method of doing so is at issue. *Huntington* is not in conflict with Dart's formula.

Notably, *Huntington* expressly supports the reliance on federal authorities when determining the "regular rate" for overtime calculation purposes. It notes how the "DLSE has stated in several advice letters: '[The] DLSE takes the position that the failure of the IWC to define the term 'regular rate' indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law.'" (*Id.* at 902-903, *internal citations omitted.*) The

court then stated that "[t]hus, even though this case involves California law – the payment of overtime for work in excess of eight hours in *one day* – and federal law requires overtime pay only for work exceeding 40 hours in *one workweek*, federal authorities still provide useful guidance in applying state law." (*Id.* at 903, *emphasis in original.*) There is a void in California law as there is no definition of regular rate. As stated by *Huntington* and the DLSE itself, it is therefore appropriate and necessary for California to adhere to federal standards, which is exactly what Dart did.

The *Huntington* court also noted that under the FLSA, the "regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek *by the total number of hours actually worked by him in that workweek* for which such compensation was paid." (*Id.* at 905, citing 29 C.F.R., § 778.109, *emphasis added.*) This is the exact procedure Dart followed.

Furthermore, *Huntington* relied upon a DLSE opinion letter on the same set of facts as *Huntington*, where the nurses were paid different hourly rates of pay based exclusively on how many hours an employee works in a day. (*Id.* at 907.) The DLSE noted that the effect is that: "the employer is paying a lower hourly rate for the same type of work whenever the employee works overtime. This practice is prohibited by state law, as well as federal law, since it constitutes a *subterfuge which operates to evade the overtime pay laws* by reducing the regular hourly rate whenever overtime hours are worked." (*Id.* at 908, *emphasis in original.*) Dart's formula is not a subterfuge that operates to evade overtime pay laws, and therefore violate of state and federal law, because it is expressly enumerated in federal law: Title 29 of the Code of Federal Regulations, section 778.209(a). As a whole, *Huntington* endorses Dart's formula, and in no way supports Alvarado's formula.

V.

CONCLUSION

Dart respectfully requests that this Court affirm the judgment of the Court of Appeal because the Court of Appeal correctly found that Dart's formula for calculating overtime on bonuses complies in all respects with federal law and does not violate any California law or regulation. As Dart's formula is lawful, as established above, and as each cause of action relies on the same claimed wrongs, all Alvarado's causes of action fail.

Dated: August 29, 2016

Respectfully submitted,

Best Best & Krieger LLP

By: _____

Howard B. Golds
Elizabeth A. Han
Attorneys for Defendant and Respondent
DART CONTAINER CORPORATION OF CALIFORNIA

CERTIFICATE OF WORD COUNT

(CALIFORNIA RULES OF COURT, RULE 8.204(c)(1))

The undersigned counsel certifies the text of this brief, including all footnotes, consists of 13,193 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: August 29, 2016

Respectfully submitted,

Best Best & Krieger LLP

By: _____

Howard B. Golds
Elizabeth A. Han
Attorneys for Defendant and Respondent
DART CONTAINER CORPORATION OF CALIFORNIA

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. August 29, 2016, I served the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 29, 2016, at Riverside, California.

Lisa Ruiz-Cambio

SERVICE LIST

OVERNIGHT MAIL:

Joseph Lavi, Esq.
Jordan D. Bello, Esq.
LAVI & EBRAHIMIAN
8889 W. Olympic Blvd., Suite 200
Beverly Hills, CA 90211

Counsel for Plaintiff, Appellant and Petitioner
Hector Alvarado

Dennis F. Moss, Esq.
15300 Ventura Blvd., Suite 207
Sherman Oaks, CA 91403

Counsel for Plaintiff, Appellant and Petitioner
Hector Alvarado

REGULAR U.S. MAIL:

Clerk, California Court of Appeal
Fourth District Court of Appeal
Division 2
3389 Twelfth Street
Riverside, CA 92501

Clerk, Superior Court of California
County of Riverside
4050 Main Street – 2nd Floor
Riverside, CA 92501

Attorney General
State of California
1300 "I" Street
Sacramento, CA 95814-2919

District Attorney, County of Riverside
2960 Orange Street
Riverside, CA 92501