No. 129526

**IN THE**
**SUPREME COURT OF ILLINOIS**

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

S&C ELECTRIC COMPANY,

*Defendant-Appellee,*

On Petition for Leave to Appeal from the Appellate Court of Illinois
First District, No. 22-0020
There Appealed from the Circuit Court of Cook County, Illinois
Chancery Division, General Chancery Section, No. 2020 CH 7349
The Honorable Allen P. Walker, Judge Presiding

# OPENING BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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**ORAL ARGUMENT REQUESTED**

## POINTS AND AUTHORITIES

## NATURE OF THE ACTION

This is a putative class action lawsuit asserting claims under the Illinois Minimum Wage Law ("IMWL"), 820 ILCS 105/4a, alleging that Plaintiffs' employer, S&C Electric Company, failed to include certain non-discretionary bonuses in its employees' regular rate of pay and therefore shorted their overtime pay for hours worked over forty in a workweek. The circuit court dismissed Plaintiffs' complaint, and in affirming the circuit court, the Appellate Court: (i) erroneously held that Plaintiffs did not adequately establish money damages, and (ii) misinterpreted the IMWL's implementing regulations to mean that an employer can exclude from the regular rate any remuneration not based on hours worked. The appeal concerns these two questions of law based on the complaint. The judgment is not based upon a jury verdict.

## ISSUES PRESENTED

1. Whether the exclusion from the regular rate of pay set forth in 56 Ill. Adm. Code 210.410(a) is limited to remuneration in the nature of a gift, or instead extends to *all* remuneration not measured by or dependent on hours worked.

2. When an employer pays an employee inadequate overtime under the Illinois Minimum Wage Law ("IMWL"), does the employee's unpaid overtime claim survive if the employer months or years later remits payment for the original wage shortfall?

## STATUTES AND REGULATIONS INVOLVED

The Illinois Minimum Wage Law ("IMWL"), 820 ILCS 105 *et seq.*, provides in relevant part:

> Sec. 4a. (1) Except as otherwise provided in this Section, no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed.
>
> . . .
>
> Sec. 12. (a) If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this Act, the employee may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid.

A regulatory provision implementing the IMWL, 56 Ill. Adm. Code 210.410, provides:

> **Section 210.410 Exclusions from the Regular Rate**
>
> The "regular rate" shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not include:
>
> a) Sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked; and
>
> b) Payments made for occasional periods when no work is performed due to a vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause; and
>
> c) Sums paid in recognition of services performed which are:
>
> 1) determined at the sole discretion of the employer, or
>
> 2) made pursuant to a bona fide thrift or savings plan, or

3) in recognition of a special talent; and

d) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees; and

e) Extra 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 a day where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; and

f) Extra compensation provided by a premium rate paid to employees on Saturdays, Sundays, holidays or regular days of rest where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; and

g) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic workday where such premium rate is not less than one and one-half times the rates established in good faith by the contract or agreement for like work performed during such workday or workweek.

## STATEMENT OF FACTS

### I. The IMWL And Implementing Regulations

This case involves the underpayment of overtime premiums owed to factory workers employed by Defendant S&C Electric Company. A.063, R. C94, ¶ 11.[1] The Illinois Minimum Wage Law ("IMWL") requires employers to pay an overtime rate of 1.5 times (*i.e.*, time and a half) an employee's "regular rate" of pay for all hours the employee works in excess of 40 in a workweek. 820 ILCS 105/4a. The "regular rate" is defined by regulation to include "*all* remuneration for employment paid to . . . the employee" with certain exclusions. 56 Ill. Adm. Code 210.410 (emphasis added). One such exclusion covers: "Sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." 56 Ill. Adm. Code 210.410(a). For example, if an employer decides to surprise its employees with a $1,000 gift around the holidays or spontaneously gives a worker $500 to spend on an upcoming vacation, those amounts are not included in the regular rate of pay. *Id.*

The IMWL's penalty provisions dictate that "[i]f any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of [the IMWL], the employee may recover in a civil action" three categories of damages: (i) "treble the amount of any such underpayments," (ii) "costs and such reasonable attorney's fees," and (iii) "damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a).

[1] "A." references are to the appendix attached hereto, and "R." references are to the record on appeal.

## II. Defendant's Underpayment Of Plaintiffs' Overtime Premiums

Plaintiff Carmen Mercado worked for Defendant as an hourly-paid factory assembly worker for sixteen years, from 2004 until 2020. A.062, R. C93, ¶ 4. Plaintiff Jorge Lopez worked for Defendant as an hourly-paid factory assembly worker from February 2019 to September 2019. *Id.* ¶ 5.

As part of its regular business practices, Defendant promised and paid nondiscretionary bonuses to Plaintiffs and other hourly employees in various forms. *Id.* ¶ 9. As Defendant admits, R. C231, these payments were not gifts; rather, Defendant paid the bonuses in recognition of and to compensate Plaintiffs for their services performed at the company. A.062, R. C93, ¶ 9. But when determining Plaintiffs' and other workers' regular rate used to calculate overtime pay, Defendant excluded these bonuses. A.063, R. C94, ¶ 10. Consequently, when Plaintiffs and other hourly employees worked more than 40 hours in a workweek, Defendant paid them an overtime rate substantially less than 1.5 times Plaintiffs' regular rate of pay, in violation of the IMWL. *Id.* ¶ 11.

For example, on July 26, 2019, Defendant paid Ms. Mercado a $300 KPI Incentive bonus and a $640.97 MIS bonus, neither of which was reflected in her regular rate used to calculate overtime pay. *Id.* ¶ 12. On February 28, 2020, Defendant paid Ms. Mercado a nondiscretionary $900.00 "seniority award," which also was not reflected in the regular rate used to calculate her overtime pay. *See* A.063-64, R. C94-95, ¶ 15. None of these bonuses were gifts, as Defendant admits. R. C231. Rather they were paid in recognition of Ms. Mercado's services performed for the company and because Ms. Mercado satisfied performance or seniority goals. A.063-64, R. C94-95, ¶¶ 14, 16.

Similarly, in July 2019, Defendant paid Mr. Lopez a $100 KPI Incentive bonus and a $425.58 MIS Bonus, neither of which was included in Mr. Lopez's regular rate of pay

used to calculate overtime pay. A.064-65, R. C95-96, ¶¶ 19, 21. Again, these bonuses were not in the nature of gifts, R. C231, but were paid for achieving certain previously announced performance and safety metrics and in recognition of Mr. Lopez's services performed for the company. A.064, R. C95, ¶ 20.

After Plaintiffs ended their employment with Defendant, on or around July 31, 2020, Defendant made an "adjustment payment" of $486.74 to Ms. Mercado and $10.33 to Mr. Lopez. A.064-65, R. C95-96, ¶¶ 18, 22. To the extent Defendant intended these "adjustment payments" to correct any miscalculation in the regular rate of pay during Plaintiffs' employment, they were insufficient to cover the entirety of the shortfall and statutory damages and penalties owed to Plaintiffs. *Id.*

## III. Procedural History

On December 17, 2020, Plaintiffs filed this action on behalf of themselves and others similarly situated, bringing a single count under the IMWL, 820 ILCS 105/4a, for failure to pay the correct overtime premiums required under the law. R. C14. After Plaintiffs filed their First Amended Complaint, A.061, R. C92, Defendants filed a combined section 2-615 and section 2-619 motion to dismiss, which the parties fully briefed and argued before the circuit court, R. C191-239.

On December 10, 2021, the circuit court granted Defendant's 2-615 motion to dismiss with prejudice but denied Defendant's section 2-619 motion. A.024-25, R. C247-48. On the 2-619 motion, the circuit court interpreted § 210.410(a) to exclude from the regular rate all remuneration "not measured by or dependent on hours worked." A.022-24, R. C245-47. It nevertheless concluded that Defendant offered insufficient evidence to demonstrate that the bonuses were not measured by or dependent on hours worked, so it

denied Defendant's motion. *Id.* On the section 2-615 motion to dismiss, the circuit court ruled that, even if Defendant underpaid Plaintiffs' overtime, Defendant mooted Plaintiffs' claim for treble damages and other statutory penalties under the IMWL by paying them the original shortfall in wages months after the initial underpayment. A.024-25, R. C247-48. It therefore dismissed the Plaintiffs' claims with prejudice. *Id.*

Plaintiffs timely filed a Notice of Appeal on January 4, 2022, seeking reversal of the dismissal of their First Amended Complaint on the basis that the circuit court erred, first, by interpreting § 210.410(a) to cover any payments not based on hours worked, and second, by concluding that Defendant's belated shortfall payment somehow mooted Plaintiffs' claim for treble damages, attorneys' fees and costs, and statutory penalties under the IMWL. A.069-71, R. C249-51.

The State of Illinois filed an amicus brief representing the interests of the Illinois Department of Labor ("IDOL") and argued in favor of Plaintiffs-Appellants on both issues. A.026-59. The Appellate Court accepted the brief into the record. A.060. In its Amicus Brief, the State asserted that the circuit court had erred in interpreting § 210.410(a) to allow employers to exclude all payments "not measured by or dependent on hours worked" from the regular rate. A.046-56. Furthermore, the State observed that the circuit court had erred in holding that an employer can moot an accrued IMWL claim by providing backpay but not treble damages, attorneys' fees, or statutory penalties. A.036-46. The State articulated the rules prescribing deference by the courts to these interpretations of the IMWL and its implementing regulations set forth in the Amicus Brief. A.034-35.

