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Case No. S232607

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR ALVARADO

Plaintiff and Petitioner

v.

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 (Superior Court Case No. RIC1211797)

APPLICATION TO FILE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER HECTOR ALVARADO

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ATTORNEYS FOR AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

APPLICATION TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rules of Court, rule 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests permission to file the attached brief as amicus curiae in support of Petitioner, Hector Alvarado ("Petitioner") in his appeal submitted to this Supreme Court and against Respondent, Dart Container Corporation of California ("Respondent").

The issue presented in this case is of fundamental importance to California employees because it addresses how employers in California must lawfully calculate and pay their overtime wages under the California Labor Code and related authorities. Respondent pays its employees a shift premium for being scheduled to work and completing a shift on a weekend day, which it incorrectly deems an "attendance bonus." The employer then relies upon inapplicable federal bonus calculations and unlawfully factors overtime hours into its calculation of the employees' regular rates of pay resulting in a systematic underpayment of overtime wages to all employees under both California and federal authority. The employer's miscalculation of the regular rate of pay also violates well-established California public policy protecting employees and ensuring they are promptly paid all wages owed, including overtime. If the employer is permitted to continue using its calculation methodology unabated it will adversely impact Respondent's employees as well as all California employees and the CELA members who advocate their interests.

CELA is a statewide organization of attorneys representing employees in termination, discrimination, wage and hour, and other employment cases, and helps its members protect and expand the legal rights of California's workers through litigation, education and advocacy. The outcome of this case will impact CELA members directly, but more importantly, will determine whether the California employees that CELA's members represent are paid all overtime wages they are owed under California law. It is critical to the effective enforcement of state overtime requirements and to the advocacy CELA's members provide California employees to ensure and achieve the objectives of the public policy embodied in the state overtime laws—protecting employees by discouraging long working hours through the imposition of overtime premium wages of 1.5 times the regular hourly wage rate. Respondent's policy and practice is unlawful under both California and federal authority in applying overtime hours worked to the regular hourly wage rate calculation. California's employment lawyers have an interest in the development of case law that correctly and coherently applies the California Labor Code and the Department of Industrial Relations, Industrial Welfare Commission ("IWC") Wage Orders, and that does so while affording due concern to the fundamental public policy of protecting California workers.

The focus of CELA as an amicus is to amplify and expand upon points that are central to determining how to correctly calculate the regular hourly rate under California authority. The primary issue CELA addresses is ensuring that employers do not dilute blended regular rates that result from two different straight time wage

rates by factoring overtime hours worked into the regular rate calculation. This practice by employers leads to the untenable result where employees receive less wages as they work more overtime hours, and is contrary to both California and federal authority.

In accordance with Rule 8.520 the California Rules of Court, below applicants represent that this amicus brief was authored by CELA's undersigned counsel. No counsel for a party or party to the pending appeal participated in drafting this Brief, nor did they contribute financially or otherwise to its preparation or submission.

CELA respectfully requests that the Court accept and file the attached Amicus Brief in this case for the reasons set forth in this application and in the Brief.

Dated: December 5, 2016

Respectfully submitted,

Richard E. Quintilone II
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QUINTILONE & ASSOCIATES
Attorneys for *Amicus Curiae* California Employment Lawyers Association

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AMICUS CURIAE BRIEF

I. INTRODUCTION

CELA as amicus supports Petitioner Hector Alvarado ("Petitioner") and the employees of Respondent Dart Container Company ("Dart" or "Respondent"). Respondent violates California and federal law by incorrectly defining a premium it pays employees to work weekend shifts as an "attendance bonus." It then unlawfully factors overtime hours worked into the determination of the regular hourly rate of pay. The inevitable result of Dart's miscalculation is systematic underpayment of overtime hours to California employees who unlawfully receive less overtime pay as they work more overtime hours.

CELA respectfully submits this Amicus Brief to this Supreme Court in supplemental support of Petitioner's Opening and Reply Briefs. On behalf of all California employees and their advocates, CELA requests the opportunity to further focus the inquiry by addressing Dart's unlawful rate calculations, and the resulting violations of California law and fundamental public policy.

Respondent has explained the scope of the inquiry on appeal as raising "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.)" (Respondent's Brief, p. 8). Respondent's policy is to pay a separate lump sum "attendance bonus" of $15/day up to a maximum of $30/week to work on the weekend. (AA at p. 069, para. 30). This is simply a way of stating Dart agrees

to pay $15/day for a weekend shift premium, in addition to the wages employees are paid for working their regular hours during the week.

Respondent frames the issue in terms of paying a "bonus in the same pay period in which it is earned," but Respondent has incorrectly termed the premium it pays for weekend shifts as an attendance bonus. As Respondent's method of calculating overtime is unlawful, the Court of Appeal's decision in *Alvarado v. Dart Container Corp. of California* (2016) 243 Cal. App. 4th 1200, 197 Cal. Rptr. 3d 304, review granted and opinion superseded, 369 P.3d 553 (Cal. 2016) ("*Alvarado*") must be reversed.

