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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

HECTOR ALVARADO

Plaintiff, Appellant and Petitioner

vs.

DART CONTAINER CORPORATION OF CALIFORNIA

Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT CASE NO. E061645
APPEAL From the Superior Court of Riverside County. Hon. Daniel A. Ottolia. (Super. Ct. No. RIC1211707)

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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ATTORNEYS FOR PLAINTIFF, APPELLANT AND PETITIONER
HECTOR ALVARADO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

This case focuses on one question only: Is Dart's method of calculating overtime compliant with the "'regular rate" requirements of California law?

The Answering Brief of Respondent misapprehends the law, and the basis in the law, that compels reversal of the Court of Appeal's decision herein.

The opening paragraph of Dart's Answer Brief on the Merits makes the bold pronouncement that Dart's overtime calculation methodology "violated no California statute rule or regulation", and Petitioner "bases his argument here,...on nothing more than unsupported and ultimately inapplicable policy." See also Respondent's Brief pgs 18-24 and 35.

Contrary to Respondent's contention, Petitioner's position is grounded in both the law and regulations. The statutory basis of Petitioner's claim is Labor Code Section 510. The regulatory basis of Petitioner's claim is Industrial Welfare Commission Wage Order 1, 8 Cal. Code of Regs. 11010. Both these sources of legal rights and obligations create an obligation upon employers to pay one and one-half times an employee's "regular rate" of pay for daily and weekly overtime and, at times, twice the "regular rate". Petitioner's position is based on the law as properly interpreted and applied.

This case compels the court to determine the application of the

words "regular rate" as they appear in California law to the facts of this case. Given the history of California's Wage Orders, applicable precedent, and the re-enactment of prior "regular rate" language in Wage Orders and the Labor Code after California Courts addressed the issue, it is clear that Dart has failed to properly calculate its employee's overtime compensation.

Respondent relies on a provision of the Code of Federal Regulations for its preferred definition of "regular rate". (Resp. Brief pgs 11-18) California authorities acknowledge a clear distinction between "regular rate" under Federal law and State law that compels rejection in California of any formula where an employer pays less per hour of overtime, as the amount of overtime an employee works increases.

The compelling nature of the California authority interpreting California law in this case is enhanced by repeated legislative action by the IWC, and ultimately passage of Labor Code 510, that did not change the "regular rate" language in the law that was at the heart of the *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239 ("*Skyline*") analysis. "The Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.' [internal citations omitted]." *People v. Overstreet* 42 Cal.3d 891, 897 (1986); *See also Apple, Inc. v. Superior Court*, 56 Cal. 4th 128 (2013). The same rule of construction applies to

quasi-legislative bodies that pass regulations in the wake of published authority on the subject matter of the regulations. *Aleman v. AirTouch Cellular, supra* 209 Cal.App.4th 556, 568 ("Wage orders are quasi-legislative regulations and therefore are construed in accordance with the ordinary principles of statutory interpretation." citing *Collins v. Overnite Transportation Co.*, 105 Cal.App.4th 171 (2003).).

Skyline in 1985 and the Attorney General in 1957 rejected, as antithetical to California's use of the words "regular rate", Federal methods of determining "regular rate" that result in a decrease in the hourly overtime rate with each additional minute of overtime worked. Reenactments of Wage Orders and passage of Labor Code Section 510 after the 1985 *Skyline* decision did not change the meaning of "regular rate", nor embrace the Federal "fluctuating workweek" methodology.

Respondent's position boils down to a belief that since the State Law uses the term "regular rate" and the Federal law uses the term "regular rate", the Federal formula must apply, claiming "California courts have repeatedly endorsed the use of federal law by employers." Respondent's Brief pg. 2, and 11-18. That position ignores the well reasoned Attorney General and Court of Appeal express rejections of the Federal approach, rejections grounded in part on the 8 hour difference in California law and the distinct "purpose" of California overtime law. *Skyline, supra.* 165 Cal.App.3d at 249-250. It also is contrary to a point this Court made in

Morillion v. Royal Packing Co. 22 Cal.4th 575, 592 (2000) "[W]here the IWC intended the FLSA to apply to wage orders, it has specifically so stated."

Another theme of Respondent's Answering Brief is an effort to distinguish fixed payments characterized as "salaries" that constitute all of an employee's non-overtime wages from fixed payments for weekend work, characterized as "bonuses" that constitute part of an employee's non-overtime wages. (Resp. Brief at 30-32). As was demonstrated in Petitioner's Opening Brief, this distinction makes no difference. Whether a "salary" in name, or a "bonus" in name, the common process of dividing a fixed amount of wages by total hours worked each pay period (a number that *fluctuates*) to determine a purported "regular rate" is unlawful given the impact on overtime pay of that process --Reducing the amount paid per hour with each extra minute of overtime worked.

Further, as discussed infra, the "bonus" at issue, as a fixed amount paid irrespective of quantity or quality of work is, per the authority cited by Dart, a "salary".

