No. S232607

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SUPREME COURT
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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR ALVARADO,

Plaintiff and Appellant,

vs.

DART CONTAINER CORPORATION OF CALIFORNIA,

Defendant and Respondent.

Court of Appeal, Fourth Appellate District, Division Two
No. E061645
Riverside County Superior Court, No. RIC1211797
Honorable Daniel A. Ottolia

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT

Service on the California Attorney General and Riverside County District Attorney required by Business and Professions Code Section 17209 and Rule 8.29(a) and (b) of the California Rules of Court

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and EMPLOYERS GROUP

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I. INTRODUCTION

For over 65 years, employers across California have relied upon well-established federal law governing the calculation of overtime compensation on bonuses paid to non-exempt employees. No Labor Code provision, Industrial Welfare Commission ("IWC") Wage Order, or appellate case ever has held that a different rule applies in California.

The only contrary suggestion is a provision — unaccompanied by citation to authority, other than an invocation of "public policy" — in the Division of Labor Standards Enforcement's *Enforcement Policies and Interpretations Manual* ("DLSE Manual"). That provision purports to require employers to pay more than *three times* the overtime that federal law requires on "flat sum" bonuses, which the DLSE defines as set amounts "not designed to be an incentive for increased production for each hour of work[.]" DLSE Manual § 49.2.4.2.

A simple example illustrates the difference between the results applicable under the DLSE's formula and those under federal law. Assume an employee receives a $100 flat sum bonus for timely completion of a project in a week in which she works 50 hours. Under the federal formula, the hypothetical employee would be owed an overtime premium of $10.00 on the $100 payment, calculated as follows:

1. $100.00 ÷ **50** total hours = $2.00

2. $2.00 x **0.5** x 10 overtime hours = $10.00

See 29 C.F.R. § 778.209(a) (specifying dividing bonus amount by total hours worked and applying a 0.5 multiplier).

Under the formula in the DLSE Manual, however, the hypothetical employee would be owed an overtime premium of $37.50, in addition to the $100 payment:

1. $10.00 ÷ **40** straight-time hours = $2.50

2. $2.50 x **1.5** x 10 overtime hours = $37.50

See DLSE Manual § 49.2.4.2 (specifying dividing bonus by straight-time hours worked and applying a 1.5 multiplier). A difference of $27.50 may not sound like much. However, massive damages will be sought if the Court were to adopt this approach. When one aggregates back-wages liability for all non-exempt employees over the four-year limitations period under the Unfair Competition Law, BUS. & PROF. CODE § 17208, and adds the pyramiding derivative penalties set forth elsewhere in the Labor Code, California employers would face staggering unanticipated liability.

Courts repeatedly have declared this provision of the DLSE Manual an "underground regulation" that is void and entitled to no deference. Moreover, it conflicts with cases and a statute, Labor Code section 515(d), that confirm the formula proposed by the DLSE applies to salaries only, and no other form of pay. Had the Legislature wanted to extend this formula to bonuses, or to other types of pay, it certainly could have, but it did not.

Adopting the DLSE's proposed formula would not advance any "public policy" (even if it were the DLSE's province to establish "policy" in the first instance, which it is not). If this Court were to adopt the DLSE's proposed formula, employers across the state who make flat sum payments — ranging from referral bonuses, to on-call stipends, to safety bonuses, to relocation payments — will face a flood of litigation. That would discourage companies from making supplemental payments of this type at all, meaning that employees in the end will be the losers. Retroactive application of any such rule would present particular due process concerns, by imposing massive liability on employers who reasonably relied on settled federal law. Therefore, if the Court for some reason were to adopt the DLSE's proposed rule, this Court should make the change apply prospectively only.

For these reasons, and those that follow, the California Employment Law Council and Employers' Group respectfully request that the Supreme Court reject the DLSE's proposed rule.

II. INTEREST OF *AMICI*

Amicus California Employment Law Council ("CELC") is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 80 private sector employers in the State of California who collectively employ well in excess of a half-million Californians.[1]

CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, including *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016); *Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014); *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Harris v. Superior Court*, 53 Cal. 4th 170 (2011); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Green v. State of California*, 42 Cal. 4th 254 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator*

[1] Respondent Dart Container Corp. is not a member of CELC.

Air Filtration Products Co., 23 Cal. 4th 163 (2000); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and every industry, which collectively employ nearly 3,000,000 employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in many significant employment cases, including: *Duran v. U.S. Bank, National Association*, 59 Cal. 4th 1 (2014); *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*,

47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009); *Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. Superior Court (L'Oreal USA, Inc.)*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Department of Health Services v. Superior Court*, 31 Cal. 4th 1026 (2003); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003); *Konig v. Fair Employment & Housing Comm'n*, 28 Cal. 4th 743 (2002); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8

Cal. 4th 121 (1994); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kilger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

III. FEDERAL LAW FOR 65 YEARS HAS PROVIDED A SENSIBLE AND ADMINISTRABLE FORMULA FOR CALCULATING OVERTIME ON BONUSES

A regulation under the Fair Labor Standards Act ("FLSA") provides a clear formula for calculating overtime premiums owed for bonus payments. It provides:

> Where a bonus payment is considered a part of the regular rate [of pay] at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. . . . The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. . . . The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

29 C.F.R. § 778.209(a); *see also id.* § 778.110(b) (providing a numeric example of proper calculation for an employee who receives bonus during a workweek).