On March 6, 2023, the Appellate Court, First District affirmed the dismissal of Plaintiffs' First Amended Complaint. A.017. The Appellate Court agreed with the circuit

court's interpretation of the gift exception: that payments "not measured by or dependent on hours worked, [are] excluded from the calculation of regular payment rate." A.012, 017. In addition, the Appellate Court indicated that Defendant could "ma[k]e up for any unpaid overtime" at any point—with no "deadline"—and thereby moot Plaintiffs' claims to treble damages, attorneys' fees and costs, and statutory penalties under the IMWL. A.014-15. The Appellate Court did not address what deference was owed to the State, or even mention the State's Amicus Brief. A.001-18. On April 24, 2023, Plaintiffs filed a petition for leave to appeal to this Court, Defendant filed its answer to the petition on May 15, 2023, and this Court granted the petition on September 27, 2023. This appeal followed.

## ARGUMENT

This should have been a case of straightforward interpretation of the Illinois Minimum Wage Law ("IMWL") and its implementing regulations. But the Appellate Court's flawed reading of these provisions worked a drastic and harmful change to Illinois employment law, leaving workers across this State alarmingly vulnerable to wage abuse. Specifically, the Appellate Court indicated that merely by paying *single* damages for underpayment of wages months or years after they are due, an employer could moot an employee's already accrued claim under the IMWL for *treble* damages, attorneys' fees and costs, and statutory penalties. Such a rule is contrary to the plain language of the IMWL's penalty provision and would render it toothless, emboldening employers to pay their employees less than the Illinois minimum wage and to withhold overtime unless and until they face legal action.

On top of this already grave error, the Appellate Court's opinion enshrines a grossly overbroad reading of the exclusion from employees' overtime premiums for "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked" (the "gift exclusion"), 56 Ill. Adm. Code 210.410(a). Contrary to the gift exclusion's plain language, the Appellate Court held that this exclusion subtracts from overtime calculations all sums not based on hours worked, which is the epitome of an exception that swallows the rule.

Disturbingly, despite the rules requiring deference to a State agency's statutory and regulatory interpretations, the Appellate Court did not even mention the Illinois Department of Labor's ("IDOL") interpretations of the IMWL and its implementing regulations articulated in the State's Amicus Brief. Unless this Court corrects these

significant errors, the Appellate Court's decision will continue to encourage employers to violate and evade the IMWL's minimum wage and overtime provisions.

## I. Standard Of Review

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based upon defects that are apparent on the face of the complaint. *Heastie v. Roberts*, 226 Ill. 2d 515, 531, 877 N.E.2d 1064, 1075 (2007). In determining whether a complaint is legally sufficient, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* The crucial inquiry in ruling upon a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 424, 712 N.E.2d 330, 333 (1999). A court should not dismiss a cause of action pursuant to section 2-615 unless it is clearly apparent that the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *Heastie*, 226 Ill. 2d at 531. The reviewing court applies a *de novo* standard of review to a ruling on a section 2-615 motion to dismiss. *Id.* at 530-31. Moreover, in matters of statutory interpretation, the standard of review is *de novo*. *People v. Swift*, 202 Ill. 2d 378, 385, 781 N.E.2d 292, 296 (2002). When *de novo* review applies, the reviewing court performs the same analysis that the trial court would perform. *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43.

## II. The Appellate Court Erred In Stating That Employers Can Moot Employees' IMWL Claims With Belated Backpay.

The IMWL's damages provision entitles employees to treble damages, reasonable attorney's fees, and statutory penalties if they receive lower wages than they are due, even

if the employer, at some later date, compensates them for the original shortfall. The Appellate Court's statement to the contrary is wrong. It conflicts with the statute's plain language and the State's interpretation of the same, and it renders the IMWL's penalty provision dead letter.

### A. Pursuant to the Plain Language Of The IMWL, An Employer's Belated Payment Of Backpay Does Not Moot An Employee's Claim For Treble Damages, Attorneys' Fees And Costs, And Statutory Penalties.

The IMWL provides in relevant part:

> If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this Act, the employee may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid.

820 ILCS 105/12(a). This provision requires employers to pay any required overtime on "the date of payment"—in this case, the date the bonuses were paid—even where such overtime is based on a bonus rather than on standard hourly wages. *Id.* Moreover, an employee's claim for treble damages, attorneys' fees, and statutory penalties accrues *at the moment the employer underpays him, i.e.*, when he receives a paycheck that does not include all required overtime pay. *Id.* Once this underpayment occurs and the employee's IMWL claim therefore accrues, it cannot be mooted by a payment of less than the *full amount* of treble damages, attorneys' fees, and penalties owed to the employee. *See Bates v. William Chevrolet/Geo, Inc.*, 337 Ill. App. 3d 151, 162 (1st Dist. 2003) (holding that "plaintiff's cause of action was not moot" because "[d]efendant failed to tender the attorney fees recoverable under section 10a(c) of the Consumer Fraud Act and, thus, failed to tender the 'full amount' owed to plaintiff"); *Berger v. Perry's Steakhouse of Illinois, LLC*, 430 F. Supp. 3d 397, 406-07 (N.D. Ill. 2019) (holding that a defendant-employer's tender covering

the original underpayment and the IMWL's requisite monthly penalty still "falls short of being fully compensatory" and does not moot a plaintiff's IMWL claim where it "d[oes] not include attorneys' fees, costs, or liquidated damages").

The Appellate Court stated that it was refusing Plaintiffs' request to incorporate the Illinois Wage Payment Collection Act's ("IWPCA") time limit into the IMWL as the "deadline" by which an employer can "make [their employees] whole" *after underpaying them*. A.015-16. This statement is misguided, first, because Plaintiffs never asked the Appellate Court to import into the IMWL any purported deadline from the IWPCA for employers to make their employees whole after underpaying them. The statement is also misguided because it reflects a serious misunderstanding of the IMWL, the IWPCA, and the mootness doctrine. As a practical matter, an underpayment pursuant to the IWML takes place on the date the employee receives his deficient paycheck, and the IWPCA requires employers to pay their employees within 13 days after the end of a semi-monthly pay period. 820 ILCS 115/4. Once the employer pays its employee for work performed during a particular pay period and shorts the employees' overtime wages, then the employee has been underpaid. At that point, the employee's IMWL claim has accrued and cannot be mooted by an employer belatedly attempting to "make [its employee] whole" by paying single damages. A.016.

The legislature clearly envisioned IMWL damages claims surviving once employees are compensated for their original underpayment of overtime wages. Pursuant to the plain text of § 105/12(a), if the employer underpays the employee and then later compensates her for the amount of the original underpayment many months later, then the 5% penalty is to be calculated each month from the date of the original underpayment until

the date on which the employer pays the employee that shortfall. For example, if an employer pays an employee $4,000 in wages on January 1, but the employer owed her (yet failed to pay her) an additional $1,000 in overtime premiums for work performed during that pay period, then the employee was underpaid $1,000 on January 1. If the employer belatedly pays the employee the amount of the original underpayment ($1,000) on July 1, she is entitled to statutory damages totaling $300 (5% of $1,000—or $50—multiplied by 6 months) in addition to treble damages and reasonable attorneys' fees. *Id.* If the July 1 payment had mooted the employee's claim, it would be unnecessary to calculate statutory penalties at that point. Yet the legislature selected the date on which "such underpayments [no longer] remain unpaid" as determining the span of the time period for calculating monthly statutory penalties. For the above reasons, an employee's entitlement to treble damages, attorneys' fees, and the 5% penalty does not vanish merely because the employer compensates the employee in the amount of the original underpayment many months or years later.

Here, as an example, Defendant did not pay Plaintiffs adjusted overtime payments until July 2020 for bonuses that Defendant paid to Plaintiffs on their paychecks in July 2019. A.063-65, R. C94-96, ¶¶ 12, 18, 19, 21, 22. As a result, they were entitled to treble damages and at least one year's worth of monthly penalties under the plain language of the IMWL. Plaintiffs alleged that Defendants' adjustment payments were insufficient to cover these additional amounts. A.064-65, ¶¶ 18, 22, R. C95-96. The Appellate Court's ruling to the contrary conflicts with the statutory language and should be reversed.

B. Even if The IMWL's Penalty Provision Were Ambiguous, The Appellate Court Would Have Owed Deference To The IDOL's Interpretation.

Even if § 105/12(a) were ambiguous, however, the Appellate Court was bound to defer to the State's interpretation of the provision articulated in its Amicus Brief: that § 105/12(a) establishes a claim for treble damages, statutory penalties, and attorneys' fees that survives even if the employer later compensates the employee for an earlier underpayment in wages. *See* A.040. As succinctly explained by the State below, "Generally, an IMWL claim accrues on the relevant payday—i.e., the day the employee should have been, but was not, paid the wages that he or she was owed." A.037.