The employer in *Skyline* applied a Federal computation system that divided the fixed payment amount received by employees in that case by total hours worked during the pay period, regular and overtime. *Skyline*, supra at 247. If an employee, for example, was paid $800 per week and worked no overtime, she earned a "regular rate" of $20 per hour ($800

divided by 40). When the same employee worked 50 hours in a week, under the "fluctuating workweek" methodology, her "regular rate" became $16 per hour, $800 divided by 50. If she worked 55 hours, her regular rate became $14.54 per hour (800 divided by 55 hours). As the "regular rate" decreases, the amount per hour paid for each overtime hour worked similarly decreases.

The foregoing was rejected in *Skyline* as not consistent with "regular rate" as contemplated by the IWC.

Dart's overtime computation policy is substantively as much of a "fluctuating workweek" policy as the policy rejected in *Skyline*. As pointed out in *Skyline*, the Federal fluctuating workweek methodology is characterized by a formula where "the more hours an employee works, the lower the regular rate becomes." *Skyline*, supra at 245.

At Dart, an employee paid $15 per hour for 40 hours in a week who works two weekend days receives $630 for the week ($15 x 40 hours = $600 + $30 for two weekend days = $630. Dividing $630 by 40 hours, yields a regular rate of $15.75. If during the next week there was a *fluctuation* in hours and the employee worked 50 hours instead of 40 and again worked two weekend days, his "regular rate" decreases under Dart's "fluctuating workweek" formula (50 x $15 = $750 + $30 fixed = $780 divided by 50 hours = a fluctuating workweek "regular rate" of $15.60 per hour).

If the next week hours fluctuated again, and the employee worked 55 hours and two weekend days, the regular rate, under the "fluctuating workweek" methodology, would decrease further (55 x $15 = $835 + $30 fixed =$855 divided by 55hours = $15.54 per hour). The fact that the fixed payments for weekend work are divided by total hours worked in a pay period in overtime calculations made by Dart was stipulated to. (Slip Op. 2-3, Appx. 68-70)

Thus, as hours per workweek fluctuate and increase under Dart's formula, just as under the formula rejected in *Skyline*, the actual amount paid per hour decreases. Such approach to overtime calculations is clearly not consistent with "regular rate" under California law.

In *Skyline*, the Court, rejecting "fluctuating workweek", said a method of computation of overtime that would encourage patterns of employment using 10 or 12 hour days would be inconsistent with the Wage Order's regular rate language. *Skyline*, supra at 249.

Respondent takes the position that its formula would not encourage an increase in hours of overtime. Respondent's Brief pg 23-24. However, Dart's formula does encourage extra overtime by making, with each hour of overtime worked, the cost of overtime per hour to go down. A Federal "regular rate" approach with diminishing "regular rates" with each hour worked, clearly encourages employers to schedule more overtime than would be encouraged with a fixed hourly rate based on 40 hours where

increases in overtime do not benefit the Employer with decreasing rates. Under California's methodology, the "regular rate" remains constant and does not decrease as more hours are worked.

Respondent takes the position that the federal "fluctuating workweek" methodology applies, simply because the "fixed amount" in this case is compensation for work on weekends, and is characterized as a "bonus" and the "fixed amount" at issue in *Skyline* was a fixed amount for work on all days, not just weekend days, and called a "salary."

In championing form over substance, Respondent misses the fundamental core of the California authority that defines "regular rate" in a manner different than the Department of Labor definition. In calculation of overtime in California, "regular rate" is NOT A RATE that advantages employers by diminishing the amount overtime costs the employer, per hour, as the amount of overtime an employee works increases.

It is imperative that this Court correct the mistake made by the Court of Appeal. To hold otherwise would invite employers throughout the state to transform hourly pay systems so that employees get daily fixed amount "attendance bonuses" as the bulk of their wages, and thereby perpetrate a subterfuge to avoid overtime obligations that have been the mainstay of California law for decades.

II. ARGUMENT

A. DART, IN A COMPARABLE FACTUAL AND LEGAL CONTEXT, MAKES THE ARGUMENTS REJECTED BY THE COURT IN *SKYLINE.*

Both in this case, and *Skyline,* a Court is called upon to determine whether a specific provision of the Code of Federal Regulations should control the determination of "regular rate" when a fixed amount of wages is part of a compensation scheme. In a painstaking analysis, the Court of Appeal in *Skyline* rejected the application of the Code of Federal Regulations despite a lack of specific regulations in the California law addressing how "regular rate" should be calculated in the context of a fixed salary. Respondent's assertion that the lack of specificity in California law as to the meaning of "regular rate" compels adoption of the CFR's "fluctuating workweek" methodology (Resp. Brief 11-18) is belied by *Skyline*'s rejection of that approach, acknowledged by this Court in *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 795, and *Morillion, supra* 22 Cal.4th at 592. The *Skyline* court's analysis turned on a finding of distinct rights in California law (8 hour day), and a distinct purpose in California law to punish employers for scheduling overtime. *Skyline, supra* 165 Cal.App.3d at 249. Skyline ultimately concluded:

> "Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work. (*California Manufacturers Assn. v. Industrial Welfare Com.*

(1980) 109 Cal.App.3d 95, 111) Remedial statutes should be liberally construed to promote the general object sought to be accomplished. (*Industrial Welfare Com. v. Superior Court, supra,* 27 Cal.3d at p. 713 In view of the dissimilar language and purpose of the California statute and regulation, we conclude that the DLSE has correctly interpreted wage order 1–76 to preclude the use of the fluctuating workweek method of overtime compensation." *Id,* at 250.