CELA has therefore focused as an amicus on addressing and establishing the following points:

1. Respondent's attendance bonus is not a bonus, but is instead a premium paid to employees for working a weekend shift, and employees are paid two different regular rates during the same workweek for labor performed. An appropriate regular rate calculation is therefore the weighted average approach under 29 CFR § 778.115;

2. Under both California and federal authority, overtime hours worked must be excluded from the regular rate calculation used to calculate and pay the resulting overtime premium. California law is more restrictive than its federal counterpart to promote the public policy of protecting California employees and in response to the federal fluctuating workweek scheme and California law must be a enforced;

3. Both the Court of Appeal and Respondent have improperly disregarded the fundamental California public policy considerations of protecting California employees and ensuring they receive prompt payment of all wages owed;

4. Both Respondent and the Court of Appeal have also afforded inadequate deference to the Division of Labor Standards Enforcement ("DLSE"), as the agency designated for interpreting, applying, and enforcing California's labor laws, and to the interpretations and guidance provided by the DLSE in its Enforcement Policies and Interpretations Manual ("DLSE Manual"); and

5. This Court's *de novo* review should consider the argument and analysis provided by both Petitioner and CELA establishing that Respondent's "attendance bonus" is not a bonus but is instead a shift premium, and including establishing that 29 CFR § 778.203 defines it as a shift premium for working Saturdays and Sundays and that Respondent has artificially labeled regular wages as a bonus under 29 CFR § 778.502.

Respondent also relies on its own selected federal regulations (29 CFR § 778.209(a) and 29 CFR § 778.110) as they pertain to bonuses to justify its calculation methodology. However, Respondent's method for calculating overtime is the "fruit of a poisonous tree," as it incorrectly labels weekend shift premiums as a bonus and miscalculates the underlying regular hourly rate by including overtime hours worked in its calculation.

Respondent claims California courts have endorsed using such federal calculations in the absence of state law, but it only finds this alleged silence because

it incorrectly terms the premium it provides for working weekends as a bonus. There is no silence when it is properly considered for what it is—a **shift differential** or **shift premium**. As there is no federal bonus related regulation on point, and there is binding state precedent establishing the "attendance bonus" is not a bonus, 29 CFR § 778.209(a) should be inapplicable. California authority is far from silent with respect to shift premiums and Respondent has incorrectly calculated overtime under the very line of authority it relies upon.

II. ARGUMENT

A. Dart's "Attendance Bonus" Is in Fact a Shift Premium for Working Weekends, and a Blended Regular Rate Calculation Should Apply

Respondent's choice to define the $15 premium it pays employees to work a weekend shift as an "attendance bonus" is not controlling, as the facts and evidence reveal it is properly classified as a shift premium or shift differential.

1. Statutory touchstones under California and the regular rate of pay under California and federal authority

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. (California Labor Code § 510(a); 8 C.C.R., § 11070.) Contrary to Respondent's contention that Petitioner's calculation methodology lacks a statutory touchstone, Petitioner has explained: "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 Reply Brief, p. 1).

Calculation of the regular rate of pay is governed by 29 CFR §778.108, which explains the "regular rate" of pay "cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract...," and expressly notes "[t]he Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed - an "actual fact"" (*Id.*) (citations omitted) (emphasis added). CELA submits the salient issue before this Supreme Court is Respondent's unlawful practice of miscalculating the regular hourly rate of pay used to calculate the overtime premium of 1.5 times that rate. Even setting aside the misnomer of Dart's "attendance bonus," Respondent's policy and practice of factoring overtime hours worked into the regular rate calculation results in a diluted regular rate and unlawfully underpaid overtime compensation.

The Court of Appeal declined to consider Petitioner's argument that the "attendance bonus" was not a bonus as untimely because Petitioner's counsel raised it the first time at oral argument. (*Alvarado*, at 316, fn. 1) (this authority included *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893; *Walling v. Youngerman–Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424–425,; 29 CFR § 778.203 (premium pay for work on Saturdays, Sundays, and other "special days"); 29 CFR § 778.327(b) (temporary or sporadic reduction in

schedule); and 29 CFR § 778.502 (artificially labeling part of the regular wages a "bonus")). Each of these statutory touchstones, along with additional California and federal authority, should have been considered by the Court of Appeal, and should also be by this honorable Court after it granted Review.

The Court of Appeal found no good cause for considering the threshold argument that the attendance bonus is actually a shift premium rather than a bonus: "without suggesting whether plaintiff's new theories and legal authority have merit, we decline to consider them because plaintiff has not demonstrated good cause for raising them for the first time during appellate oral argument." (*Alvarado*, at 316, footnote 3). There is good cause for doing so now, as Respondent's justification for its overtime calculation is founded upon the presumption that the "attendance bonus" is a bonus, under the specifically selected authority of 29 CFR § 788.209(a).