This regulation applies comprehensively to all bonus payments that must be included in the regular rate of pay for overtime compensation, regardless of whether the employer pays a fixed sum or variable amount. *See* 29 C.F.R. § 778.209(a) (regulation titled "Method of inclusion of bonus in regular rate"); *id.* § 778.106 ("For a discussion of overtime payments due because of increases by way of bonus, see § 778.209.").

The same basic formula — divide pay by all hours worked to calculate the regular rate, and pay a premium equal to 0.5 times the regular rate for each overtime hour — applies regardless of whether the bonus is paid for a single pay period, or over a longer period, such as a month or a quarter. *See* 29 C.F.R. § 778.209(a) ("Under many bonus plans . . . calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. . . . When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours . . . .").

This regulation is well established. It was implemented in substantially this form by the Wage and Hour Division of the Department of Labor in 1950, more than 65 years ago. Overtime Compensation, 15 Fed. Reg. 623, 628

(Feb. 4, 1950) (to be codified at 29 C.F.R. § 778.6(b)). After minor revisions, it has appeared in its current form for nearly 50 years. *See* Overtime Compensation, 33 Fed. Reg. 986, 995 (Jan. 26, 1968) (to be codified at 29 C.F.R. § 778.209).

This calculation formula for overtime on bonuses is the same as the formula for computing overtime for other forms of extra pay. It follows the same elementary two-step formula applicable to all wages (except salaries), including commissions (*see* 29 C.F.R. § 778.118), piece rates (*id.* § 778.111), and hourly pay (*id.* §§ 778.109-778.110): (1) divide compensation by all hours worked to calculate the regular rate of pay; and (2) pay a premium, equal to 0.5 times the regular rate, for each overtime hour. (The multiplier is 0.5 rather than 1.5 because the payment of the bonus itself supplies the 1.0: the straight-time component of the overtime hour.)

IV. NOTHING IN CALIFORNIA LAW REQUIRES A DIFFERENT OVERTIME CALCULATION FOR FLAT SUM BONUSES

No California law requires employers to calculate overtime on flat sum bonuses any differently than the well-established formula under longstanding federal law. The only suggestion to the contrary — an unsupported provision in the DLSE Manual — is a void underground regulation that this Court should reject, as shown below.

A. The Labor Code And IWC Orders Track, And Do Not Depart From, The Language Of Federal Law.

Labor Code section 510 and the IWC Wage Orders provide only that overtime must be paid at one and one-half times the *regular rate of pay* — terminology patterned on the federal Fair Labor Standards Act. *Compare* LAB. CODE § 510(a) (overtime "shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee") *and* Wage Order 4-2001 § 3(A)(1), 8 CAL. CODE REGS. § 11040 § 3(A)(1) (same) *with* 29 U.S.C. § 207(a)(1) (requiring overtime "at a rate not less than one and one-half times the regular rate at which [an employee] is employed").

B. The DLSE Flat Sum Rule Is A Void Underground Regulation That Lacks The Force Of Law.

The Court should give no deference to the DLSE Manual provision that purports to require a different calculation for flat sum bonuses. The DLSE proposes dividing only by straight time hours worked (not all hours) to calculate the regular rate, and then paying an added premium of *1.5* times the regular rate (rather than 0.5) for each overtime hour.[2] The use of the 1.5

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[2] The provision states, in relevant part: "If the bonus is of 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

(*Continued . . .*)

multiplier is an arbitrary penalty, because it overlooks that the payment of the bonus itself comprises the 1.0, and that only the 0.5 is necessary on top of that to reflect the overtime rate.

This Court previously held that the DLSE Manual's written policies amount to void underground regulations that do not have the force of law. *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 561, 576-77 (1996) (DLSE Manual provisions constitute void regulations that should be given "no weight"). Numerous other decisions are to the same effect. *See, e.g.*, *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 581-82 (2000) ("The Court of Appeal correctly ruled that the DLSE interpretation of 'hours worked' in its 1989 Operations and Procedures Manual should be given no deference . . . ."); *Aleman v. AirTouch Cellular*, 209 Cal. App. 4th 556, 573 (2012) (rejecting DLSE Manual's interpretation of a Wage Order; "any attempt by the DLSE to 'interpret [a] regulation in an enforcement policy of general application without following the [Administrative Procedures Act]' is void.") (punctuation in original) (citation omitted); *In re United Parcel Serv. Wage & Hour Cases*, 190 Cal. App. 4th 1001, 1011 (2010) (noting that "DLSE manuals have been declared void by the Supreme Court for failing to comply

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applies. . . . To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy." DLSE Manual § 49.2.4.2.

with the Administrative Procedures Act . . . and are therefore entitled to no weight or deference in any judicial interpretation of a wage order.") (citations omitted); *Church v. Jamison*, 143 Cal. App. 4th 1568, 1579 (2006) ("In accordance with *Tidewater* and *Morillion*, we will give no weight to the interpretations that may be implied from section 15.1.9 of the [DLSE Manual][.]").