Dart's arguments here are the same arguments made by the Employer, and rejected by the Court of Appeal in *Skyline*. Respondent fails to provide a compelling argument as to why the rationale of *Skyline,* and the A.G.'s Opinion before *Skyline,* should not apply with equal force here.

1. <u>Legal Context Similarities</u>

At the time *Skyline* was decided in 1985, the regulation language at issue was contained in IWC Wage Order 1-76 which provided:

"(A) No employee eighteen (18) years of age or older shall be employed more than eight (8) hours in any one workday or more than forty (40) hours in any one workweek unless the employee receives one and one-half (1 1/2) times the employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any one workday or more than six (6) days in any

one workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) 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 twelve (12) hours in any one workday, and for the first eight (8) hours worked on the seventh (7th) workday; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any one workday..."

At the time, the Labor Code did not provide an equivalent provision.

Nowhere in the text of the 1976 Wage Order was there an inkling as to how "regular rate" should apply in a context where an employee receives, irrespective of quality or quantity of work, a fixed amount such as a fixed amount per week, a salary or a fixed bonus for working specific days in a week, as all or part of a compensation package.

Fast forward to the present, and the legal context has not changed. In 2001, the currently applicable Wage Order, IWC Wage Order 7-2001 was enacted by the IWC. It provides:

3. HOURS AND DAYS OF WORK

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school

and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any 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 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...

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary."

In the interim, the Legislature in 2000, responding to an IWC

regulation enacted in 1998 that had temporarily eliminated overtime pay for work over 8 hours in a day, but preserved "regular rate' language, enacted AB 60. It provides in relevant part, at Labor Code §510, consistent with the 2001 Wage Order:

> "(a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any workweek shall be compensated at the rate of no less than one and one-half times the *regular rate* of pay for any employee..."

Neither the IWC nor the Legislature, after the 1985 decision in *Skyline*, ever adopted an overtime calculation methodology that embraced a system that divided fixed amounts of wages by total hours worked--fluctuating workweek. In all the post-*Skyline* enactments, the IWC never said directly or by inference that it was rejecting the Court of Appeal decision on "regular rate" going forward.

With one exception, the IWC, in 2001, and the Legislature with the passage of Labor Code §510, continued not to provide guidance for the calculation of "regular rate." The exception was a codification of *Skyline's* application to a fixed salary that constitutes all of an employee's non-overtime wages. See Labor Code §515(d)(1) and (2) and IWC Wage Order 1-2001, *supra* at 3(a)(1)(c).

2. Factual Similarity Between Skyline and Dart

In support of its position, Dart attempts to argue that *Skyline* is factually inapposite to the instant case. Respondent's Brief pgs. 2 and 29-34. This characterization is, when it comes to the issues that drive the case, woefully inaccurate. In *Skyline,* the employees worked different amounts of time weekly, fluctuating workweeks. Similarly, Dart's employees work fluctuating amounts of time from week to week (Slip Op. 3; Appx 116-126). In *Skyline* the salesmen were paid a fixed payment for their work irrespective of the amount of hours they worked in a week and irrespective of whether or not they worked any overtime. Dart employees are paid a fixed amount as part of their wages when they work weekends, irrespective of the amount of hours they work during the week or pay period, and irrespective of whether they work any overtime. (Appx. 68-70).

In *Skyline*, the rate used for overtime pay was determined through a formula dividing the fixed amount by total hours worked during the pay period, resulting in a situation where the more overtime an employee worked, the lower the amount paid per overtime hour worked. The same facts are operative here. The fixed amounts under Dart's formula are subject to division by the total hours worked, which in turn results in a diminishing amount per hour of overtime worked as the amount of overtime increases. (Pet.'s Opening Brief pgs. 4-8).

Respondent's assertion that the facts are inapposite simply does not

stand up to scrutiny. Although a fixed amount of compensation in one case was 100% of the non-overtime pay and called a "salary", and here the fixed amount is a smaller percentage of the wage package, the calculation methodology in *Skyline* and this case are functionally identical, and central to any analysis of *regular rate*. In both cases, a fixed amount of wages is divided by total hours worked in the pay period, including overtime hours, and not divided by the maximum number of non-overtime hours (e.g. 40 hours in a week).

Juxtaposing the literal assertions in Dart's Brief with *Skyline's* facts, underscores the undeniable similarity of the cases. Respondent's Brief states:

"The fact is that the bonus at issue here was not paid for overtime work, which is fundamentally different than *Skyline*." (Resp's brief pg. 3). In fact, the opposite is true. The "salary" in *Skyline* was similarly not paid for overtime. As the "bonus" in this case, the "salary" in *Skyline* was a fixed amount paid irrespective of whether overtime was worked.