A statutory provision is ambiguous "when it is capable of being understood by reasonably well-informed persons in two or more different senses." *People v. Jameson*, 162 Ill. 2d 282, 288, 642 N.E.2d 1207, 1210 (1994). This Court has unequivocally held that courts must defer to a State agency's reasonable interpretation of an ambiguous statutory provision the agency is tasked with administering and enforcing. *See Church v. State*, 164 Ill. 2d 153, 161–62, 646 N.E.2d 572, 577 (1995) ("A court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration."); *Bonaguro v. Cnty. Officers Electoral Bd.*, 158 Ill. 2d 391, 398, 634 N.E.2d 712, 715 (1994); *Abrahamson v. Illinois Dep't of Prof'l Regul.*, 153 Ill. 2d 76, 97–98, 606 N.E.2d 1111, 1121 (1992). Importantly, deference is still warranted "even if [the State agency] has articulated its interpretation for the first time in an amicus brief (instead of a formal rulemaking proceeding or agency adjudication), unless there is reason to believe that the interpretation is merely a post-hoc, self-interested litigation position that does not reflect the agency's considered judgment on the matter or the interpretation conflicts with prior agency decisions or clearly conflicts with the statute

at issue." *Landmarks Illinois v. Rock Island Cnty. Bd.*, 2020 IL App (3d) 190159, ¶ 60 (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208–11, 131 S. Ct. 871, 880-82 (2011) (deferring to agency's interpretation advanced in amicus brief and finding "no reason to believe that the interpretation advanced . . . is a 'post hoc rationalization' taken as a litigation position" because the agency was "not a party to th[e] case.")).

The IDOL is charged with administering and enforcing the IMWL. 820 ILCS 105/10(a) ("The Director [of the Department of Labor] shall make and revise administrative regulations, including definitions of terms, as he deems appropriate to carry out the purposes of this Act . . . ."); *Id.* § 105/11(d) ("It is the duty of the Department of Labor . . . to enforce generally the provision of this Act."). Because the IDOL is not even a party to this lawsuit, there is no reason to believe that its interpretation is a "post-hoc, self-interested litigation position." *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60; *Chase Bank USA, N.A.*, 562 U.S. at 208–11. Moreover, the IDOL's reading of § 105/12(a) does not conflict with any prior agency decisions, nor does it "clearly conflict[]" with the IMWL itself. *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60. As such, under *Landmarks* and the United States Supreme Court's and this Court's own precedent, deference to the IDOL's interpretation of § 105/12(a) of the IMWL is clearly warranted here. Despite the deference owed to the IDOL's interpretation, the Appellate Court altogether ignored it, making no mention whatsoever of the IDOL's interpretation of § 105/12(a) articulated in the State's Amicus Brief. Thus, even if this Court finds that § 105/12(a) lends itself to two or more reasonable interpretations, it should reverse the Appellate Court's decision for failing to defer to the IDOL's reasonable interpretation thereof.

### C. The Appellate Court's Opinion Guts The Penalty Provisions Of The IMWL And Incentivizes Employers To Pay Their Employees Lower Wages Than Legally Required.

The Appellate Court's reading of the IMWL cannot be what the legislature intended because it has the practical effect of rendering Illinois' minimum wage and overtime rate dead letter. If, as the Appellate Court's opinion indicates, a defendant could really "ma[k]e up for any unpaid overtime" at *any point* after the initial underpayment and thereby moot an employee's claims to treble damages, attorneys' fees and costs, and statutory penalties under the IMWL, A.014-15, the IMWL would have no teeth, and employers could and would flout its mandates with impunity.

Treble damages and monthly statutory penalties serve to incentivize all employers to pay their employees properly in the first instance—before the employer is sued or final judgment is entered against it. *See* Illinois Senate Transcript, 2019 Reg. Sess. No. 10, at 17 ("[T]here's a considerable amount of wage theft that takes place around this particular area. We've addressed that in this legislation to make sure that we strengthen those labor laws and put sanctions in place that would encourage employers to provide the actual tipped wage."). Alarmingly, the Appellate Court's opinion appears to allow employers to avoid paying all three categories of damages—treble damages, attorneys' fees and costs, and 5% monthly penalties—simply by paying *single* damages months or even years after the original underpayment, indeed, at any point until final judgment.

In that case, an employer would have no financial motivation to pay their employees what they are legally due at least until threatened with legal action, and even then, the employer could elect to delay payment of the original shortfall even further, for instance, until the eve of trial or during closing arguments, and face no economic consequences whatsoever. Without any consequences for noncompliance with the IMWL,

its directives are rendered completely ineffectual. The Appellate Court's reading of the IMWL's penalty provision therefore frustrates the "manifest purpose of the [IMWL]": "to secure that employers pay a standard minimum wage and overtime to employees at a level consistent with the employees' health, efficiency and general well-being." *People ex rel. Dep't of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 21 (1st Dist. 2003).

## III. The Appellate Court Was Wrong In Holding That The IMWL Excludes From The Regular Rate All Remuneration Not Based On Hours Worked.

In addition, the Appellate Court erred in ruling that the gift exclusion removes all sums not measured by or dependent on hours worked from the regular rate used to calculate overtime pay. Not only is this ruling contrary to the regulation's plain language, but it also contradicts and ignores the State's interpretation thereof.

### A. The Gift Exclusion, By Its Plain Language, Is Limited To Awards In The Nature of Gifts.

Nothing in the plain language of the regulations defining regular rate justifies the Appellate Court's interpretation that remuneration not measured by or dependent on hours worked is excluded from the regular rate. A.012. The IMWL requires an employer to pay its hourly, non-exempt employees at a rate of not less than 1.5 times the regular rate of pay for all hours worked in excess of 40 in any workweek, 820 ILCS 105/4a, and the regular rate is defined by regulation to include "*all* remuneration for employment paid to . . . the employee" with a few limited exclusions, 56 Ill. Adm. Code 210.410 (emphasis added).[2]

[2] Courts rely on IDOL regulations to construe and apply the IMWL. *See, e.g.*, *People ex rel. Dep't of Lab.*, 339 Ill. App. 3d at 19–23, (deferring to the test set forth in IDOL regulations to determine whether an individual is an employee or independent contractor under the IMWL) (citing 820 ILCS 105/10 ("The Director [of the IDOL] shall make and revise administrative regulations, including definitions of terms, as he deems appropriate to carry out the purposes of this Act . . . .")).

Among these limited exclusions is the gift exclusion, which covers: "Sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." *Id.* § 210.410(a).

The plain language of the gift exclusion reveals that it encompasses only sums paid as gifts, for example: gifts made at holidays or gifts in other amounts that are not measured by or dependent on hours worked. What follows "such as" are illustrations of rewards that could be granted in the nature of a gift: gifts "made at holidays," as well as gifts made at other times of the year in "amounts that are not measured by or dependent on hours worked." As noted above, examples might include an employer spontaneously providing $1,000 to all employees around the holidays or $500 to a valued employee to spend on an upcoming vacation.

It is in utter discord with the natural reading of the gift exclusion to interpret the phrase beginning with "or other amounts" as drastically expanding the exclusion to encompass *all* remuneration not measured by or dependent on hours worked, regardless of whether it is in the nature of a gift. In ruling that all amounts not based on hours worked can be properly excluded from the regular rate, the Appellate Court took a few words ("other amounts that are not measured by or dependent on hours worked") completely out of context and ignored that they immediately follow "[s]ums paid as gifts *such as* those made at holidays or . . ." and therefore clearly illustrate the types of "[s]ums" that could be "paid as gifts." *Id.* (emphasis added). The Appellate Court offers no explanation for disregarding the phrase "such as," which plainly introduces examples of "[s]ums paid as gifts." *See* A.013.

Furthermore, Plaintiffs' plain language reading of the gift exclusion is in harmony with the surrounding IMWL regulatory provisions, whereas the Appellate Court's tortured interpretation conflicts with the regulatory context. In ascertaining the intent of a regulation's drafters, courts "give the language its plain and ordinary meaning and *read the regulatory scheme as a whole*." *Perez v. Illinois Dep't of Child. & Family Servs.*, 384 Ill. App. 3d 770, 772–73 (4th Dist. 2008) (emphasis added) (citation omitted); *see also Chicago Tchrs. Union, Loc. No. 1 v. Bd. Of Educ. Of City of Chicago*, 2012 IL 112566, ¶ 15, 963 N.E.2d 918, 923 ("[W]ords and phrases are construed in light of other relevant statutory provisions and not in isolation."); *People v. Beachem*, 229 Ill. 2d 237, 243, 890 N.E.2d 515, 519 (2008) ("We construe the statute as a whole and afford the language of the statute its plain and ordinary meaning."); *People v. Burge*, 2021 IL 125642, ¶ 34, 195 N.E.3d 1135, 1148 ("[T]he fundamental principle of statutory interpretation is that statutes must be read as a whole and not as isolated provisions."). The Appellate Court mischaracterized this argument as "plaintiffs' argument that the plain meaning of section 4a of the Wage Law resulted in an 'absurd interpretation' that was inconsistent with the rest of the Wage Law . . . ." A.009-10. This is incorrect. The argument is not that the court should somehow deviate from the plain language of § 210.240, but rather that the court should properly construe that plain language in the first instance, reading the regulatory scheme as a whole. *See Perez*, 384 Ill. App. 3d at 772–73.

The IMWL regulations at §§ 210.420 and 210.430 set out several ways in which non-hourly compensation must be included in calculating the regular rate of pay, thus conflicting directly with the Appellate Court's inaccurate construction of the gift exclusion as excluding from the regular rate all pay not measured by or dependent on hours worked.

As one example, if an employer pays an employee "on a piece-rate basis," *i.e.*, per item manufactured or completed, then the compensation must be included in the regular rate of pay used to calculate overtime premiums. 56 Ill. Adm. Code 210.430(b). This is the case even though piece-rate pay is not measured by or dependent on hours worked. Additionally, employers must include compensation paid to employees on a salary basis, or on a per-day or per-job basis. *Id.* § 210.430(c) & (d). Again, these types of pay are not measured by or dependent on hours worked, yet the regulations explicitly require an employer to include them in the regular rate of pay used to calculate overtime premiums. Put simply, §§ 210.420 and 210.430 of the regulations are inconsistent with Defendant's interpretation of § 210.410(a) as excluding all remuneration not measured by or dependent on hours worked.