Also, to whatever extent any argument that the attendance bonus is a shift premium was not briefed before the Court of Appeal, Petitioner has made the arguments before this Court in his Opening Brief section entitled "Federal Regulations Do Not Support the Overtime Plan Adopted by Dart," and again addressed this line of argument in his Reply Brief. (Petitioner's Opening Brief, p. 37-40; *see also*, Reply Brief, p. 33-36). Respondent provides little response in its Answer Brief to Petitioner's on-point authority, focusing instead on arguing the attendance bonus satisfies the definition of a bonus under 29 CFR § 778.502(a), that 29 CFR 778.203 does not apply, and that it correctly calculates overtime under 29

CFR § 788.209(a) and 29 CFR § 788.110. (Respondent's Brief, p. 16-18). These arguments are refuted by the application of relevant authority and the record.

2. Dart's calculation methodology wrongfully presupposes its weekend shift premium is a bonus under federal regulations

Respondent claims the "Attendance Bonus falls squarely in line with the definition of bonuses in the federal regulations." (Respondent's Brief, p. 17, citing 29 CFR § 778.502(a).) Dart's cited CFR Section is interestingly entitled "Artificially labeling part of the regular wages a "bonus," and that is exactly what Dart is doing here. The section instructs that: "[t]he term [bonus] is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract…." 29 CFR § 778.502(a). A "general rule may be stated wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply." 29 CFR § 778.502(e).

Here, as part of the employees' implied or actual employment contracts with Dart, they are paid a regular hourly rate, and if they work a weekend day, they also receive a shift premium of $15.00 per day. However, Respondent is doing exactly that which section 778.502 is expressly intended to prevent—artificially labeling part of the regular wages a "bonus." "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, para.

3.) 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, para. 3.)" (Respondent's Brief, p. 5) (emphasis added).

Dart's policies specifying the details of the attendance bonus serve as a contract in this instance, meaning the employee Class Members are entitled to receive the payment under their regular wage contracts (as addressed in 29 CFR §778.502(a)). If they are scheduled to work a weekend shift and complete the shift, they are contractually guaranteed a $15 payment. For the same reasons, the employee Class Members are guaranteed a fixed or determinable sum as wages each week under these same terms. As a result, "no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply" under 29 CFR §778.502(e).

There is no need for Respondent to turn to the federal provisions it cites because the attendance bonus is not a bonus under the very federal authority Respondent relies upon. It is also inapplicable under the appropriate prism of calculating the blended regular rate, or weighted average, when two separate regular rates are paid during a workweek or pay period.

3. The appropriate "regular rate" calculation for the weekend shift premiums is the weighted average approach under 29 CFR §778.115

Respondent paid Petitioner and the other similarly situated employee Class Members two types of "regular rate" wages, a first for their "straight-time rate," and

a second for a shift differential straight-time rate. Dart's "attendance bonus" is paid as a premium for completing a regularly scheduled weekend shift. As employees were paid at two different regular "straight-time" rates during a work week, an appropriate approach for calculating the regular rate is a "weighted-average":

> "Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. . .

(29 CFR §778.115 (emphasis added); *see also*, Section 49.2.5 of the DLSE Manual (noting that: "Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay mirrors the federal method, based upon the weighted average of all hourly rates paid.")).

Petitioner has established the unlawfulness of Dart's calculation as the more overtime hours an employee works the less overtime wages he or she is paid. The reason is clear, as Respondent explains the "bonus" for working weekends is "merely added to the other earnings of the employee and the total divided by the total hours worked, including overtime hours." (Respondent's Brief, page 1) (emphasis added). Dart thus also incorrectly includes overtime hours worked in the calculation of the regular rate, but 29 CFR §778.115 is expressly limited by its terms to calculating the weighted average of "nonovertime" hours.

The appropriate weighted calculation will result in an increased regular rate and a corresponding greater overtime wage payment. Here, Dart's employees who work a regular work shift are essentially paid two different rates for work spanning both week days and weekend shifts. The employee is paid a first hourly rate, for example **$15.22/hr** in Petitioner's case, for hours worked on both weekdays and weekend days, but is also paid a second rate of **$15/work shift** for eight hours completed on a weekend day. This amounts to an additional payment of **$1.87/hr** for completing an eight hour weekend shift. If Petitioner worked 5 shifts of 10 hours and a weekend shift of eight hours during a week, it would amount to a work week of 48 regular or straight time hours and 10 overtime hours (for those over eight in a shift).

As the regular rate is not calculated based on any overtime hours, Petitioner should receive 48 hours times **$15.22/hr** ($730.56), plus the $15.00 shift premium paid for completing the weekend day shift, for a total of **$745.56**. The resulting regular rate from these two blended rates, excluding overtime hours worked, is **$15.53/hr** ($745.56 divided by 48 hrs). This increases the regular rate by **.31 cents per hour**. Overtime due for 10 hours would then be 10 hours, times the blended $15.53/hr regular rate, times 1.5 for overtime rate = $232.95 in overtime pay. This results in total weekly earnings of **$978.51** ($745.56 plus $232.95).