Respondent's Brief goes on to state:

"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." The same was true in *Skyline.* The fixed amount in *Skyline* 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.

Respondent's brief then provides:

"[The fixed 'bonus'] 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." (Resp's brief pg. 3). The same is true as to the fixed salary in *Skyline*. There is no indication in the decision or in logic that would compel a conclusion that the fixed salary in *Skyline* would "encourage or discourage overtime", and there "is no logical connection between the payment of the [salary in *Skyline*] and whether the employee receiving the [salary] ultimately worked overtime in the same given week".

Dart represents (Resp's Brief pg. 3) that the facts in this case are "entirely unlike the facts of *Skyline* where the direct issue was how to calculate pay for the overtime hours that were the subject of that litigation". That conclusion is absurd. The facts here are clearly not at all unlike the facts in *Skyline*, and the issue in both cases is how to calculate pay for overtime hours when a wage package includes "fixed" amounts.

Respondent's Brief then goes on to claim that the fixed amount paid by Dart was intended to encourage Dart's workers to appear for less desirable shifts. (Resp's Brief pg. 3). This intent is as irrelevant to the applicable analysis as the intent of the fixed payment in *Skyline* to

encourage employees to appear for all shifts. In both cases, the fixed payment is an implied contract exchange for labor performed.

Toward the end of page 3 of Dart's Brief, Dart claims that factoring a fixed bonus into the "regular rate" is an expense it took on so that workers would report as scheduled on weekends, i.e. perform their jobs as scheduled. It then proclaims "How this 'encourages' Dart's assignment of overtime is not explained by Alvarado, nor can it be." (See also Respondent's Brief pgs. 23-34). Similarly, *Skyline* factored its fixed payments into overtime calculations so that workers will perform their job as scheduled. That which Respondent claims Alvarado supposedly cannot explain is completely irrelevant. *Skyline's* "encourage" reference condemns a methodology that *encourages* an employer to work employees increasing amounts of overtime by using a formula that decreases the pay rate, lessens the cost of the overtime burden on the employer, as the amount of overtime an employee works increases.

In *Marin v. Costco Wholesale Inc.* (2008) 169 CA4th 804, 819, the court succinctly summarized this *Skyline* concept as follows in a discussion of overtime on flat rate bonuses:

"In the case of a true flat sum bonus [Dart's position in this case] 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 [encourage employers to schedule 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." *Id*, 169 CA 4th at 819. (Emphasis Added).

3. <u>Similarity of Arguments</u>

In *Skyline*, in the absence of specific provisions in the California Wage Order on how to calculate "regular rate" when an employee's non-overtime wages included a fixed minimum amount, the Employer argued:

> (1) federal law provides for the fluctuating workweek method of overtime computation, and in the absence of California law or regulation to the contrary, and in view of the similar language and purpose of the California and federal statutes, federal law should be followed; (2) neither the California Labor Code not the Industrial Welfare Commission wage orders preclude the use of the fluctuating workweek method of overtime compensation; (3) the DLSE's operations and procedures manual which interprets wage order 1076 as prohibiting the use of the fluctuating workweek is an improper exercise in rule making and was not promulgated in accordance with the law. *Skyline,supra* 165CA 3d at 246.

Dart's arguments here mimic the employer arguments rejected by the Court of Appeal in *Skyline*. Here Dart claims:

(1) The fluctuating workweek calculation methodology it uses applies to the fixed amount element of the wages in this case because no California law or regulation establishes how to calculate "regular rate" when an employee receives a fixed amount, and the terminology "regular rate" is in both Federal and State law. Resp's Brief pg. 1, and 11-18. (2) Neither the California Labor Code, nor the wage orders, preclude use of the fluctuating workweek methodology adapted by Dart . Resp's Brief pg. 2 and 18-25, and (3) the DLSE's manual is of no force and effect Resp's Brief pg. 2 and 34-36.

Significantly, the precise arguments made by Dart, were rejected by the Court in *Skyline.*

Here, Dart argues that, in a context where State regulations are not specific, federal regulations explain how to calculate regular rate when there is a "fixed bonus", specifically 29 C.F.R. §778.209(a) and §778.110 In *Skyline*, the employer took a comparable position, that 29 C.F.R. §778.114, which specifically controlled calculation of regular rate on a "salary" under Federal Law, controlled in the absence of State law or regulation defining how to calculate "regular rate" on a "salary". Despite the foregoing argument in *Skyline,* the Court looked to differences in the language of and intent behind California and Federal law, and discerned that application of the Federal Regulation is not appropriate on account of those differences. The same result is compelled here.

As demonstrated above, the facts, the legal context, and the arguments made by Dart here and the employer in *Skyline* are not at all dissimilar. Having failed to successfully distinguish *Skyline*, Dart, at a minimum, needed to make a plausible argument why the language and intent of California overtime law that *Skyline* concluded compelled rejection of "fluctuating workweek", should not apply when the fixed amount at issue in the calculation of overtime is only a small part of the non-overtime wages. Respondent failed to make such an argument because, as a matter of reason, the *Skyline* case and rationale applies any time a formula is employed that results in a diminishing regular rate as overtime is increased.