The Appellate Court attempted to harmonize §§ 210.420 and 210.430 with its overbroad reading of the gift exclusion by declaring that the ill-conceived exclusion for sums "not measured by or dependent on hours worked" does not actually apply to all such sums. A.012. Instead, the Appellate Court stated that the exclusion for sums "not measured by or dependent on hours worked" should be limited to hourly workers—*i.e.*, not those paid exclusively on a salary or piece-rate basis. *Id.* But, importantly, the Appellate Court provided no textual basis for this carveout from its fabricated exclusion. *Id.* A clear sign that the Appellate Court's reading of the gift exclusion is incorrect is the fact that said reading needed to be narrowed significantly, without any textual justification, so as not to conflict directly with the surrounding regulatory provisions. *See Burge*, 2021 IL 125642, ¶ 20 ("[C]ourts may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express.").

If a regulatory interpretation requires a court to invent new rules to reconcile that interpretation with the regulatory framework, it cannot be correct.

The statutory framework cannot be ignored. Either the gift exclusion is limited to sums paid in the nature of a gift, or if the gift exclusion is deemed to cover all sums not dependent on hours worked, then that excluded category of payments must be narrow enough to omit payments made on a piece-rate, salary, per-job, and per-day basis, which are indisputably required to be factored into the regular rate pursuant to 56 Ill. Adm. Code 210.430(b), (c), and (d). Put another way, if § 210.410(a) excludes from the regular rate all sums "not dependent on hours worked," then sums that are "dependent on hours worked" must be construed so broadly as to cover payments on a piece-rate, salary, per-job, and per-day basis such that these categories of payments would fall outside of the gift exclusion. In that case, all bonuses at issue in this case would also fall outside of the gift exclusion because they are just as "dependent on hours worked" as any sums paid on a piece-rate, salary, per-job, or per-day basis. As alleged in the complaint, the bonuses were paid in recognition of Plaintiffs' services performed for the company and their satisfaction of certain performance and safety metrics and seniority goals. A.063-64, R. C94-95, ¶¶ 14, 16, 20. If Plaintiffs had not worked any hours for Defendants, they would not have earned their bonuses.[3]

[3] In support of its section 2-619 motion to dismiss, Defendant submitted an affidavit by one of its employees Aurelie Richard attesting that "[n]one of the incentives alleged in the Complaint, including KPI, success sharing, or the seniority award, are measured or dependent on hours worked by team members." R. C56. The circuit court rightly struck and refused to consider this paragraph of the affidavit as conclusory. A.024; R. C247. As the Appellate Court noted, "[t]he circuit court's ruling on striking a portion of Richard's affidavit is not before us on appeal." A.010, n.1. Likewise, this question is not before this Court. This factual dispute will need to be weighed by the circuit court on remand after the parties further develop the factual record.

Even the latter reading of the gift exclusion creates discord with other provisions of the statutory text, however. The regulatory framework implementing the IMWL should be "construed so that no part of it is rendered meaningless or superfluous," *People v. Jones*, 214 Ill. 2d 187, 193, 824 N.E.2d 239, 242 (2005). Yet any reading that expands the gift exclusion to cover all payments not dependent on hours worked would render redundant the subsection that immediately follows the gift exclusion, § 210.410(b). Section 210.410(b) excludes from the regular rate "[p]ayments made for occasional periods *when no work is performed* due to vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause." (emphasis added). Quite obviously, payments made for "periods when no work is performed" are "not measured by or dependent on hours worked." If the gift exclusion were intended to encompass all amounts "not measured by or dependent on hours worked," then § 210.410(b) would be rendered wholly superfluous. There would be no reason whatsoever to include it. For this additional reason, the Appellate Court's interpretation of § 210.410 is inconsistent with the regulatory framework as a whole.

Importantly, here, Plaintiffs' allegations were more than sufficient to demonstrate that the bonuses Defendant paid them did not satisfy the gift exclusion set out in 56 Ill. Adm. Code 210.410(a). Plaintiffs explicitly alleged that the payments were not gifts,[4]

[4] A "gift" is the transfer of property "without compensation." Black's Law Dictionary 696 (7th ed. 1999); *see also Provena Covenant Medical Center v. Department of Revenue of State*, 384 Ill. App. 3d 734, 751, 894 N.E.2d 452, 467 (4th Dist. 2008) ("[A] gift is, by definition, free goods or services: 'something voluntarily transferred by one person to another without compensation.'") (quoting Merriam-Webster's Collegiate Dictionary 491 (10th ed. 2000)). Here, Defendant promised the bonuses ahead of time to reward efficient, quality work and thus received compensation in the form of increased productivity in return.

A.062, R. C93, ¶ 9—an allegation that Defendant does not challenge, R. C231. Moreover, Plaintiffs alleged that the KPI Incentive bonuses were paid "for achieving certain previously announced performance and safety metrics on [their] production line[s]." A.063-64, R. C94-95, ¶¶ 13, 16, 20. As the Attorney General argued below, these payments were "functionally indistinguishable from piece-rate compensation" and should have been included in the Plaintiffs' regular rate of pay. A.048. Put simply, these payments were not gifts but were an alternative form of compensation for the Plaintiffs' labor. As such, this Court should rule that they fall outside the gift exclusion and were therefore improperly excluded from Plaintiffs' regular rate of pay in calculating their overtime wages.

### B. Even If The Gift Exclusion Were Ambiguous, The Appellate Court Would Have Owed Deference To The IDOL's Interpretation.

Even if Plaintiffs' reading of § 210.410(a) were one of two or more reasonable readings thereof, this Court would still be bound to defer to the interpretation of the exclusion that the State articulated in its Amicus Brief, which is the same as the Plaintiffs' interpretation—that § 210.410(a) is limited to sums paid in the nature of a gift. *See* A.050-055. As the State explained, the phrase "or other amounts that are not measured by or dependent on hours worked" "simply helps illustrate the kinds of 'gifts' that can be excluded." A.052-53.

Courts must defer to a State agency's reasonable interpretation of its own regulations. *Medponics Illinois, LLC v. Dep't of Agric.*, 2021 IL 125443, ¶ 31, 183 N.E.3d 79, 94 ("[A]n agency's interpretation of its own regulations is entitled to substantial deference and weight, as the agency makes informed judgments based on its expertise and experience and provides a knowledgeable source in ascertaining the intent of the legislature."); *Portman v. Dep't of Hum. Servs.*, 393 Ill. App. 3d 1084, 1092–93, 914

N.E.2d 1186, 1194–95 (2d Dist. 2009) ("[W]e are to give an administrative agency's interpretation of its own regulations deference unless it is clearly erroneous, arbitrary, unreasonable, or inconsistent with past interpretations.") (internal citations omitted). Moreover, as discussed above, deference is warranted "even if [the State agency] has articulated its interpretation for the first time in an amicus brief . . . unless there is reason to believe that the interpretation is merely a post-hoc, self-interested litigation position that does not reflect the agency's considered judgment on the matter or the interpretation conflicts with prior agency decisions or clearly conflicts with the statute at issue." *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60; *see also Chase Bank USA, N.A.*, 562 U.S. at 208–11.

The IDOL is the agency authorized to enact the IMWL's implementing regulations and enacted § 210.410(a) pursuant to that authority. 820 ILCS 105/10(a). Moreover, because the IDOL is not a party to this lawsuit, there is no reason to believe that its interpretation is a "post-hoc, self-interested litigation position." *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60; *Chase Bank USA, N.A.*, 562 U.S. at 208–11. In addition, the IDOL's reading of § 210.410(a) does not conflict with any prior agency decisions, nor does it "clearly conflict[]" with the plain language of § 210.410(a) or the IMWL. *Landmarks Illinois*, 2020 IL App (3d) 190159, ¶ 60. As such, under *Landmarks* and the United States Supreme Court's and this Court's own precedent, the Appellate Court was bound to defer to the IDOL's interpretation of § 210.410(a). Despite the deference owed to the IDOL's interpretation, the Appellate Court did not acknowledge its interpretation of the gift exclusion or the existence of the State's Amicus Brief. In sum, even if the gift exclusion

were ambiguous, this Court should nevertheless reverse the Appellate Court for its failure to defer to the IDOL's reasonable interpretation of that exclusion.

### C. Even If The Gift Exclusion Were Ambiguous, This Court Should Adopt Plaintiffs' Reading As It Is The Only One Supported By Well-Established Canons of Statutory Construction.

Not only is Plaintiffs' reading of § 210.410 the only reasonable reading based upon the provision's plain language and regulatory context, it is also the only reading supported by traditional canons of statutory construction. Plaintiffs' plain language reading is aligned with the well-established principles of "ejusdem generis" and "noscitur a sociis." Under the "ejusdem generis" rule of statutory construction, when a statutory clause specifically identifies classes of persons or things and then includes "other persons or things," the word "other" is interpreted to mean "other such like." *Pooh-Bah Enterprises, Inc. v. County of Cook,* 232 Ill. 2d 463, 492-94, 905 N.E.2d 781, 799-800 (2009). Similarly, under the principle of "noscitur a sociis," "a word is given more precise content by the neighboring words with which it is associated." *Corbett v. County of Lake*, 2017 IL 121536, ¶ 31, 104 N.E.3d 389, 397. "The canon of noscitur a sociis is particularly useful when construing one term in a list, in order to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to legislative acts." *Id.* ¶ 32 (internal quotations and alterations omitted).