In contrast, an incorrect application of the weighted average under Respondent's approach, which includes overtime hours, will reduce the regular rate and result in a corresponding underpayment of overtime. For example, Respondent

explains its calculation methodology at pages 15-16, fn. 4 of its Respondent's Brief: "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.)"
  - $15.22 x 10 hours = $152.20
- "Second, Dart adds the total amount owed in a pay period for regular non-overtime work, 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.)"
  - ($15.22 x 48 hours = $730.56) + ($15 bonus) + $152.20 = $897.76.
  - $897.76 divided by 58 hours = **$15.48/hr** "regular rate." [**This includes overtime hours in the regular rate calculation**].
- "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.)"
  - 10 hours x $15.48/hr = $154.80
  - $154.80 x 0.5 = overtime premium of $77.40.
- "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.)"

- $77.40 + $152.20 = $229.60 in total overtime hours paid
- $229.60 (overtime) + $730.56 (regular hours) + $15 bonus = **$975.16**

The correct calculation results in a total of **$978.51**, as explained above, not **$975.16.** Thus Respondent's calculation equates to an underpayment of **$3.35** in overtime for the week under Respondent's improper calculation methodology. In a two week pay period, using the same numbers, this would be an underpayment of **$6.70**, or **$174.20** a year.

Dart confidently asserts its "formula for calculating overtime on its Attendance Bonus is exactly the same" as 29 CFR §§ 778.110 and 778.209. (Respondent's Brief, p. 16, citing AA, p. 069-070, ¶ 4.). Respondent and the Court of Appeal are wrong, as Dart's formula results in significant underpayment of overtime under these federal provisions, which are in conflict with California law and on-point guidance from the DLSE. Petitioner has also established these issues with Respondent's calculation methodology in his briefs, and that Respondent's reliance on the federal approach leads to systematic, class-wide underpayment of overtime wages. By including the overtime hours worked in the calculation of the regular rate, Respondent's methodology undervalues the regular rate and in turn underpays overtime at 1.5 times that regular rate.

B. **Under California and Federal Law, Overtime Hours Worked Must Be Excluded from the Calculation of the Regular Rate and the Resulting Overtime Premium**

California and federal authority is consistent and clear that, in calculating the "regular rate" of pay to which an overtime rate of 1.5 times is applied, overtime hours worked are not to be included with regular rate hours. The above calculation example establishes the adverse impact on Dart's employees that results from its admitted inclusion of these overtime hours in its calculation, a mistake which flows from Respondent incorrectly referring to the weekend shift pay as a bonus rather than a shift premium.

1. **The DLSE and the DLSE Manual provide the starting point for the analysis**

California's Division of Labor Standards Enforcement ("DLSE") exists to enforce the State's labor laws regulating wages, hours and working conditions for employees in the State of California. (*See* California Labor Code, § 95). As the DLSE explained in its Amicus Curiae Letter in Support of Petition for Review dated **April 21, 2016** ("DLSE Amicus Letter"): "By statute, the Labor Commissioner is authorized to enforce the state's minimum labor standards, including various laws governing the payment of wages, and the regulations of the Industrial Welfare Commission ("IWC"). (Labor Code §§ 90.5, 95(a), 1193.5, 1193.6). Labor Code § 98.3(b) authorizes the Labor Commissioner to prosecute actions for the collection of wages... Enforcement of the minimum wage and overtime requirements of the

Labor Code and IWC Wage Orders are a core function of the Division of Labor Standards Enforcement." (DLSE Amicus Letter, p. 2).

Also, the DLSE's Enforcement Policies and Interpretations Manual ("DLSE Manual") includes a section entitled "Items of Compensation Included in Calculating Regular Rate of Pay," which instructs that: "In not defining the term "regular rate of pay", the Industrial Welfare Commission has manifested its intent to adopt the definition of "regular rate of pay" set out in 29 U.S.C. § 207(e)." (DLSE Manual, § 49.1.2; *see also* § 49.1.2.2). The DLSE Manual also states: "In determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California law adheres to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law." (DLSE Manual, § 49.1.2) (emphasis added). Thus, while the DLSE has not offered a specific definition of "regular rate of pay," it refers to the definition in the Fair Labor Standards Act ("FLSA") at 29 U.S.C. § 207(e), but only to the extent it is not contrary to California law.

2. The regular rate as defined under the California Labor Code and the FLSA must exclude overtime hours from the calculation

Under California law, "wages" are defined by California Labor Code § 200 as including: "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (emphasis added). Labor Code § 510 sets forth California's minimum overtime wage requirements: "Any work in

excess of eight hours in one workday . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Labor Code § 510(a) (emphasis added); *see also* Industrial Welfare Commission Order No. 5-2001, para. 3(A)(1)). To calculate this overtime premium, the Court must first determine how to accurately calculate the regular rate of pay.