Courts have deemed *the very section* at issue here a "void regulation under the reasoning of *Tidewater*." *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804, 815 (2008) (DLSE Manual section 49.2.4.2 is "not merely a restatement of prior agency decisions or advice letters" and "does not have the force of law"); *see also Studley v. Alliance Healthcare Servs., Inc.*, 2012 WL 12286522, at *4 (C.D. Cal. July 26, 2012) (DLSE Manual section 49.2.4.2 "has been expressly declared void").

As the court noted in *Marin*, the section cites as its source nothing but the DLSE's notion of "public policy." 169 Cal. App. 4th at 815. But (absent some specific delegation from the Legislature, as is found in Labor Code section 227.3[3]) the DLSE exists to apply the law, not conjure it up. The DLSE

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[3] Section 227.3 sets forth the rules for paying unused vacation time upon termination, concluding with: "The Labor Commissioner . . . in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness." No similar language of delegation applies to the regulatory provisions in this case.

is neither empowered to make general statements of law or policy that the California Legislature has failed to enact explicitly, nor entitled to implement interpretative regulations while disregarding the Administrative Procedures Act. Therefore, section 49.2.4.2 of the DLSE Manual is precisely the type of legislative pronouncement that *Tidewater* deemed void for failure to comply with the APA. This Court should give it no deference.

C. The Calculation Rule Applicable To Salaries Does Not Apply To Bonuses.

1. The rule in *Skyline Homes v. Department of Industrial Relations* does not apply.

Lacking legal authority — apart from the void DLSE Manual provision — plaintiff contends that fixed sum bonuses actually constitute a salary, because salary *is* subject to a different overtime calculation rule under both the FLSA and *Skyline Homes v. Department of Industrial Relations*, 165 Cal. App. 3d 239 (1985). Plaintiff's reliance on *Skyline* is misplaced.

In *Skyline*, the court held that California law does not permit employers to pay non-exempt employees a fixed salary for all hours worked. *Id.* at 248-49. The court reasoned that the state law requirement to pay daily overtime for hours worked in excess of eight per day would be undermined for salaried nonexempt employees if they received the same fixed salary regardless of the

number of hours they actually worked each day. *Id.* at 248. An employer could work a nonexempt employee 40 hours one week and 80 the next without increasing base pay.

Skyline did not deal with bonuses, much less provide a rule addressing them. *Skyline*'s rationale does not extend to bonuses or other supplemental compensation — like the $15 payment to be available for weekend work in this case — paid *on top of* base pay for all hours worked. The court made clear that "the method of computing overtime compensation for employees other than salaried employees is not before us. . . . This case does not concern employees working on a commission, piece rate or other wage basis." *Id.* at 254; *see Marin*, 169 Cal. App. 4th at 812 (*Skyline* was "inapplicable" to bonus calculations because "*Skyline* did not address bonuses in any respect").

None of the 25 published California cases citing *Skyline* has applied it to a bonus or any form of pay other than a fixed salary.

Nor can plaintiff contend a bonus paid as a flat amount constitutes a salary. A salary is a fixed, regularly received sum an employer pays irrespective of the quantity or quality of the work performed. 29 C.F.R. § 541.602 (an employee is paid on a "salary basis" where he or she "regularly receives . . . a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations

in the quality or quantity of the work performed"); *Negri v. Koning & Assoc.*, 216 Cal. App. 4th 392, 398, 400 (2013) (citing federal regulation regarding definition of salary). In contrast, a bonus — whether paid as a fixed or variable sum — is a payment "made in addition to the regular earnings of an employee," typically for achievement of a goal or the performance of extra or exemplary work. *See* 29 C.F.R. § 778.208. The DLSE itself has recognized this distinction. A glossary posted in its website defines a "bonus" as

> [m]oney promised to an employee in addition to the monthly salary, hourly wage, commission or piece rate usually due as compensation. Bonuses are in addition to any other remuneration rate and may be predicated on performance over and above that which is paid for hours worked, pieces made, or sales completed. A bonus may be in the form of a gratuity where there is no promise for their payment, for example, a holiday bonus at the end of the year. Additionally, a bonus may be a contractually required payment where a promise is made that a bonus will be paid in return for a specific result, such as exceeding a minimum sales figure or piece quota, or as an inducement to remain in the employ of the employer for a certain period of time.

See DLSE Glossary, *available at* http://www.dir.ca.gov/dlse/Glossary.asp?Button1=B. While there may be instances where an employer artificially labels some portion of regularly received wages as a "bonus" as a subterfuge, 29 C.F.R. § 778.502, (i) this is not one of them, and (ii) the federal regulations already prohibit such schemes. *Id.* § 778.502(a) & (e).