As an illustration, the court relied on both "ejusdem generis" and "noscitur a sociis" in *In re Estate of Crawford*, 2019 IL App (1st) 182703, in construing an exception to the Dead-Man's Act for "a book account *or any other record or document*." *Id.* ¶¶ 31-33 (emphasis added). The court concluded that the phrase "any other record or document" did *not* stretch so far as to encompass a log of personal loans because, unlike a "book of account," it documented personal rather than business transactions. *Id.* ¶ 35. Here, pursuant

to both "ejusdem generis" and "noscitur a sociis," the phrase "or other amounts that are not measured by or dependent on hours worked" is most naturally read as further illustration of "[s]ums paid as gifts," just like the phrase "those made at holidays" provides an example of another type of reward that could qualify as a gift. 56 Ill. Adm. Code 210.410(a).

In short, the rules of statutory construction further reinforce Plaintiffs' plain language reading of the gift exclusion.

### D. The Burden Of Proving An Exclusion From the IMWL Is On The Employer.

The Appellate Court committed another error that this Court should correct: It stated, albeit in dicta, that "[i]t is plaintiffs' burden to show that the bonuses at issue qualify as such and do not fall under any other exclusion." A.012. However, it is the employer—not the employee—who bears the burden of proving that an exclusion from the IMWL applies. *See Wilkins v. Just Energy Grp., Inc.*, 308 F.R.D. 170, 178 (N.D. Ill. 2015), *on reconsideration in part*, 171 F. Supp. 3d 798 (N.D. Ill. 2016) (holding that employer bears the burden of proving exclusion from IMWL); *see also Richardson Bros. v. Bd. Of Rev. of Dep't of Emp. Sec.*, 198 Ill. App. 3d 422, 426, 555 N.E.2d 1126, 1128 (5th Dist. 1990) (holding that employer bears burden of proving exemption from Unemployment Insurance Act).

Quite logically, it is the default rule across myriad types of statutes that the party asserting an exclusion from the statute bears the burden of proving that exclusion. *See Bd. of Educ. of Glenview Cmty. Consol. Sch. Dist. No. 34 v. Illinois Educ. Lab. Rels. Bd.*, 374 Ill. App. 3d 892, 899, 874 N.E.2d 158, 164 (4th Dist. 2007) ("The party asserting the exclusion has the burden of producing sufficient evidence to support its position."); *Cnty. of Cook v. Illinois Lab. Rels. Bd., Loc. Panel*, 369 Ill. App. 3d 112, 123, 859 N.E.2d 80, 89

(1st Dist. 2006) ("An employer who wishes to exclude an employee from a bargaining unit because the employee is a confidential employee bears the burden of proving that fact."); *Resurrection Lutheran Church v. Dep't of Revenue*, 212 Ill. App. 3d 964, 968, 571 N.E.2d 989, 992 (1st Dist. 1991) ("The burden of proving the right to an exemption is upon the person seeking it."); *Turner v. Joliet Police Dep't*, 2019 IL App (3d) 170819, ¶ 10, 123 N.E.3d 1147, 1150 ("If the public body asserts an exemption from disclosure, it has the burden of proving the exemption applies by clear and convincing evidence."). By asserting that an employee has the burden of *disproving* every possible exclusion, the Appellate Court flipped this default rule on its head. This Court should correct this serious error.

## CONCLUSION

For the foregoing reasons, Plaintiffs Carmen Mercado and Jorge Lopez, respectfully ask this Court to reverse the Appellate Court and remand to the circuit court for further proceedings.

Respectfully submitted,

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**IN THE**
**SUPREME COURT OF ILLINOIS**

CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

S&C ELECTRIC COMPANY,

*Defendant-Appellee,*

On Petition for Leave to Appeal from the Appellate Court of Illinois
First District, No. 22-0020
There Appealed from the Circuit Court of Cook County, Illinois
Chancery Division, General Chancery Section, No. 2020 CH 7349
The Honorable Allen P. Walker, Judge Presiding

**CERTIFICATE OF SERVICE/NOTICE OF FILING**

TO: John Roache
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You are hereby notified that on December 6, 2023, I caused to be electronically filed with the Clerk of the Illinois Supreme Court through the Odyssey/eFileIL system, the *Brief of Plaintiffs-Appellants*. On December 6, 2023, by 5:00 p.m., a copy of the *Brief of Plaintiffs-Appellants* will also be electronically mailed to the above-named opposing counsels.

Within five days of acceptance by the Court, the undersigned certifies that 13 paper copies of the *Brief of Plaintiffs-Appellants* will be sent to the Office of the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Date: December 6, 2023

*/s/ Margaret E. Truesdale*

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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under 342(a), is 28 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Date: December 6, 2023

*/s/ Margaret E. Truesdale*

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## APPENDIX

2023 IL App (1st) 220020
No. 1-22-0020

FIRST DIVISION
March 6, 2023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| CARMEN MERCADO and JORGE LOPEZ, on Behalf of Themselves and All Others Similarly Situated<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>S&C ELECTRIC COMPANY,<br><br>Defendant-Appellee. | ) | Appeal from the Circuit Court of Cook County, Chancery Division<br><br>No. 2020 CH 7349<br><br>The Honorable Allen P. Walker, Judge Presiding. |

JUSTICE PUCINSKI delivered the judgment of the court, with opinion.
Justices Hyman and Coghlan concurred in the judgment and opinion.

**OPINION**

¶ 1 Plaintiff-appellants, Carmen Mercado and Jorge Lopez, filed a single-count class action complaint against defendant-appellee, S&C Electric Company (S&C), seeking allegedly unpaid wages pursuant to the Illinois Minimum Wage Law (Wage Law) (820 ILCS 105/1 *et seq*. (West 2020)), as well as statutory interest, penalties, and attorney fees and costs. Plaintiffs claim that defendant violated the Wage Law by incorrectly calculating their regular rate of pay for the purpose of paying them for working overtime because they received certain bonuses and incentive payments that they argue were improperly excluded from this overtime calculation. Defendant contends that the bonuses and incentive payments were not paid based on the number of hours

worked and therefore fall under an enumerated list of exclusions to the regular rate of pay, found in the regulations to the Wage Law. Plaintiffs further argue that, despite receiving an adjustment payment from defendant following the end of their employment, they still have not received the full amount of overtime, plus statutory interest, fees, and penalties pursuant to the Wage Law, that they are owed. Defendant argues that the adjustments account for all unpaid wages owed to plaintiffs and plaintiffs no longer have any remaining damages they could plead.

¶ 2 Defendant moved to dismiss the complaint on the above-stated grounds. The circuit court agreed with the defendant's interpretation of what qualifies as a gift or other sum of money not measured by or dependent on hours worked under the regulations to the Wage Law but declined to dismiss the case because of a lack of evidence in the record to determine whether the bonuses at issue fell within that category. However, the court dismissed the complaint on the basis that plaintiffs' alleged underpayment was satisfied in whole by defendant's adjustment payments and plaintiffs were therefore unable to plead damages. Plaintiffs now appeal from this ruling. We now affirm the circuit court's order.

¶ 3 BACKGROUND

¶ 4 The underlying matter arises from a class action lawsuit brought by named plaintiffs, Mercado and Lopez, against their former employer, defendant S&C for unpaid overtime wages pursuant to the Wage Law. Plaintiffs were formerly employed as factory assembly workers at S&C; Mercado worked from 2004 to June 2020 and Lopez from February 2019 to September 2019. Both were paid hourly in these positions. Defendant paid its hourly employees certain nondiscretionary bonuses, which are described as a "KPI initiative," a "MIS bonus," a "success sharing bonus," and a "seniority award" (collectively, the bonuses). Plaintiffs' complaint alleges

that they received these bonuses, that the bonuses were not categorized as gifts, and that the bonuses were paid in recognition of services performed.

¶ 5 Over the course of their employment, plaintiffs worked some amount of overtime. In their complaint, they allege that defendant paid them for these overtime hours at a rate below the minimum required by the Wage Law. See 820 ILCS 105/4a(1) (West 2020) (overtime pay must be calculated "at a rate not less than 1½ times the regular rate at which [the worker] is employed"). This, they claim, is because defendant improperly excluded the bonuses in calculating plaintiffs' "regular rate of pay." On or around July 31, 2020, after both plaintiffs had ended their employment with S&C, defendant paid Mercado and Lopez what is described in the complaint as "adjustment payments" of $486.74 and $10.33, respectively, which plaintiffs allege were insufficient to make up for the amount they would have received in overtime pay had the bonuses been included in the calculation.

¶ 6 On December 17, 2020, plaintiffs filed a one-count complaint on behalf of themselves and a similarly situated class of hourly workers, alleging a violation of the Wage Law for the underpayment of overtime. On March 5, 2021, they filed their first amended complaint. Defendant moved to dismiss the complaint on March 31, 2021, pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2020)). In its combined motion to dismiss, defendant argued that the bonuses were properly excluded from the calculation of regular rate of pay pursuant to the Wage Law regulations and, in the alternative, plaintiffs failed to plead damages because they had received the adjustment payments and therefore had been compensated for any underpayment, even if the bonuses should have been included.