The FLSA provides a definition for "regular rate" which tracks with that of California Labor Code § 200: "As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, . . ." (29 U.S.C. § 207(e)). The $15.00 per weekend day "attendance bonus" is automatically paid to employees upon the condition precedent that they complete a scheduled weekend work shift, and certainly is "remuneration for employment" under the FLSA and an "amount for labor performed" under California Labor Code § 200.

The FLSA then addresses those items which the regular rate "shall **not** be deemed to include." One of these is: "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day ... or in excess of the employee's normal working hours or regular working hours, as the case may be..." (29 U.S.C. § 207(e)(5)). The DLSE is in agreement, also excluding from the regular rate calculation "[e]xtra compensation provided by a premium rate paid **for certain hours worked** by the employee in any day or workweek because such hours are hours worked **in excess of eight in a day** ...or in excess of the employee's normal

working hours or regular working hours, as the case may be." (DLSE Manual, § 49.1.2.4(5)). (emphasis added).

3. California overtime law is intended to be more protective of employees than federal law, and should be enforced

The "certain hours worked" over eight in a day referred to in 29 U.S.C. § 207(e)(5) and DLSE Manual, § 49.1.2.4(5) are overtime hours under California Labor Code § 510(a). However, they are not under the FLSA, which only applies overtime premiums to hours worked over 40 in a week. California overtime law is intentionally more protective of employees than its federal counterpart. Both Respondent and the Court of Appeal have acknowledged this difference: "[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." (Respondent's Brief, p. 11-12, citing Slip Op., p. 8). It follows that, if overtime wages are expressly not included in the regular rate of pay by the FLSA, overtime hours worked should also not be factored into determining the "regular rate" of pay for calculating overtime wages.

When addressing "Computation of Regular Rate of Pay and Overtime," the DLSE instructs that: "In California, as with the federal FLSA, overtime is computed based on the regular rate of pay. The regular rate of pay includes many different kinds of remuneration, for example: hourly earnings, salary, piecework earnings, commissions, certain bonuses, and the value of meals and lodging." (DLSE

Manual, §49.1.1) (emphasis added). This begs the question of whether both regular and overtime hours should be used in calculating the regular rate upon which overtime is calculated.

This question is answered in Section 49.1.4 of the DLSE Manual, entitled "Hours used in Computation" [of the regular rate]. It instructs that overtime hours should not be used in calculating the regular rate of pay: "Ordinarily, the hours to be used in computing the regular rate of pay may not exceed the legal maximum regular hours which, in most cases is 8 hours per day, 40 hours per week...The alternate method of scheduling and computer overtime in most Industrial Welfare Commission Orders, based on four 10-hour days or three 12-hour days does not affect the regular rate of pay, which in this case also would be computed on the basis of 40 hours per week. (*Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 245-50)." (DLSE Manual, § 49.1.4) (footnote omitted). Again, Respondent's calculation fails to comply with *Skyline* because the regular hourly wages are "merely added to the other earnings of the employee and the total divided by the total hours worked, including overtime hours." (Respondent's Brief, page 1) (emphasis added).

4. The *Skyline* case establishes the federal fluctuating workweek scheme is inconsistent with California law and public policy of protecting employees

The DLSE's citation to the *Skyline* case is noteworthy given the attention Respondent has dedicated to it, along with the trial court and Court of Appeal. They have rejected the applicability of *Skyline* and criticized Petitioner's reliance upon it

because the case concerned salaried employees. (*See, e.g.*, Respondent's Brief, page 2) (citing *Skyline*). However, Petitioner has properly relied upon *Skyline* for the same reasons the DLSE did, to highlight the fact that the federal fluctuating workweek scheme is inconsistent with California law, as the regular rate, and in turn the overtime wages paid to employees based upon it, are diluted (or reduced) as their hours worked increase.

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. <u>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</u>." (*Skyline*, at 248) (emphasis added). Respondent also points out that: "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." (Respondent's Brief, p. 27, citing *Skyline*, at 248, 255). Respondent then asserts it "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." (*Id.*). If this is true, Respondent is admitting that the more restrictive California approach is the appropriate one.

It is non-controversial that a fluctuating workweek calculation under federal provisions, which call for overtime only for hours worked over 40 in a week, should be inapplicable in favor of those addressing overtime for hours worked over 8 in a day, as under California Labor Code § 510. The importance of the *Skyline* decision here is that in light of the important differences between the state and federal approach, "we must assume that the IWC intended to impose a different standard for determining overtime than that allowed under the FLSA..." (*Skyline*, at 248).

Petitioner also does not dispute that Respondent pays the employee class members overtime, but the core issue on appeal is whether Respondent employs an unlawful calculation methodology that systematically underpays overtime wages by diluting the regular rate of pay used to calculate it. While Respondent also states it does not follow a fluctuating workweek methodology, it chooses to incorrectly follow federal regulations rather than following the differing California approach to determining overtime wages.

Respondent also misses the point in attempting to differentiate *Skyline* by arguing it applied to salaried employees. As Petitioner has explained in response: "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." (Petitioner's Reply Brief, p. 4).