2. Labor Code section 515(d) demonstrates the Legislature's intent to apply the *Skyline* rule only to salaries.

The Legislature's later enactment of Labor Code section 515(d) confirms its intent that the *Skyline* formula applies only to salaries — not all flat sum payments.

Skyline's reasoning was called into question because the court in that case had relied on the DLSE Manual. *See Tidewater*, 14 Cal. 4th at 573. The Legislature subsequently enacted Labor Code section 515(d), essentially codifying *Skyline*'s holding. Stats. 1999, c. 134 (A.B. 60), § 9. Section 515(d) states: "For the purpose of computing the overtime rate of compensation required to be paid to a *nonexempt full-time salaried employee*, the employee's regular hourly rate shall be 1/40th of the employee's *weekly salary*." (Emphasis added.)

Labor Code section 515(d) establishes a different regular rate and overtime calculation for salaries — but not for any other form of pay. Section 515(d) does not apply to hourly employees, and it does not apply to bonus payments. As this Court stated in *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1230 (1994), "[u]nder the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute,

we may not imply additional exemptions unless there is a clear legislative intent to the contrary." *See also Parmett v. Superior Court*, 212 Cal. App. 3d 1261, 1266 (1989) ("[T]he existence of specific exceptions does not imply that others exist. The proper rule of statutory construction is that the statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exceptions precludes implying others.").

Had the Legislature wanted to make an analogous exception for the calculation of certain bonuses, it would have done so. *Apple Inc. v. Superior Court*, 56 Cal. 4th 128, 158 (2013) ("[T]he court 'must assume that the Legislature knew how to create an exception if it wished to do so.'"); *In re Reeves*, 35 Cal. 4th 765, 787-88 (2005) (the "Legislature knew how to, but did not, adopt language" in the statute, and its omission was significant); *Jeffrey v. Superior Court*, 102 Cal. App. 4th 1, 8 (2002) ("[T]he Legislature clearly knew how to write the statute to say what the petitioner says it says, and it didn't.").

Where such a specific provision exists for salaries, but not bonuses, it would be error to read into the statute an exception for bonuses not created by the Legislature. A court's "judicial task is to decide what the Legislature has done, not what it should have done." *Crowl v. Comm'n on Prof'l Competence*, 225 Cal. App. 3d 334, 351 (1990). Although it is within the

power of the judiciary to declare the action of the Legislature unconstitutional, it does not have the power to create law or to impose additional burdens not sanctioned by statute. "To make laws is a province of the Legislature; the Governor shall not do it by proclamation; the courts shall not do it by judicial decisions." *Ross v. Whitman*, 6 Cal. 361, 363 (1856); *see also In re Marriage of Holtemann*, 166 Cal. App. 4th 1166, 1175 (2008) ("Any change in the law is the province of the Legislature."). Even where a court believes that "policy reasons" might exist for a particular rule, it cannot read them into law without well-established statutory, regulatory, or constitutional authority. *See Carter v. Escondido Union High Sch. Dist.*, 148 Cal. App. 4th 922, 925-26 (2007) (while "sound policy reasons" might support the plaintiff's case, plaintiff failed to show the asserted violation of public policy was "fundamental," "well-established," and "carefully tethered" to a constitutional or statutory provision).

3. ***Marin v. Costco Wholesale*** **correctly held that the FLSA formula applied to the bonus there at issue.**

In *Marin*, the court of appeal considered the proper computation of pay for what it called a "hybrid" production bonus, paid semi-annually. 169 Cal. App. 4th at 816. The employer paid the bonus to qualifying employees who were paid for at least 1,000 hours over a six-month period. In that sense, the payment functioned like a production bonus. *Id.* at 806, 816. The bonus did

not increase if an employee exceeded the 1,000 hours required. *See id.* at 817. Plaintiffs argued the employer underpaid overtime because it did not use the flat sum bonus formula in the DLSE Manual.

Marin disagreed. It first held that, under *Tidewater*, the DLSE Manual lacked legal force. *Id.* at 815. The court then concluded that there was no controlling California law that differed from the FLSA rule:

> [N]o California court decision, statute, or regulation governs bonus overtime, the DLSE Manual sections on the subject do not have the force of law, and the DLSE advice letters on the subject are not on point. Thus, *there is no controlling California authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay.*

Id. at 815 (emphasis supplied). The bonus at issue functioned "for the most part like a production bonus" because it rewarded employees for reaching the 1,000-hour threshold. *Id.* at 816. Although the bonus had some properties of a flat sum bonus for hours in excess of 1,000, the court rejected application of the DLSE's proposed flat sum bonus rule. The court found no evidence the bonus plan "encourage[d] imposition of overtime" on employees,[4] so there

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[4] Plaintiff notes that *Marin* in dictum held out the possibility that the DLSE flat rate bonus formula might apply if a bonus would encourage the assignment of overtime. *Id.* at 816-18. But it is well established that dictum is not law, and that "[d]ecisions are not controlling authority for propositions not considered in the case." *Natkin v. Cal. Unemp. Ins. Bd.*, 219 Cal. App. 4th

(*Continued . . .*)

was no reason to award a "premium bonus overtime payment" like the one proposed by the DLSE. *Id.* at 818-19.[5]

V. IN THE ABSENCE OF BINDING STATE LAW, THE COURT SHOULD FOLLOW THE WELL-ESTABLISHED FEDERAL FORMULA

As described above, the FLSA regulations speak precisely to the calculation of overtime on bonuses. In the absence of a statute or IWC Order providing otherwise, the Court should follow the well-established federal rule.