¶ 7 The circuit court agreed with defendant that the plain language of the Wage Law enacting regulations excluded bonus payments that were not measured by or dependent on hours worked

from the calculation of an employee's regular rate of payment for the purposes of determining overtime payments, and the court further found this interpretation to be consistent with the sections of the Wage Law addressing the calculation of overtime payments for nonhourly employees. However, the court denied defendant's motion to dismiss on the grounds that the bonuses at issue were excluded from plaintiffs' overtime payment calculations, instead finding an issue of material fact as to whether any of these bonuses were measured by or dependent on hours worked. The court further stated that the only evidence presented on this question was a single conclusory statement made in the affidavit of Aurelie Richard, defendant's chief human development and strategy officer. Her assertion that none of the incentive payments were measured by or dependent on hours worked was unsupported by any other facts, and the court declined to consider that portion of the affidavit. Specifically, the language the court struck read, "None of the incentives alleged in the Complaint, including KPI, success sharing, or the seniority award, are measured or dependent on hours worked by team members." The court kept the remainder of the affidavit, including Richard's explanation of the formula used to determine plaintiffs' adjustment payment amounts, which she claims included both the incentive payments described above, as well as a 5% annual interest rate.

¶ 8 As for defendant's other basis for moving to dismiss, the circuit court granted the motion pursuant to section 2-619(a)(9) (*id.* § 2-619(a)(9)), finding that plaintiffs failed to prove that they had suffered any underpayment of their wages because defendant showed that it had provided both plaintiffs an adjustment payment in an amount satisfying the underpayment, which they did not refuse or return. Plaintiffs now appeal from that order.

¶ 9 ANALYSIS

¶ 10 Standard of Review

¶ 11 A section 2-619.1 motion allows for a combined motion to dismiss under sections 2-615 and 2-619 (*id*. §§ 2-615, 2-619), as well as motions for summary judgment under section 2-1005 (*id*. § 2-1005). *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 688 (2004).

¶ 12 A section 2-615 motion to dismiss presents the question of whether the plaintiff has pled sufficient facts in the complaint to entitle him to relief if proven. *Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, ¶ 13. In reviewing a dismissal pursuant to section 2-615, all well-pleaded facts in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *Id.* A dismissal pursuant to section 2-615 is only proper where it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief. *Id.*; *Casualty Insurance Co. v. Hill Mechanical Group*, 323 Ill. App. 3d 1028, 1033 (2001). A plaintiff cannot simply rely upon conclusions of law or fact unsupported by specific factual allegations. *Powell*, 2014 IL App (1st) 123643, ¶ 13; *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1039 (1998). However, the complaint is to be liberally construed, viewed in the light most favorable to the plaintiffs. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). The standard of review for a dismissal under section 2-615 is *de novo*. *Powell*, 2014 IL App (1st) 123643, ¶ 13.

¶ 13 An order of dismissal pursuant to a section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2020)) is similarly reviewed *de novo. Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). The section 2-619 motion admits as true all well-pleaded facts, all reasonable inferences to be drawn from the facts, and the legal sufficiency of the claim. *Id.* In addition, all pleadings and supporting documents must be construed in the light most favorable to the nonmoving party. *Id.* A dismissal of a pleading pursuant to section 2-619 is based on certain defects or defenses that defeat the claim. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18.

¶ 14 A motion to dismiss under section 2-619(a)(9) specifically argues that the pleadings are barred by an affirmative matter not otherwise listed in this section. 735 ILCS 5/2-619(a)(1) (West 2020). An affirmative matter under section 2-619(a)(9) is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). In a section 2-619(a)(9) motion, "[t]he defendant does not admit the truth of any allegation in plaintiff's complaint that may touch on the affirmative matter raised in the [section] 2-619 motion." *Barber-Colman v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). Where the movant supplies an affirmative matter, the opposing party cannot rely on bare allegations alone to raise issues of material fact. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 835 (2006). Neither conclusory allegations nor conclusory affidavits are sufficient to defeat properly submitted facts in a section 2-619 motion. *Allegis Realty Investors v. Novak*, 379 Ill. App. 3d 636, 641 (2008). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993).

¶ 15 The Wage Law and Statutory Interpretation

¶ 16 The Wage Law (820 ILCS 105/4a(1) (West 2020)) provides for the payment of statutory overtime, stating that:

> "§ 4a. (1) Except as otherwise provided in this Section, no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed."

The regulation of the Wage Law that defines the "regular rate" of pay is found in Title 56, section 210.410, of the Illinois Administrative Code (56 Ill. Adm. Code 210.410 (1995)). Section 210.410 lists seven categories that are excluded from determining an employee's regular rate, as follows:

"The 'regular rate' shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not include:

(a) Sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked; and

(b) Payments made for occasional periods when no work is performed due to a vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause; and

(c) Sums paid in recognition of services performed which are:

(1) determined at the sole discretion of the employer, or

(2) made pursuant to a bona fide thrift or savings plan, or

(3) in recognition of a special talent; and

(d) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees; and

(e) Extra 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 a day where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; and

(f) Extra compensation provided by a premium rate paid to employees on Saturdays, Sundays, holidays or regular days of rest where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; and

(g) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic workday where such premium rate is not less than one and one-half times the rates established in good faith by the contract or agreement for like work performed during such workday or workweek." *Id*.

¶ 17 As enforcement of the minimum wage law, the Wage Law provides the following remedy to employees:

"(a) If any employee is paid by his employer less than the wage to which he is entitled under the provisions of this Act, the employee may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a) (West 2020).

¶ 18 While it is uncontested that plaintiffs were paid on an hourly basis, the court also looked at the regulation that defines the regular rate for nonhourly employees, which states:

"(b) The regular rate is a rate per hour. The Act does not require employers to pay employees on an hourly rate basis. Their earnings may be determined on a piece-rate, salary, commission, or some other basis, but in such case the overtime pay due must be

computed on a basis of the hourly rate derived from such earnings." 50 Ill. Adm. Code 210.420(b) (1995).

¶ 19 The parties dispute whether any of the bonuses fell into any of the above exclusions or whether they should have been included in calculating plaintiffs' rate of overtime payment. The parties further dispute whether plaintiffs are able to plead damages in light of defendant's adjustment payments, which defendant claims covered any underpayment alleged by plaintiffs.

¶ 20 Our primary objective when interpreting a statute is to give effect to the intent of the legislature. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). Where the meaning of the text is clear on its face, we apply the plain language of the statute, without resort to outside aids or tools of interpretation. *Id*; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Statutory terms are not to be interpreted in a vacuum; rather, they must be viewed as a whole with the rest of the statute's provisions. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 27; *In re Madison H.*, 215 Ill. 2d 364, 372 (2005). Furthermore, in reading a statute, no term should be rendered superfluous or meaningless, and we shall not depart from the plain meaning of the text to read into the statute any "exceptions, limitations, or conditions that conflict with the legislative intent." *JPMorgan*, 238 Ill. 2d at 461. In interpreting the statute, we presume that the legislature "did not intend absurdity, inconvenience or injustice." *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 40 (2001); see also *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶ 14.

¶ 21 Defining Regular Rate Under the Wage Law

¶ 22 As a preliminary matter, we note that the circuit court rejected defendant's motion to dismiss pursuant to the argument it put forth under section 2-615, that the bonuses plaintiffs received were properly excluded from calculating their overtime payment rate. Rather, the court disagreed with plaintiffs' argument that the plain meaning of section 4a of the Wage Law resulted

in an "absurd interpretation" that was inconsistent with the rest of the Wage Law, specifically the provisions for calculating overtime payments for workers whose salary was not based on an hourly rate. Plaintiffs argued, as they do on appeal, that the court must look outside the Wage Law to federal guidance on calculating regular rate under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.* (2018)) and utilize certain canons of statutory construction in order to interpret the Wage Law regulation defining the regular rate of payment.

¶ 23 The circuit court held that the plain meaning of the statute did not create an absurd result, and it was unnecessary to look beyond the face of the statute. Specifically, by excluding "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked," the regulations did not result in an inconsistent interpretation of the Wage Law as it applied to overtime payments for hourly and nonhourly workers. 56 Ill. Adm. Code 210.410(a) (1995)

¶ 24 What the circuit court did not rule on, however, was whether the bonuses paid to plaintiffs fell under the gift exception in section 210.410(a). Rather, the court declined to dismiss plaintiffs' complaint on those grounds, due to the existence of a genuine issue of material fact as to whether the bonuses should have been included in calculating plaintiffs' overtime rate. The court did strike the portion of Richard's affidavit where she stated that none of the bonuses were measured by or dependent on hours worked, finding her statement to be conclusory and unsupported by any other facts.[1] Beyond the affidavit, there were no other facts in the record explaining these bonuses.

¶ 25 As an initial matter, we note that we disagree with the circuit court that the portion of Richard's affidavit, where she states that the KPI, success sharing, and seniority awards were not measured by or dependent on hours worked, ought to have been stricken as a conclusory statement

[1] The circuit court's ruling on striking a portion of Richard's affidavit is not before us on appeal.

unsupported by sufficient facts. She is presented as an individual at S&C with knowledge of these bonuses and what they entailed, and her affidavit is based on her personal knowledge. Furthermore, plaintiffs did not counter her affidavit with one of their own and have not pled sufficient facts contradicting Richard's testimony. When ruling on a motion to dismiss, all well-pled facts in the complaint are accepted as true; however, facts contained in an uncontested affidavit must also be accepted as true. *Pilipauskas v. Yakel*, 258 Ill. App. 3d 47, 54 (1994). Regardless, we ultimately reach the same result as the circuit court in its decision. See also *Pekin Insurance Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200, ¶ 21 ("On appeal, a reviewing court may affirm the trial court's ruling for any reason supported by the record regardless of the basis relied upon by the trial court.").