B. DART'S CONCLUSION THAT PETITIONER RELIES EXCLUSIVELY ON POLICY IS PATENTLY WRONG.

Respondent's Brief repeatedly takes the position that both Petitioner and the Division of Labor Standards Enforcement have taken policy positions that are not tethered to the law. In doing so, Dart echoes a central error in the Court of Appeals decision. (Resp's Brief pg. 18-22; Slip Opinion pg. 25). Both the Court of Appeal and Respondent got it wrong.

The "regular rate" laws, upon which Petitioner relies, are decades of Industrial Welfare Commission (IWC) Wage Order enactments requiring that daily and weekly overtime be paid at multiples of the "regular rate".

The IWC's authority to promulgate Wage Orders derives from the California Constitution. The California Constitution empowers the legislature to delegate responsibility for regulations of wages, hours, and working conditions to a commission.[1] In 1913, pursuant to its Constitutional power, the legislature created the IWC to protect the interest of working women and children. *Industrial Welfare Commission v. Superior Court* 27 Cal.3d 690, 700. In the 1970s, the IWC's mandate expanded to encompass all California workers. *Id.*

Given the authority granted to the IWC by the Legislature, the IWC is a quasi-legislative body, vested with the authority to regulate the wages, hours, and working conditions of California employees. *Id.* 701-703. In as much as the IWC is a quasi-legislative body, interpretation of Wage Orders enacted by the IWC comports with the rules governing interpretation of statutes.[2]

In 1911, long before the federal government enacted overtime protections for workers, California enacted the first daily overtime law setting the eight-hour daily standard. For decades, with a two year

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[1] Cal. Const. Art. 14 § 1. "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers."

[2] *Aleman v. AirTouch Cellular, supra* 209 Cal.App.4th at 568

exception between 1998 and 2000, the IWC has embraced the 8 hour day in the regulations it has enacted, compelling overtime pay at multiples of the "regular rate" for work in excess of 8 hours in a day and 40 hours in a week. With the passage of Labor Code 510, the Legislature provided a further legal basis for the conclusion that Dart has violated the law, embracing the IWC's "regular rate" language. The law set forth in the IWC Wage Orders, and in the Labor Code, as interpreted by the Attorney General, and by the Courts, is the basis of Petitioner's position in this matter. The "public policy" at issue is grounded in decades of California law.

C. THE 1957 OPINION OF THE ATTORNEY GENERAL IS A PIVOTAL FACTOR IN THE ANALYSIS OF "REGULAR RATE" UNDER CALIFORNIA LAW.

The May 1957 Opinion of the Attorney General (A.G. Opinion No. 57-29) has been, to use a colloquialism, improperly dissed by Dart. Resp's Brief pg. 36-38.

The A.G.'s opinion is significant to the outcome of this case for three important reasons.

First, it correctly interprets the expression "regular rate" as it appears in California law, and in so doing, pronounces that the Federal Government "fluctuating workweek" methodology is not only inapplicable, it is inconsistent with the term "regular".

Second, the Opinion is entitled to significant deference especially when there was, at the time it is written, no judicial authority on the meaning of "regular rate" under California law. *People v. Gnass* (2002) 101 CA 4th 1271, 1305.

Third, subsequent to publication of the A.G. Opinion , the IWC (to whom the opinion was addressed), and the Legislature, passed overtime laws using the term "regular rate", never deviating from the AG's opinion, never embracing "fluctuating workweek", and never expressing an intent to embrace Federal Law.

The Attorney General was carrying out a statutory duty in responding to the IWC's 1957 inquiry. Govt. Code 12519.

Significantly, the AG focused, as courts are directed to do, on "plain meaning" correctly pointing out how there is nothing "regular" about a rate that changes as overtime increases, and pointing out how *overtime* is by definition, *irregular*, and therefore, overtime hours should not be used in determining "regular rate". The AG concluded that the California Wage Orders' "regular rate" language precludes use of a "fluctuating workweek" methodology, which it correctly defined "as a method of determining the hourly 'regular rate' of pay by dividing the amount regularly paid during the pay period...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..." See question posed to the A.G. at *Id*, pg. 168, and the answer at 170-172.

Dart does exactly what the A.G. said was not contemplated under California law. Dart takes the fixed regular amount of $30 paid for two weekend days, or $15 for one weekend day, whether or not overtime is worked, and divides that amount by the total hours worked during the pay period, including overtime hours, "as a basis for computing overtime pay".