To be sure, this Court has recognized that the IWC's "wage orders,

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997, 1007 (2013); *see also Acosta v. SI Corp.*, 129 Cal. App. 4th 1370, 1379 (2005); *Ginns v. Savage*, 61 Cal. 2d 520, 524 n. 2 (1964). "The *ratio decidendi* [holding of case] is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, *i.e.*, dicta, with no force as precedents." *Krupnick v. Hartford Accident & Indem. Co.*, 28 Cal. App. 4th 185, 199 (1994). The part of *Marin* cited by plaintiff fits perfectly that description of dictum.

[5] The court of appeal's decision here suggested that the bonus in *Marin* was distinguishable from this case in part because it was a semi-annual bonus, not a bonus paid for a single pay period. 243 Cal. App. 4th at 1218. *Amici* respectfully disagree with that portion of the court of appeal's opinion. 29 C.F.R. section 778.209(a) provides the same formula, regardless of the length of the period over which the bonus is earned. Although *amici* agree with the court of appeal's disposition of the case, the text of the federal regulation makes clear that the same formula applies whether the bonus is earned over a week or a longer period.

although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the [FLSA] and accompanying federal regulations." *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 795 (1999). However, no such state law or regulation exists here.

Absent a clear mandate to deviate from federal wage and hour law, California courts have long followed it. California courts have recognized that California's wage laws are patterned on federal statutes, and that the authorities construing those federal statutes provide persuasive guidance to state courts. *Rhea v. Gen. Atomics*, 227 Cal. App. 4th 1560, 1567-68 (2014). Thus, in the context of wage and hour law, California courts routinely look to federal authorities for guidance in applying state law. For example, in *Rhea*, the court of appeal considered what it meant to be paid on a "salary basis" under California law. *Id.* Because no applicable state law defined this term, and because "California law was patterned to some extent on federal law," the court noted the "general approach in interpreting California law has been to use the federal salary basis test unless some other provision of California law calls for a more protective standard." *Id.* The court therefore followed federal law interpreting the salary-basis test. *Id.* at 1569-76.

Similarly, in *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012), the court examined relevant FLSA provisions regarding an

employer's policy of rounding small increments of time. The court noted that "[i]n the absence of controlling or conflicting California law, California courts generally look to federal regulations under the FLSA for guidance." *Id.* at 903. The court therefore applied the FLSA time-rounding standards. *Id.* at 903-07.

In *Huntington Memorial Hospital v. Superior Court*, 131 Cal. App. 4th 893 (2005) — a case cited by plaintiff — the court looked to FLSA authority interpreting the regular rate of pay for overtime calculation. *Id.* at 902 ("[T]he failure of the IWC to define the term regular rate indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law.") (internal citations omitted). The court acknowledged that California and federal law had different hours-worked requirements for overtime, but nevertheless found that "federal authorities still provide useful guidance in applying state law." *Id.* at 903.

For the same reasons, it is appropriate to look to federal law for guidance regarding how to calculate the regular rate in this case. Here, the Legislature chose not to adopt any special regular-rate rule for bonuses. Given the lack of controlling authority, the court of appeal correctly looked to federal law that speaks directly to the method of calculation.

VI. ADOPTING THE DLSE'S VOID FLAT SUM BONUS PROPOSAL WOULD (a) STRAY FROM EVERY OTHER STATE'S LAW, (b) NOT ADVANCE ANY DEFINED PUBLIC POLICY, AND (c) ULTIMATELY DISCOURAGE EMPLOYERS FROM OFFERING SUCH BONUSES TO EMPLOYEES

A. The DLSE's Proposal Departs From Every Other State's Law.

The example in the Introduction illustrates that employers who voluntarily pay flat sums like those described above will need to pay more than *three times* the overtime on those forms of pay in California than is payable under federal law. *Not one other state follows the DLSE's proposed rule.*[6]

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[6] Other states instead adhere to the FLSA rule. *See, e.g.*, MONT. ADMIN. R. 24.16.2517(2) (codifying regulation nearly identical to federal standard); KAN. ADMIN. REGS. 1-5-24(b) (directing that regular rate of pay on bonus payment be calculated by dividing the bonus by total hours worked, and multiplying by one-half to derive overtime on bonus); 803 KY. ADMIN. REGS. 1:060, § 7 (providing for regular rate of pay calculation on bonus by dividing "by the total number of hours worked"); MD. CODE REGS. 09.12.41.19(B)-(C) (tracking regular rate bonus formula provided in federal regulation); CODE ME. R. tit. 12-170 Ch. 13, § V(B) (directing that bonuses be added into regular rate of pay by dividing the bonus by "total hours worked" during applicable period); N.J. ADMIN. CODE § 12:57-3.5 (providing for inclusion of certain bonuses in total earnings, and calculating regular rate of pay by dividing by "total hours of work").