Respondent's practice of dividing a fixed amount of wages by total hours worked each pay period, including overtime hours, produces the same unlawful result—reducing the regular rate and resulting overtime. CELA submits the focal issue here is that Respondent includes overtime hours worked in the total hours considered in determining the regular rate, when both California and federal authority prohibits including these hours in the regular rate calculation. The reason is clear, as doing so dilutes and lowers the regular rate and results in an employer having to pay less overtime to its employees than it is required to under California law. Petitioner has explained this inherent flaw in Respondent's methodology is that it leads to a lower regular rate when more overtime hours are worked: "As the "regular rate" decreases, the amount per hour paid for each overtime hour worked similarly decreases." (Petitioner's Reply Brief, p. 4-5). This result contradicts that intended by the Labor Code and related provisions, but importantly also violates fundamental California public policy by underpaying overtime wages to employees.

Skyline remains viable and applicable authority, as the DLSE explains: "It is important to note that the *Skyline Homes* case was not overturned by the Supreme Court...The *Skyline* court had adopted the DLSE approach, but used an independent analysis to reach that decision. Thus, the rationale of the court concerning the fluctuating workweek method is valid. The case is still regularly cited by the Supreme Court in its decisions. (*See, Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575)." (DLSE Manual, §49.1.4, fn. 1) (emphasis added).

As an amicus here, the DLSE has further explained: "Fundamentally, *Skyline* approved the DLSE's interpretation of the state's overtime requirement as being stricter and more protective of employees than the federal regulation...This method was expressly applied in *Skyline* to account for the higher state protection which does not reduce the employee's "regular rate" of pay as more overtime hours are worked—and objective which state overtime requirements protect against by instituting both a daily and weekly overtime standard." (DLSE Amicus Letter, p. 3; *see also, id.* at footnote 1 ("Under the federal method...the regular rate "fluctuates" based on the number of hours worked during the week which effectively reduces the overtime compensation as more overtime hours are worked.")).

5. **The U.S. Supreme Court defines the regular rate as exclusive of overtime hours rendering Respondent's mathematical computation unlawful**

The United States Supreme Court long ago instructed: "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." *Walling v. Youngerman-Reynolds Hardwood Co* (1945) 325 U.S. 419, 424-425 (emphasis added). 29 CFR § 778.108 appropriately defers in defining the "regular rate," explaining: "The Supreme Court has described it as the hourly rate actually paid the employee for the normal, **nonovertime** workweek for which he is employed - an "actual fact" (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419)." (29 CFR §

778.108). This CFR section defining the regular rate then further clarifies: "As stated by the Supreme Court in the *Youngerman-Reynolds* case cited above: "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." (29 CFR § 778.108) (emphasis added). In this instance, Respondent's designation of the weekend shift premium as an "attendance bonus" does not alter the fact that it is a shift premium and not a bonus.

Respondent applies an incorrect mathematical computation because its result incorrectly follows an inapplicable federal bonus calculation methodology under 29 CFR §§ 778.209(a) and 778.110 and because it unlawfully includes overtime hours worked when calculating the regular rate by dividing the total earnings "by the total hours worked, including overtime hours." (Respondent's Brief, page 1) (emphasis added).

In contrast, Petitioner has proposed a proper calculation methodology that excludes overtime hours in his Briefs, which account for the differences between the California approach and the federal fluctuating workweek approach to overtime. Another proper mathematical computation to apply, which excludes overtime hours when calculating the regular rate, is the "weighted average" method under 29 CFR § 778.115, as addressed above. It is undisputed that Respondent includes overtime hours worked in determining the regular rate used to calculate overtime pay, but 29 CFR §778.115 is expressly limited by its terms to calculating the weighted average

of "nonovertime" hours. Respondent's ensuing arguments that the impropriety of its calculation methodology is only apparent under the DLSE's interpretation and not in any Code section or IWC Wage Order is misplaced when the alleged attendance bonus is properly considered as the shift premium that it is.

C. Respondent and the Court of Appeal Disregard California's Fundamental Public Policy of Protecting Workers and Ensuring the Prompt Payment of All Wages Earned

Respondent admits its formula for calculating the regular rate is derived by dividing total earnings by total hours worked, "including overtime hours," and the resulting amount is multiplied by "the total hours worked, including overtime hours worked and again by 0.5 to calculate the amount due to the employee." (Respondent's Brief, page 1). Respondent then cites 29 CFR § 778.209(a) and 778.110 as support for this approach, claiming it is "completely legal under existing California precedent," and the Court of Appeal's *Alvarado* decision. In doing so, Respondent acknowledges the Court of Appeal's admission that its holding was contrary to California public policy: "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." (Respondent's Brief, p. 8, citing Slip. Op., p. 25; *see Alvarado*, at 316). There was no need for the Court of Appeal to disregard public policy, as Petitioner and CELA have addressed lawful alternative formulas applicable to shift premiums.