The A.G. went so far to say that computation method "is entirely inconsistent with the [IWC] commission orders, and contrary to the general legislative scheme." The A.G. stated "Overtime should not be used in the computation of regular rate, and "it perceived no reason to more clearly spell out a prohibition against the 'fluctuating workweek' methodology in Wage Orders". *Id*, at 172

The court in *Skyline* referenced the AG's Opinion as follows:

> "The Attorney General's opinion stated that the fluctuating workweek method was inconsistent with the IWC wage orders. The IWC, on notice of the Attorney General's May 1957 opinion, enacted regulations shortly thereafter without expressly permitting the fluctuating workweek and has continued to omit permission of that method of computing overtime compensation from subsequent wage orders. It seems apparent that, correct or incorrect, the IWC relied on

the Attorney General's opinion and did not consider it necessary to add language specifically prohibiting the fluctuating workweek." *Skyline Homes, supra* 165 Cal.App.3d at 252-253.

The significance of this statement in *Skyline*, takes on additional meaning given that this court has since held:

"When construing a statute, we may presume that the Legislature acts with knowledge of the opinions of the Attorney General which affect the subject matter of proposed legislation. (*Cal. State Employees Assn. v. Trustees of Cal. State Colleges* (1965) 237 Cal.App.2d 530, 536" *Burden v. Snowden* 2 Cal. 4th 556, 564 (1992).

Subsequent to *Skyline*, with *Skyline* doubling down on the A.G.'s opinion, the IWC continued to adopt Wage Orders that included the "regular rate" language unmodified by anything that comes close to adoption of the "fluctuating workweek" computation method. (e.g.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; and 2001 Wage Order referenced *supra.*)

The role of the Court is to ascertain and effectuate the legislative intent." *Laurel Heights Improvement Association v. Regents of U.C.* (1993) 6 Cal.4th 1112, 1127. In the ascertainment of legislative intent, the post-*Skyline,* post -A.G. Opinion enactments by the IWC and the Legislature, incontrovertibly compel rejection of the Court of Appeal decision herein. *People v. Overstreet* (1986) 42 Cal.3d 891, 897 ["the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes ' "in the light of such decisions as have a direct bearing upon them" ' "]. The IWC and the Legislature, when it selected the words "regular rate" from pre-*Skyline* Wage Orders, never signaled an intent to supersede the holding of *Skyline,* or the A.G.'s Opinion. There is nothing in the post-*Skyline* enactments to suggest the Legislative bodies meant to adopt the "fluctuating workweek" computation method. On the contrary, if the Legislature or IWC had wanted to make "fluctuating workweek" applicable, it would have made little sense for it to simply reiterate the pre-*Skyline* Wage Order verbiage without reference to Federal Regulations or other language distancing the new laws from *Skyline* and the A.G. Opinion. If the Legislature, or the IWC, did not agree with *Skyline* or the A.G., they had opportunities to rectify any error each time new wage orders were enacted, or when Labor Code 510 was enacted.

Contrary to Dart's position, as the foregoing history establishes, the law does not permit Dart's overtime computations, computations inconsistent with "regular rate" as that term has been used in California law for decades.

D. THE FIXED BONUS IS A "SALARY"

Based on the foregoing, California's rejection of the "fluctuating workweek" compels reversal of the Court of Appeal decision irrespective of whether the "fixed bonus" is a "salary". Nonetheless, Dart's position that the fixed amount it pays for weekend work is not a "salary" is belied by the authorities it cites. Resp's Brief 30-31.

Dart points out: " '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]." Resp's Brief pg. 30. Dart employees are paid an hourly wage **plus** a salary, (fixed rate of pay), when they worked weekends, irrespective of the number of hours worked during the pay period.

Dart goes on to make the further point, citing *Negri. supra*:

> "[T]he 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 a 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).". Resp's Brief pg. 31 (Emphasis Added)

The foregoing definition is clearly applicable here. During each pay period in which Dart's hourly employees work weekends, "**part** [of their] compensation" is a fixed amount of $15 for work on a Saturday or Sunday that "***is not subject to reduction because of variations in the quality or quantity [number of hours] of the work performed"*** during the pay period.

Dart's argument that the "bonus' was subject to reduction because the employee had to be scheduled to work a weekend shift (Resp's Brief pg. 32) is unavailing because that is no different than the fact that an employee employed exclusively on a salary basis is subject to not being scheduled to work during a week, and therefore, does not get paid his salary for the week. Respondent's further assertion that Petitioner conceded he was paid hourly wages, not a fixed rate of pay (i.e. salary) is contrary to the stipulated facts that establish Petitioner was clearly paid both hourly wages and a fixed rate for pay periods during which he worked on weekends.

E. *SKYLINE'S* "REGULAR RATE" ANALYSIS IS DETERMINATIVE.

Respondent emphasizes differences between the fixed rate in *Skyline*, called a "salary", that constituted all of the employees' wages, with

the fixed rate in Dart, called an "attendance bonus", paid as a small part of the employees' wages, as a factor that warrants the Court of Appeal conclusion that *Skyline* does not apply.