¶ 26 Plaintiffs argue that the court erred in holding that the Wage Law excludes any and all employee compensation that is not based on hours worked. They further argue that the bonuses they received were not, definitionally, "gifts," as a basis for not categorizing them as exempt gifts pursuant to section 210.410(a) of Title 56 of the Illinois Administrative Code (56 Ill. Adm. Code 210.410(a) (1995)). We again note that the circuit court did not make any findings regarding the nature of the specific bonuses plaintiffs received. We therefore cannot rule on whether the court should have found that the bonuses were or were not gifts, as this issue is not properly before us. As for whether the circuit court actually held that section 210.410(a) excluded all recompense not based on hours worked, and whether this was a reading that was inconsistent with certain parts of the Wage Law, we disagree with plaintiffs' explanation of the circuit court's order. The court states in its order that its findings are not inconsistent with the sections of the Wage Law that provide for the determination of overtime pay for employees who are not compensated on an hourly basis, such as those paid on commission, piece-rate, or salary, because the regulations provide a formula

for converting nonhourly work to an hourly rate that should be used for determining overtime pay, and because the regulations specifically include bonuses in those calculations. See 56 Ill. Adm. Code 210.430 (1995).[2]

¶ 27 We agree that there is no inconsistency in finding that hourly workers' bonuses that are not measured by or derived from hours worked are excluded from calculating the rate of overtime pay for such workers. That is merely the plain reading of the Wage Law regulations at section 210.410(a). While the regulation uses the phrases "sums paid as gifts" and "other amounts," there is nothing in the language of the statute or its regulations that would require us to exclude bonuses, incentives, or any other term plaintiffs use to describe the payments from defendant that they seek to include in their overtime pay. Nowhere in the statute or its enacting regulations did our legislature provide an exclusion for bonuses or other such payments that are paid to hourly workers based on hours worked. It is plaintiffs' burden to show that the bonuses at issue qualify as such and do not fall under any other exclusion. Following the rules of statutory interpretation, we cannot read into the text any intent by the legislature to exclude all bonuses where no such language exists; we find that the circuit court did not do so in its ruling. Rather, it applied the plain meaning of the text where it was clear on its face to conclude that our legislature intended for sums received by hourly workers, that are not measured by or dependent on hours worked, to be excluded from the calculation of regular payment rate.

¶ 28 Plaintiffs attempt to argue that the circuit court improperly expanded the exclusion in section 210.410(a) by applying it to sums that were not paid as gifts; plaintiffs contend that this

[2] "When an employee is employed on a piece-rate basis (so much per piece, dozen, gross, etc.) the regular rate of pay is computed by adding together the total earnings for the workweek from piece rates and all other earnings (*such as bonuses*) and any sums paid for waiting time or other hours worked. This sum is then divided by the number of hours worked in that week to yield the piece worker's 'regular rate' for that week." (Emphasis added.) 56 Ill. Adm. Code 210.430(b) (1995).

provision should be read to apply only to "gifts" as defined by Black's Law Dictionary and no other payments, and the payments that are "in the nature of gifts." They claim that the court ignored the phrases in this section that limit this exclusion to only gifts and gift-like payments, namely "such as" and "or other amounts." 56 Ill. Adm. Code 210.410(a) (1995) ("Sums paid as gifts *such as* those made at holidays *or other amounts* that are not measured by or dependent on hours worked ***." (Emphases added.)). This argument fails; as Defendant notes, the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.* (2018)) and its implementing regulations have a similar exemption, enacted before the Wage Law and its regulations, and the language in the federal texts expressly limits the exemption to sums paid as gifts or in the nature of gifts. See 29 U.S.C. § 207(e)(1) (2018) (regular rate shall not include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency"); 29 C.F.R. § 778.212(b) (2020) ("To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift."). Plaintiffs argue that the circuit court should have looked outside the Wage Law and compare language from other statutes—to the extent that Defendant agrees that such a comparison would be proper in order to read the Wage Law, this only supports the court's interpretation. The Wage Law could have adopted this language as well, but it did not. There is no definition of "gift" or "sums in the nature of gifts" in either the statute or its implementing regulations. The circuit court did not read an overly expansive meaning of the section 210.410(a) exclusion into the regulation. Furthermore, the circuit court found insufficient evidence in the record to determine the nature of the bonuses plaintiffs received; we therefore do not know whether

they would fall under even plaintiffs' narrower version of the exclusion. We therefore find that the circuit court did not err both in its ruling on the meaning of the Wage Law regulations and in denying the section 2-615 portion of the motion to dismiss.

¶ 29 Whether Plaintiffs Alleged an Underpayment

¶ 30 The circuit court stated in its order that it could not determine whether there originally was any underpayment, due to the lack of any facts in the record addressing the nature of the bonuses. However, the remaining portions of Richard's affidavit that the circuit court did not strike established that the bonuses were accounted for in the adjustment payments that plaintiffs received. The court stated that plaintiffs admitted they received and kept the adjustment payments, that they do not dispute that the amount of the adjustments was insufficient to make them whole, and that they conceded that there was no statutorily mandated deadline for defendants to have made up for any unpaid overtime under the Wage Law. The circuit court therefore dismissed their complaint on the grounds that the adjustments satisfied the underpayments and that plaintiffs failed to offer any authority for their position that the Wage Law allowed for them to recover damages that existed in the months before they received the adjustments.

¶ 31 On appeal, plaintiffs argue that they never admitted that the adjustments were sufficient to make up for the unpaid overtime. They further argue there must be a deadline in the Wage Law by which an employer is required to cure an underpayment of overtime wages because if there were not, it would lead to an absurd result, such as allowing an employer to repay an employee the day before the employee's suit against the employer goes to trial. Plaintiffs do not point to any portion of the Wage Law or its regulations that states the length of this deadline or otherwise mentions any deadline. In fact, they concede that the statute contains no such provision. They cite to the

appropriate portion of the statute, discussing remedies available for an employer's violation of the Wage Law, which is found in section 12(a). The statute provides that an employee

> "may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a) (West 2020).

¶ 32 To circumvent the issue of the lack of a payment deadline in the Wage Law, plaintiffs argue that they are entitled to recover treble damages plus attorney fees and costs and a 5% monthly penalty for each month during which the underpayment remained outstanding, regardless of whether or when they received the adjustment payments. They further argue that they still have not been made whole, because the adjustments did not include the plaintiffs' bonuses in computing their overtime payment rate. However, Richard's affidavit clearly states that incentive payments were used to calculate the adjustment payment. Finally, plaintiffs contend that the court should adopt the deadline for payment of wages found in the Illinois Wage Payment and Collection Act (Collection Act), which states that wages must be paid within 13 days after the end of a pay period. 820 ILCS 115/4 (West 2020).

¶ 33 We decline to follow plaintiffs' contention that we should read into the Wage Law language that simply is not present in the statute. See *People v. Woodard*, 175 Ill. 2d 435, 443 (1997) ("There is no rule of construction that allows a court to declare that the legislature did not mean what the plain language of the statute imports."). Furthermore, where the text of a statute is clear on its face, we do not look outside the text to interpret it and give it effect. See *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 81 (1994).

Plaintiffs do not provide any support to suggest that our legislature intended to apply the payment deadline of the Collection Act to the Wage Law. Plaintiffs cannot maintain pleadings that defendant was required to make them whole pursuant to the Wage Law, by the deadline of the Collection Act.

¶ 34 Plaintiffs state in their amended complaint that after they left their employment with defendant, defendant paid each of them an adjustment payment, but in both instances, the amounts were "insufficient to cover the entirety of the shortfall and statutory damages and penalties owed" because the overtime calculations did not include the bonuses plaintiffs received. However, as we stated above, plaintiffs have not showed that the bonuses should have been included in those calculations. Even when construing all well-pled facts in a light most favorable to plaintiffs, it is clear that plaintiffs are not able to contest the contents of Richard's affidavit, which support defendant's argument that the bonuses did not need to be included in calculating the overtime rate. Furthermore, in the affidavit, Richard provides the formula used to calculate the amount of the adjustment payments; regardless of whether defendant included the bonuses in plaintiffs' overtime payment rate—and of course, defendant's position here is that they were exclusions pursuant to the administrative code—the evidence it puts forward is meant to show that the bonus amounts were factored into the adjustments anyway. While plaintiffs do not provide evidence to contradict the use of the formula identified by Richard, they claim that, however the adjustments were calculated, they were insufficient and specifically should have included the interest and penalties provided for late payments in section 12 of the Wage Law (820 ILCS 105/12(a) (West 2020)). Even without an explicit deadline for payment of wages in the Wage Law, defendant does not dispute that, for some amount of time, plaintiffs were owed unpaid wages after the end of their employment. This was the purpose of issuing the adjustment payments.