In its Amicus Letter to this honorable Court, the DLSE explained the importance of the public policy considerations here: "Critical to the effective enforcement of state overtime requirements is that uniform and valid interpretations exist to ensure and effectively achieve the objectives of enacted public policy embodied in state overtime laws designed to protect employees by discouraging long working hours through imposition of required overtime compensation." (DLSE Amicus Letter, p. 2) (emphasis added). The Court of Appeal should have considered the public policy grounds for denying Dart's motion for summary judgment. The prominent concern in this instance is protecting the rights and interests of California employees, which is a well-established public policy in California. *See, e.g., Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal.4th 1094, 1111 (referring to "our prior holdings that statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees.").

The Supreme Court has also stated that "[p]ublic policy has long favored the "full and prompt payment of wages due an employee."" *Pressler v. Donald L. Bren Co.* (Cal. 1982) 654 P.2d 219, 223 (citation omitted); *see also Prachasaisoradej v. Ralphs Grocery Co.* (2004) 18 Cal. Rptr. 3d 514, 521 ("The Labor Code provisions at issue, as well as the regulation, are designed to protect employees. "California courts have long recognized wage and hour laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare."") (citations omitted). To further these fundamental policy considerations, Respondent

must be foreclosed from further unlawfully miscalculating the regular rate and the overtime premium based on that rate.

D. Respondent and the Court of Appeal Afford Inadequate Deference to the DLSE and Its Interpretation of California Law

Respondent cites to the trial court's finding 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. (Respondent's Brief, pages 7-8; *see also, Alvarado,* at 312). It also cites to the Court of Appeal's conclusion that the DLSE Manual has no force of law and is supported by "only public policy" rather than any precedent or other precedential authority. This is incorrect, as the DLSE is recognized as the agency responsible for enforcing California's labor laws and Dart's calculation methodology is directly contrary to both California and federal statutory authority and case law, as addressed herein.

Respondent asks the Court to ignore a helpful and on point interpretation of that law by California's DLSE, which is the designated entity responsible for enforcing California's law regulating wages, hours and working conditions for California employees. (*See* Labor Code § 95(a) ("The division may enforce the provisions of this code and all labor laws of the state...")). The DLSE has explained in support of the petition for review: "Enforcement of the minimum wage and overtime requirements of the Labor Code and IWC Wage Orders are a core function of the Division of Labor Standards Enforcement." (DLSE Amicus Letter, p. 2).

This Court has afforded respect to the weight of DLSE pronouncements, and has often consulted the DLSE Manual in situations such as this, where there is value in considering guidance from the agency tasked with enforcing California's Labor Code and the IWC Wage Orders. For example, in the California Supreme Court's seminal *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*") decision, it noted that: "Nearly a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC and delegating to it the authority to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor." (*Brinker*, at 1026) (citations omitted).

While the Court of Appeal lent deference to neither the DLSE nor fundamental California public policy, this high Court in *Brinker* reaffirmed its calling to further the policy of protecting California employees: "[I]n 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." (*Brinker*, at p. 1026-1027) (citations omitted).

After recognizing "Cal. Const., art. XIV, § 1 [confirming the Legislature's authority to establish a commission and grant it legislative and other powers over such matters]", the *Brinker* Court then instructed "the relevant wage order provisions must be interpreted in the manner that best effectuates that protective intent...", and "[t]he IWC's wage orders are to be accorded the same dignity as

statutes." (*Brinker*, at 1027). The Court later observed "[t]he DLSE "is the state agency empowered to enforce California's labor laws, including IWC wage orders" and that its opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker*, at 1029, fn. 11 (citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581, 584)).

In the event the Court further inquires into the federal regulations Respondent relies upon, it need only look to the DLSE's guidance to decide against doing so. In determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California law adheres to the standards adopted by the U.S. Department of Labor, but only to the extent that those standards are consistent with California law. The federal standards Respondent attempts to apply here are inconsistent with California law because Dart looks to federal regulations addressing bonuses rather than shift premiums. The federal regulations regarding bonuses are inconsistent with California law regarding the calculation of the regular rate and shift premiums. The DLSE specifies that California law, and the DLSE's stated interpretation of it, must take precedent over DOL regulations. Respondent would have the Court order the opposite result from the one the DLSE states should occur under its interpretation.

E. De Novo Review Should Determine the Attendance Bonus Is Not a Bonus and May Consider All Authority Contrary to Respondent's Calculation Methodology

Respondent cites to the Court's decision in *Merrill v. Navegar, Inc.* (2001) 26 Cal. 4th 465 for the standard of review: "We review the trial court's decision de

novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Id.* at 476) (emphasis added). Here, the inference can and should be drawn from the evidence and arguments that the alleged "attendance bonus" is not a bonus at all, but is instead a shift premium as outlined in Section II.A above.