B. Most Flat Sum Bonuses Do Not Implicate Overtime Work, So DLSE's Proposed Rule Advances No "Public Policy."

The DLSE Manual vaguely suggested that "public policy" supports dividing a bonus by straight time hours instead of total hours worked. Otherwise, according to the Manual, the bonus might "encourage, rather than discourage, the use of overtime." DLSE Manual, § 49.2.4.2.

But most flat sum payments have no impact on whether an employer assigns overtime hours. Consider the following common examples:

- *Referral bonuses.* An employer offers to pay employees $100 for recommending qualified candidates who are hired by the company. Referral bonuses may be included in the regular rate of pay, depending on the conditions. *See* U.S. Department of Labor, Wage & Hour Division, Fact Sheet #54. However, the treatment of a referral bonus would not encourage an employer to assign overtime to an employee, so there is no reason to multiply the payment by 1.5 rather than .5 in determining the overtime premium on the $100.

- *On-call stipends.* An employer pays an employee a $25 "on-call" stipend for uncontrolled time when the employee is not working, but is expected to be available to field calls (*e.g.*, over

a weekend). In addition to that, employees separately receive base pay — including overtime — for all hours actually worked. The on-call pay must be included in the regular rate, even though it is not pay for time worked. *See* 29 C.F.R. § 778.223. However, the payment does not encourage the assignment of overtime; rather, the employer still must separately compensate the employee, at time-and-one-half of the base rate, for each overtime hour of work.

- *Safety bonuses*. Employees receive a bonus of $150 if the facility has no work-related accidents for a year. The payment is meant to promote workplace safety. The flat sum does not encourage an employer to assign more overtime during the earning period.

- *Suggestion bonuses*. An employer pays an employee a bonus of $200 if the employee makes a suggestion that saves the company money. Suggestion bonuses may be included in the regular rate of pay, depending on the conditions. *See* 29 C.F.R. § 778.333. However, the flat sum has no relationship to hours worked, and would not encourage an employer to assign additional overtime work.

- *Education/technical certification bonuses.* Employees who complete a degree or certification program receive a $500 bonus. The payment is meant to reward an employee for his or her enhanced credentials; it provides no incentive to assign overtime work. (If anything, in fact, employee work hours may be *reduced* during the certification or educational program, as employees spend more time outside of work pursuing the degree or certification.)

As these examples illustrate, many flat sum payments have no effect at all on whether an employer assigns an employee to work overtime.

Nor would it be workable to establish different rules for flat sum payments that theoretically could encourage overtime to some extent, because the question of whether a payment might foster overtime work is hopelessly ambiguous and in the eye of the beholder. For example, the DLSE Manual vaguely cites a "$300 [payment] for continuing to the end of the season" as flat sum pay that might encourage the assignment of overtime. DLSE Manual § 49.2.4.2. However, there is no reason to believe that most $300 retention payments would have such an effect. Or suppose an employer pays a relocation bonus of $300 to employees — to encourage them to relocate to a different area for work — but requires employees to refund the money if they do not remain employed for 60 days. The 60-day retention requirement is

designed to guard against employee abuse and prevent windfalls, and does not encourage an employer to assign more overtime during those 60 days. Or, consider an employer that pays a hiring-referral bonus like the one described above, but only if the newly hired employee remains employed for 90 days. That, too, does not seem to encourage the employer to assign added overtime.

The DLSE Manual also explains that a flat sum bonus should be divided by straight time hours instead of total hours worked because a flat sum bonus "is not designed to be an incentive for increased production for each hour of work." However, the DLSE again misapprehends the nature of these bonuses. Many flat sum bonuses are earned for achieving an objective for the entirety of the designated period, not for only straight-time hours worked during the bonus period. Consider the following examples:

- *Safety bonuses.* Employees earn a safety bonus if there are no accidents throughout the entirety of bonus period. The employee does not earn the bonus simply for being safe during non-overtime hours worked during the bonus period; the bonus is contingent on safe work practices for all hours worked.

- *Company-wide productivity bonuses.* Employees earn a flat, $100 bonus if the manufacturing plant ships $1 million worth of products for a month. The bonus is achieved based on all hours

worked during the month, which all contribute to the production goal.

- *Profit-Sharing Bonuses*. Employees earn a fixed $1,200 bonus if the company achieves a designated profit during the fiscal year. Profit-sharing plans may be included in the regular rate of pay, depending on the conditions. *See* 29 C.F.R. § 778.214. The bonus is achieved based on all hours worked during the fiscal year, and each hour worked (not just straight-time hours) contributes to the company's profits.