To this end, Dart points out how *Skyline* remarked that it did not apply to other than salaried employees. Resp's Brief pg. 27. What *Skyline* actually provides in this regard is:

> "[T]he method of computing overtime compensation for employees other than salaried employees is not before us... 'The dispute in this case centers on the proper method of overtime computation for employees who receive a fixed salary but work a variable number of hours each week. This case does not concern employees working on a commission, piece rate or other wage basis.' **There has been no showing that those employees are similarly situated to salaried employees.**" *Skyline*, *supra* at 254. (Emphasis Added)

Here, aside from the fact that the "fixed attendance bonus" is a "salary" (See Argument D. supra), the record establishes that Dart's employees "*are* similarly situated", experiencing a pay scheme that divides fixed amounts by all hours worked in a pay period in the calculation of overtime. Instructive on this issue is *Lujan v. Southern California Gas Co.* (2002) 96 CA 4th 1200 where the Court applied *Skyline* to a fixed wage that manifested itself as a fixed amount per day on some days.

In further support of the contention that *Skyline* only applies to *Skyline-like* salaries, Dart cites *Marin, supra* 189 CA 4th at 812-813.

Marin comments that *Skyline* was concerned with a fixed "salary" and the specific problem of calculating overtime when salaried employees work variable hours. The issue is the same in this case, the problem of calculating overtime when employees who earn, in part, a fixed wage, work variable hours.

Marin also referenced that *Skyline* did not specifically address "bonuses". This assertion fails to recognize that *Skyline* did address "regular rate" under California law applied to fixed wage payments, the issue that drove the *Skyline* holding.

Marin recognizes that *Skyline* dealt with a "formula that encouraged 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." *Id,* at 813. This factor, that distinguished *Marin* facts where the "bonus" was not a fixed rate bonus, from *Skyline*, is clearly not a distinguishing factor here. *Id.*

One final distinguishing factor referenced in *Marin* was a factor not clearly established in *Skyline*. *Marin* asserted that *Skyline* was not paying overtime for work over 8 hours in a day. *Marin, supra* 169 CA 4th at 812.

Whether or not this is true, *Skyline* makes clear that given its rationale, this fact does not make a difference – per *Skyline*, any system that

effectively lowers an employer's cost per hour as more overtime is worked is prohibited:

> "Skyline [the Employer not the case] counters with the argument that the fluctuating workweek does not conflict with wage order 1-76 because an employee who worked more than eight hours a day, but less than 40 hours in a week, would be compensated for overtime by utilizing the same formula as if the employee worked over 40 hours. For example, if an employee worked 39 hours in one week but 12 hours in one day, one would simply divide 39 into weekly salary and determine overtime compensation for the extra four hours worked in one day in that manner. **This argument 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 that would encourage patterns of employment using 10 or 12 hours days would be inconsistent with wage order 1-76.**" *Skyline, supra* 165 Cal.App.3d at 254. (Emphasis added).

The system Dart employs encourages 10 -12 hour days, just as the system in *Skyline*. A 10 hour or 12 hour day at Dart costs Dart less per overtime hour than an 8.5 or 9 hour day.

F. THE DLSE MANUAL'S APPROACH TO FIXED SUM "BONUSES" IS APPLICABLE HERE

Dart inaccurately asserts that DLSE Manual 49.2.4.2 is inapplicable to the facts of this case. Resp's Brief pg. 34-35. DLSE Manual 49.2.4.2 provides, in relevant part:

> "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.**" DLSE Manual at 49.2.4.2 (Emphasis added).

Here, the "bonus" at issue fits within this section of the Manual. A

fixed $5.00 per day referenced in the Manual Section, is not unlike Dart's fixed $15 per weekend day in Dart's program. As the DLSE accurately points out: "To allow [either a $5 per day bonus or a $15 per weekend day bonus] to be divided by the total hours instead of straight time hours would encourage, rather than discourage the use of overtime".

Dart's representation that its "bonus" was not designed to ensure an employee stays employed is not supported by the record, but more importantly misses the DLSE's point that, fixed payments are not incentives for more productivity like production bonuses or piece work systems, but are designed as part of the consideration for work irrespective of the amount of time or effort put in.

Dart further asserted that the DLSE Manual provision at issue is inapplicable because it was not tied into a statutory touchstone and relied solely on policy. Resp's Brief at 35. In making this assertion Dart failed to address the clear interrelationship between section 48 and 49 of the Manual. Section 48.1.4 and 48.1.5 address the legal basis for California's interpretation of "regular rate", while Section 49 applies section 48 to "Bonus" scenarios. (See Pet's Opening Brief pg. 35-37.).

Marin, supra (2008) 169 CA4th 804, 817-818, makes the salient point that DLSE Manual Section 49.2.4.2 and 49.2.4.3, with its requirement that the divisor in overtime calculations not include overtime hours, is consistent with *Skyline.*

G. DART'S REJECTION OF POST-*SKYLINE* AUTHORITY FAILS TO APPREHEND THE SETTLED NATURE OF CALIFORNIA'S REJECTION OF "FLUCTUATING WORK WEEK".