1. **The "attendance bonus" is a shift premium under 29 CFR § 778.203 because it is specifically directed to pay for work on Saturdays and Sundays**

Petitioner has convincingly argued that "the Court of Appeal's error, in relying on the general language of 29 CFR 788.209(a), is also exposed by 29 CFR § 778.203, which is entitled "Premium pay for work on Saturdays, Sundays, and other 'special days'." (Petitioner's Opening Brief, p. 40). Dart pays it's alleged "attendance bonus" of $15.00 per day to employees who complete work shifts on weekend days. As such, there must at least be good cause for considering whether the alleged "attendance bonus" is really a shift premium under 29 CFR § 778.203 because it is specifically directed to pay for work on Saturdays and Sundays.

29 CFR § 778.203 specifies that, if "the premium rate is less than time and one-half, the extra compensation it must be included in determining the employees regular rate of pay and cannot be credited towards statutory overtime, unless it qualifies as an overtime premium under section 7(e)(5) [applying to overtime hours worked]." The attendance bonus here is not paid for overtime hours, so it must be included in the regular rate without factoring in overtime hours worked.

Dart notes the parties agree that the alleged "attendance bonus" is significantly less than the overtime rate, and claims it complies with this section. Respondent then argues "the Attendance Bonus "must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due ...." (29 CFR, § 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." (Respondent's Brief, p. 17) (emphasis added).

Petitioner defeats this argument in his Reply: "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."" (Petitioner's Reply, p. 36) (emphasis added). Petitioner then points out that Dart "is funding the overtime due by paying in part for the straight time part of the overtime due." (*Id.*).

2. Respondent has artificially labeled part of the regular wages a "bonus" under 29 CFR § 778.502

Petitioner also presented the argument that Dart has mislabeled the "attendance bonus" a bonus under 29 CFR § 778.502, entitled "Artificially labeling part of the regular wages a 'bonus' ". (*See* Petitioner's Opening Brief, p. 38-39). The CFR explains 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." (29 CFR § 778.502(a)).

Petitioner argues that: "In this case, the implied in fact employment contract at Dart provided the so-called "bonus" as a portion of regular wages each week an employee worked weekends. Pursuant to the foregoing such payments are not a "bonus" under the Federal Regulations, and therefore, the Court of Appeals' reliance on 29 CFR 788.209 (a) in this case is incorrect even if the Court properly deferred to Federal law." (*See* Petitioner's Opening Brief, pages 38-39).

29 CFR § 778.502(a) also explains 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." Picking up on the regular wage contract language, Dart argues its 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." (Respondent's Brief, p. 17). While Respondent then asserts its attendance bonus "falls squarely in line with the definition of bonuses" in Section 778.502(a), its statement is actually an admission that it is not a bonus.

Petitioner has aptly responded to Dart's misconception in the Reply, establishing the alleged attendance bonus is actually a "fixed amount for working a particular scheduled day" and is not for extra effort or loyal service, and that it "is

part of an implied in fact wage contract that regularly pays employees $15 for work on Saturdays and Sundays,..." (Petitioner's Reply Brief, p. 33-36). In defining how an employer may be "[a]rtificially labeling part of the regular wages a "bonus," 29 CFR § 778.502(e) explains: "The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply." The employees who work weekend shifts are guaranteed to earn a set $15.00 premium for each shift, and no part of this amount is a true bonus. Therefore, the rules for determining overtime due on bonuses, upon which Respondent solely relies, are inapplicable.

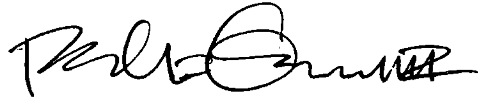
The attendance bonus is also not a bonus in the eyes of the DLSE, which defines a bonus as "money promised to an employee in addition to the monthly salary, hourly wage, commission or piece rate usually due as compensation." DLSE Manual § 2.5.5. As the $15 per weekend day premium is a part of the employee's hourly wages, it is also not a bonus according to the agency responsible for enforcing California's labor laws.

III. CONCLUSION

CELA submits the Court's review must result in a reversal of the Court of Appeal's imprudent and incomplete decision to affirm the trial court's granting of summary judgment to Respondent on the issue of the lawfulness of its overtime calculation methodology.

Dated: December 5, 2016

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Brief of Amicus Curiae by the California Employment Lawyers Association in support of Petitioner Hector Alvarado's claims against Dart Container Corporation of California was produced using 13-point, Roman type font and contains **9,597** words.

Dated: December 5, 2016

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Quintilone & Associates, 22974 El Toro Road, Suite 100, Lake Forest, CA 92630. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On December 5, 2016, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

APPLICATION TO FILE BRIEF OF AMICUS CURIAE BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER HECTOR ALVARADO

PROPOSED BRIEF OF AMICUS CURIAE BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER HECTOR ALVARADO

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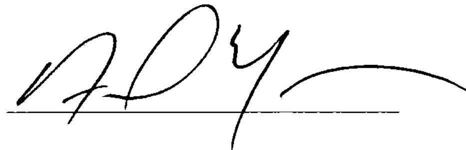
Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of Quintilone & Associates at whose direction the service was made.

Executed on December 5, 2016, at Lake Forest, California.



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