As these examples illustrate, many flat sum payments apply to an objective achieved for all hours worked. In this respect, they have properties akin to production bonuses. The DLSE concedes that production bonuses are "earned during straight time as well as overtime hours," so the regular rate of pay may be calculated by dividing by the total hours worked and applying a half-time overtime premium on the bonus. DLSE Manual § 49.2.4 ("Since the [production] bonus was earned during straight time as well as overtime hours, the overtime 'premium' on the bonus is half-time . . . on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours.").

It would be unworkable to require separate rules for flat sum bonuses that reward meeting an objective for all hours worked, and payments that do not. As noted above, the DLSE cites the vague example of a "$300 payment for continuing to the end of the season" as a flat sum bonus that is not designed to incentivize increased production for each hour worked. However, depending on the nature of that payment, the bonus could be based on achieving an objective for all hours worked. If the $300 payment is premised on safe work practices throughout the season, as noted above, all hours worked contribute to achieving this objective. If, as described above, a monthly bonus is tied to a company-wide benchmark, but is paid in the form of a fixed sum, then it also arguably has properties of a production bonus (which the DLSE permits to be calculated by dividing by total hours worked). *Compare* DLSE Manual § 49.2.4.2 *with id.* § 49.2.4. Given these variations of flat sum bonuses, the distinction between production bonuses and flat sum bonuses proposed by the DLSE Manual would be hopelessly vague and only lead to disputes about which rule applies to bonuses with attributes of both.

These examples are not far-fetched; employers across the state, in every industry, make payments like these every day. The uncertainty surrounding these examples illustrates precisely why policy-based rulemaking must comply with the APA. The DLSE's proposed formula did not, and it is ill-conceived and fails to advance the policy it purports to serve.

C. The DLSE Proposal In The Short Run Would Unfairly Penalize Well-Intentioned Employers Who Now Pay A Variety Of Common Bonuses, And In The Long Run Would Penalize Employees Who No Longer Will Receive Them.

If the Court were to adopt plaintiff's proposed formula, it will penalize in the short run employers who pay a variety of supplemental compensation to employees. In the longer run, employers would adjust by not paying those bonuses at all, making employees the losers.

Creating a special rule for flat-sum bonuses also would require all employers to reprogram their payroll systems (at a substantial administrative cost) to perform two different calculations for the same employee in the same workweek: one for flat sum bonuses, that divides the payment only by 40 hours and pays an added 1.5 premium, and another for every other form of pay (except salaries), that divides by all hours worked and pays an added 0.5 premium.

No Labor Code section, Wage Order provision, appellate case, or other valid legal authority requires this. Any departure from the federal regulation on flat rate bonuses should come from the Legislature.

VII. IF, NOTWITHSTANDING THE ARGUMENTS HERE, THE COURT WERE TO ADOPT THE DLSE'S PROPOSED FORMULA, IT SHOULD DO SO PROSPECTIVELY; RETROACTIVE APPLICATION WOULD CREATE MASSIVE AND UNFAIR LIABILITY

If the Court were to adopt plaintiff's proposed bonus formula, the Court should make the change prospectively only.

A. Potential Liability Under The DLSE's Proposal Would Be Massive.

Employers across the state will face far-reaching civil liability for failing to follow a formula not found in any existing law. In addition to back wages and interest (which would be high enough, especially when sought in a class action spanning four years), employees in wage and hour suits typically seek derivative penalties, such as:

- Pay-stub penalties, under Labor Code section 226(e), of $50 per employee for the initial pay period in which a violation occurs, and $100 for each violation in a subsequent pay period, of up to $4,000 per employee.

- Waiting-time penalties, equal to 30 days of wages, under Labor Code section 203 for failure to pay all wages at termination.

- Penalties under the Labor Code Private Attorneys General Act ("PAGA"), LAB. CODE § 2698 *et seq.*, in the amount of $100 for each "aggrieved employee" per pay period for the initial violation of applicable Labor Code provisions, and $200 per pay period for each subsequent violation. *Id.* § 2699(f)(2).

This would invite a flood of class actions, where employers across the state face the prospect of damages and pyramiding derivative penalties for numerous employees, with potential liability in the millions of dollars. For just one hypothetical employee alone, underpaid $27.50 per month (drawn from the example in the Introduction), potential exposure would equal $9,670:

- $1,320 in back wages ([$27.50] x [12 months] x [4 years]), plus prejudgment interest;
- $1,150 in pay-stub penalties under Labor Code section 226(e) ($50 for the initial pay period violation, plus $100 for subsequent violations, applied to the 12 monthly bonus payments);
- $6,000 in waiting-time penalties under Labor Code section 203, assuming a normal hourly rate of $25.00, multiplied by 240 hours (the number of hours in 30 working days); and

- $1,200 in PAGA penalties (assuming the employee was paid the bonus once a month and that only the $100 penalty figure is used).