Respondent's Brief at pgs.39-42 claims that the validation by several Courts of *Skyline*, in *Alcala v. Western Ag Enterprises* (1986) 182 CA 3d 546, 551, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, *Ghory v. Al-Laham* (1989) 209 Cal.App.3d 1487, *Lujan supra* (2002) 96 Cal.App.4th 1200, *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, and *Huntington Memorial v. Superior Court* (2007) 131 Cal.App.4th 893, cited in Petitioner's Opening Brief at pgs.20-31, are all inapplicable. For the reasons stated, supra, Respondent's position is not well taken especially since those cases, all involved later versions of Wage Orders that reenacted "regular rate" language, and all were in a position to disagree with the *Skyline* opinion. As pointed out above, *Lujan, supra,* 96 CA4th 1200, is especially informative because it makes clear the applicability of *Skyline* to a fixed rate context that does not involve a weekly or monthly salary. *Huntington Memorial, supra,* similarly rejects a pay plan that effectively reduces overtime pay as overtime increases in a non-salary context.

H. FEDERAL LAW DOES NOT SUPPORT DART

Petitioner's Opening Brief pointed out how, given 29 CFR 778.502 and 29 CFR 778.20, Dart's reliance on 29 CFR 778.209 is not justified

under Federal Law. (Pet's Opening Brief pg. 37-39.). Dart's Answering Brief does not undermine this analysis. 29 CFR 778.502 provides:

> "(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"
>
> "(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."

A fixed amount for working a particular scheduled day does not qualify as a bonus given the foregoing. Such payment is not for "extra effort" or "loyal service" or a "gift". It is Dart's valuation of market conditions, the amount necessary to get employees to work undesirable shifts, days, not unlike a fixed graveyard shift premium. It is part of an implied in fact wage contract that regularly pays employees $15 for work on Saturdays and Sundays, not unlike the hourly wages paid for work

during all scheduled hours.

> Dart's Answering Brief claims 29 CFR 778.502 does not apply. "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." Resp's Brief pg. 17.

These assertions do not stand up to scrutiny. Hourly paid employees are not guaranteed their wages each week either. They can be terminated, or their wages can be prospectively reduced, just as Dart can prospectively discontinue the weekend pay plan. Having to earn the Attendance Bonus by "showing up for regularly scheduled weekend shifts" is no different than earning hourly wages by showing up for regularly scheduled weekday or weekend shifts. Not being contractually entitled to receive the Attendance Bonus indefinitely is no different than not being entitled to hourly wages at a rate above the minimum wage indefinitely. An employer has a right to change hourly, "bonus", salary, or any other wage programs applicable to any at will employee so long as lawful minimums are paid.

"[A]n employer may unilaterally alter the terms of an employment agreement, provided such alteration does not run afoul of the Labor Code. [cite omitted] see 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 236 [unilateral reduction in wage]." *Schachter v. Citigroup* (2009) 47 Cal. 4th 610, 619.

"The at-will presumption authorizing an employer to discharge or demote an employee similarly and necessarily authorizes an employer to unilaterally alter the terms of employment, provided that the alteration does not violate a statute or breach an implied or express contractual agreement. (*Scott v. Pacific Gas & Electric Co., supra...*" *Schachter, supra* 47 Cal. 4th at 620.

Dart's analysis of 29 CFR 778.203 is similarly flawed. 29 CFR 778.203 provides, in the part not addressed by Dart's Brief, that the Saturday or Sunday premium being paid "cannot be credited toward statutory overtime due". Here, with Dart dividing the fixed $15 per weekend day by all hours, including overtime hours, it is clearly being "credited toward statutory overtime due" It is funding the overtime due by paying in part for the straight time part of the overtime due. Dividing $15 by 50 hours worked in a week applies 30 cents per hour of the bonus to each straight time and overtime hour, literally crediting $3.00 of the bonus (10 hours of overtime x 30 cents) toward Dart's overtime obligation.

III. CONCLUSION

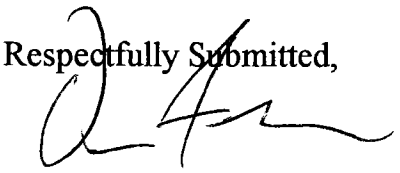
" '[P]ast decisions teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702" *Ramirez, supra* (1999) 20 Cal.4th at 794-795.

In this matter, the foregoing, and a history of statutory construction going back close to 60 years that has repeatedly rejected "fluctuating workweek" computation methods, should ultimately inform and control the outcome herein.

In the absence of reversal, "attendance bonuses" for every day of the week will become de riguer throughout the State, and hourly rates will plummet on account of an undermining of sensible regulation of overtime computation in California that has been part of the legal landscape since at least the 1950's.

Dated: September 19, 2016

Respectfully Submitted,



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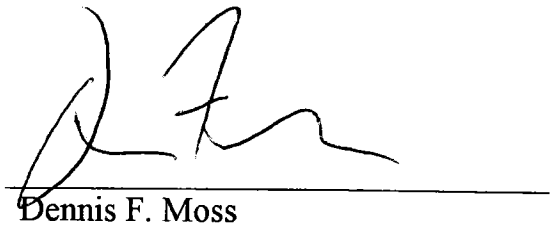
RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 8,271 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: September 19, 2016



Dennis F. Moss

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on September 19, 2016 declarant served the APPELLANT'S REPLY BRIEF by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of September, 2016 at Sherman Oaks, California.

Lea Garbe

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