Depending on the number of non-exempt employees in California, the total amount sought in a class action could bankrupt the employer, as this schedule shows:

100 employees:	$967,000
1,000 employees:	$9,670,000
10,000 employees:	$96,700,000

In addition to the risk of substantial civil liability, employers also could be subject to possible criminal penalties. For example, Labor Code section 553 states that any person who violates the overtime provisions can be found guilty of a misdemeanor. Labor Code section 216 makes it a misdemeanor to willfully refuse to pay wages due and payable after a demand is made.

B. This Court Should Not Adopt DLSE's Proposed Formula At All, But If This Court Does So, Its Decision Should Be Applicable Only Prospectively.

Adopting the DLSE's proposed bonus formula not only would lead to a torrent of litigation statewide, but it also raises substantial due process

concerns. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 132 S. Ct. 2307, 2317 (2012); *see also Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___, 132 S. Ct. 2156, 2167 (2012); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1115 (1997) (noting that "adequate notice" of the law is a "core due process requirement"). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment," and requires invalidation of any laws that are "impermissibly vague." *Fox Television*, 132 S. Ct. at 2317; *accord U.S. v. Lanier*, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction to conduct that "neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

The "void for vagueness" doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, that precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *Fox Television*, 132 S. Ct. at 2317. A law is impermissibly vague if a person of common intelligence would be required to guess as to the meaning of the statute or its application. *Id.*; *accord Lanier*, 520 U.S. at 266 ("[T]he vagueness doctrine bars enforcement of 'a statute

which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"); *In re J.W.*, 236 Cal. App. 4th 663, 670 (2015) (same).

The U.S. Supreme Court has applied these principles in both civil and criminal cases. *See Fox Television*, 132 S. Ct. at 2317-20 (applying doctrine in context of civil fines, finding that parties did not have fair notice of new indecency regulations); *Christopher*, 132 S. Ct. at 2167-70 (rejecting new administrative interpretation of sales for pharmaceutical salespersons).

In *Christopher*, the Supreme Court applied these principles to a civil dispute brought by employees challenging their exempt status under the FLSA. On appeal, the petitioners/employees invoked the Department of Labor's new interpretation of applicable regulations regarding the overtime exemption. *Id.* at 2166-67. The Supreme Court did not defer to the Department's interpretation, because the Department's interpretation of the regulations would impose "potentially massive liability" on the employer and "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Id.* at 2167 (punctuation in original).

This Court does not normally issue a ruling that is prospective only. However, because of the lack of clear authority and potentially staggering

liability, this case fits comfortably into the class of cases where this Court has done so. *See, e.g.*, *Claxton v. Waters*, 34 Cal. 4th 367, 378-79 (2004) (denying retroactive application of rule that workers' compensation settlements cannot release sexual harassment claims; "[D]enying retroactive application will not unduly impact the administration of justice because it will merely permit a gradual and orderly transition."); *Estate of Propst v. Stillman*, 50 Cal. 3d 448, 463 (1990) ("The circumstance most strongly militating against full retroactivity of our present holding is its unforeseeability to counsel."); *Woods v. Young*, 53 Cal. 3d 315, 330 (1991) ("[C]onsiderations of fairness and public policy may require that a decision be given only prospective application."); *Camper v. WCAB*, 3 Cal. 4th 679, 688-89 (1992) (prospective application only; reliance on the former rule was reasonable; statutory objectives "are not compromised by prospective application of the new rule"). This Court has routinely held since *Tidewater* — for a period of 20 years — that the DLSE Manual consists of void regulations that lack the force of law. Certainly, it is not foreseeable that employers would face liability on an interpretative Manual held to be void by the highest court in the state. Instead, it was reasonable for employers like respondent Dart Container to rely on well-established federal regulations supporting their bonus formula.

Therefore, if the Court for some reason were to adopt the DLSE's proposed rule (which this Court should not do), at a minimum this Court should make the change prospective only.

VIII. CONCLUSION

For all of these reasons, the California Employment Law Council and Employers' Group respectfully request that the Supreme Court affirm the court of appeal's decision.

Respectfully submitted,

DATED: October 18, 2016

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CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for *Amici Curiae* hereby certify that the **BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT** is proportionately spaced, uses Times New Roman 13-point typeface, and contains 8,332 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our law firm's word processing system used to prepare this brief.

Respectfully submitted,

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PROOF OF SERVICE

Hector Alvarado v. Dart Container Corporation of California
Supreme Court of California, No. S232607

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within-entitled action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441.

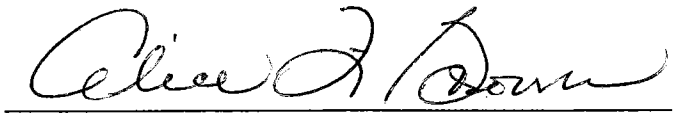
On October 19, 2016, I served a copy of the within document(s):

- **BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT**

☒ **VIA U.S. MAIL**: By placing a true and correct copy of the foregoing documents in an envelope addressed as set forth on the attached mailing list. The envelope was then sealed. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on October 19, 2016, at San Francisco, California.



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