¶ 35 Reading the pleadings in the light most favorable to plaintiffs, and liberally construing the allegations of the complaint, we find that plaintiffs have failed to sufficiently plead an underpayment. The Wage Law includes an exception for bonuses and incentive payments. Plaintiffs admit that they received, accepted, and kept the adjustment payments. Richard's affidavit, which, again, we believe not to be conclusory as the circuit court found, provided that the bonuses were not dependent on or measured by hours worked, and we agree with the circuit court that they therefore should not have been included in calculating overtime. Regardless, Richard's uncontested affidavit also states that the formula for calculating plaintiffs' adjustment payments included incentive payments and an added 5% annual interest rate. Defendant established that Richard had the requisite knowledge to inform the court of the nature of the bonuses, and plaintiffs have not shown that they were entitled to anything more after they received the adjustment payments. Their claim that the bonuses were based on hours worked is entirely speculative and not supported by any facts in the record. We therefore affirm the circuit court's dismissal of their complaint.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed on the issue of the court's ruling on whether the payments in question should have been included in the overtime calculation and on the issue of whether plaintiffs sufficiently pled damages of underpayment in light of the adjustment payments.

¶ 38 Affirmed.

***Mercado v. S&C Electric Co.*, 2023 IL App (1st) 220020**

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| **Decision Under Review:** | Appeal from the Circuit Court of Cook County, No. 2020-CH-7349; the Hon. Allen P. Walker, Judge, presiding. |
| **Attorneys for Appellant:** | Christopher J. Wilmes and Margaret E. Truesdale, of Hughes Socol Piers Resnick & Dym, Ltd., of Chicago, for appellants. |
| **Attorneys for Appellee:** | John T. Roache and Megan M. Kokontis, of Akerman LLP, of Chicago, for appellee. |
| ***Amicus Curiae*:** | Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Alex Hemmer, Deputy Solicitor General, of counsel), for *amicus curiae* State of Illinois. |

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

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| CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>S&C ELECTRIC COMPANY,<br><br>Defendant. | Case No. 20 CH 7349<br><br>Calendar 03<br>Honorable Allen P. Walker |

**MEMORANDUM OF OPINION AND ORDER**

This matter comes to be heard on Defendant, S&C Electric Company's, 2-619.1 Combined Motion to Dismiss Plaintiffs' Amended Class Action Complaint. The matter has been fully briefed and argued before the Court. Defendant's motion to dismiss on the issue of whether KPI, MIS, success sharing, or the seniority award should have been included in calculating Plaintiffs' overtime pay is denied. Defendant's motion to dismiss on the issue of the underpayment in light of the adjustment payments is granted with prejudice.

**BACKGROUND**

Carmen Mercado ("Mercado") and Jorge Lopez ("Lopez") are former employees of S&C Electric Company ("S&C"), a Delaware corporation with its headquarters in Chicago, Illinois.[1] S&C designs and manufactures switching, protection and power-quality products for electric power transmission and distribution systems.

Mercado and Lopez worked as hourly-paid factory assembly workers for S&C. Mercado worked for S&C from 2004 until June 2020. In 2019, S&C paid Mercado an hourly wage of $14.20 for up to 40 hours per week, and an overtime rate of $21.30 for hours worked in excess of 40 hours per week. In July of 2019, Mercado also received two bonuses from S&C – a $300 Key Performance Indicator ("KPI") Incentive Bonus and a $640.97 "MIS" Bonus. Neither bonus was reflected in Mercado's regular rate for purposes of calculating overtime pay, even though Mercado worked overtime hours in June and early July 2019. In 2020, Mercado received the same hourly

[1] The facts recited herein are derived from Plaintiffs' Complaint and the exhibits attached thereto and are accepted as true for purposes of Defendant's Motion to Dismiss. *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d. 112, 115 (1993).

rate of $14.20 and overtime rate of $21.30. Additionally, in 2020, Mercado received three (3) bonuses – a $300 KPI Incentive Bonus, a $909 "success sharing" bonus, and a $900 "seniority award" bonus. Once again, Mercado's overtime rate of pay did not reflect the bonuses she received in 2020.

Lopez worked for S&C from around February 2019 until around September 2019. In 2019, Lopez was paid an hourly rate of $14.00 for up to 40 hours per week, and $21.00 for any overtime hours. In July of 2019, Lopez received a $100 KPI Incentive Bonus and a $425.58 MIS Bonus. As with Mercado, Lopez's overtime rate did not account for the bonus amounts received, despite Lopez working overtime hours in June and July of 2019.

S&C paid the KPI and MIS bonuses to employees who achieved certain performance and safety production metrics. Additionally, the "seniority award" and "success sharing" bonuses were paid by S&C in recognition of employees' time served or services performed for the company.

On July 31, 2020, following Mercado's termination, S&C paid Mercado an "adjustment payment" of $486.74 to correct miscalculations in Mercado's rate of pay. Lopez also received an "adjustment payment" of $10.33 on July 31, 2020, after terminating his employment with S&C.

On December 17, 2020, Mercado and Lopez filed a complaint on behalf of themselves and other similarly situated employees of S&C (collectively "Plaintiffs") against S&C (hereinafter "Defendant"), alleging violations of the Illinois Minimum Wage Law (the "IMWL"), 820 ILCS 105 *et seq*. (West 2021) due to Defendant's "unlawful compensation practice of failing to include bonuses when calculating Plaintiffs' overtime payments." On March 5, 2021, Plaintiffs filed an amended class action complaint (the "Amended Complaint"), alleging that since their bonuses were not gifts, Defendant was obligated, under the IMWL, to include them in the overtime calculations. Additionally, the Amended Complaint alleged that Defendant's "adjustment payments" were insufficient to cover the entire amount owed to Plaintiffs.

On March 31, 2021, Defendant filed a Combined Motion to Dismiss the Amended Complaint pursuant to section 2-619.1, which is presently before the Court.

## 2-619.1 MOTION TO DISMISS STANDARD

A combined motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure allows a party to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses. 735 ILCS 5/2-619.1 (West 2016); *Illinois Non-Profit Risk Management Ass'n v. Human Service Center*, 378 Ill. App. 3d 713, 719 (4th Dist. 2008).

## SECTION 2-615 STANDARD

A section 2-615 motion to dismiss, on the other hand, challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422,

429 (2006). The motion does not raise affirmative factual defenses, but rather alleges only defects on the face of the complaint. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). The court must consider, in a light most favorable to the plaintiff, if the complaint is sufficient to state a cause of action upon which relief can be granted. *Id.* This determination requires an examination of the complaint as a whole, not its distinct parts. *Lloyd v. County of Du Page*, 303 Ill. App. 3d 544, 552 (2d Dist. 1999). In reviewing the sufficiency of a complaint, a court must accept all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Burger King Corp.*, 222 Ill. 2d at 429. A complaint is deficient when it fails to allege facts necessary for recovery. *Chandler v. Ill. Cent. R. R.*, 207 Ill. 2d 331, 348 (2003). A court should not dismiss a cause of action unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recovery. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 921 (1st Dist. 2007).

**SECTION 2-619 STANDARD**

Section 2-619 allows for disposal of issues of law or easily proved issues of fact. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A section 2-619 motion admits all well-pleaded facts in the complaint, but does not admit conclusions of law or conclusions of fact unsupported by specific allegations. *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 21. "A section 2-619 motion admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matter that appear on the face of the complaint or are established by external submissions that act to defeat the plaintiff's claim." *Hager v. II In One Contractors, Inc.*, 342 Ill. App. 3d 1082, 1086 (1st Dist. 2003). In reviewing a section 2-619 motion to dismiss, the court must construe all documents presented in the light most favorable to the non-moving party, and, if no disputed issue of material fact is found, the court should grant the motion. *Id.* However, if it cannot be determined with reasonable certainty that the defense exists, the motion to dismiss should be denied. *Saxon Mortgage. Inc. v. United Financial Mortgage. Corp.*, 312 Ill. App. 3d 1098, 1104 (1st Dist. 2000). A motion brought under 2-619 must satisfy a rigorous standard and can be granted only where "no set of facts can be proven that would support the plaintiff's cause of action." *Nosbaum v. Martini*, 312 Ill. App. 3d 108, 113 (1st Dist. 2000).

**DISCUSSION**

*Arguments for Dismissal*

Defendant argues the Court should dismiss the Amended Complaint pursuant to section 2-615 because: (1) the Amended Complaint fails to state a claim under the IMWL since the amounts at issue are not part of the regular rate of pay and (2) the Amended Complaint fails to allege any underpayment. Defendant also argues the Court should dismiss Plaintiffs' Amended Complaint pursuant to section 2-619(a)(9) because Defendant paid Plaintiffs the amounts to which they were entitled.

*a. Regular rate*

Defendant argues that the Court should dismiss the Complaint because the bonuses Plaintiffs received are not part of their regular rate of pay, and are therefore exempt from the overtime calculation. According to Defendant, the IMWL states "no employer shall employ any of his employees for a work week of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed." 820 ILCS §4a (West 2021). Defendant asserts that while the IMWL does not define "regular rate" of pay, the Illinois Administrative Code's regulations relating to the IMWL provide a clearer definition. Defendant contends Section 210.410 of the Illinois Administrative Code provides that the "regular rate" does not include "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured or dependent on hours worked." Ill. Admin. Code tit. 56 § 210.410(a) (2021) (emphasis added). Defendant argues that because the bonuses were not dependent on hours worked, they are exempt.

Plaintiffs respond that their bonuses are not exempt from their regular rate of pay for calculating overtime payments. Plaintiffs contend that the IMWL only exempts "sums paid in recognition of services performed" that are (1) determined at the sole discretion of the employer, (2) made pursuant to a bona fide thrift or savings plan, or (3) paid in recognition of a special talent. Plaintiffs argue that bonuses are not exempt because they are not gifts and are not included in the above list. Plaintiffs cite to Black's Law Dictionary 696 (7th ed. 1999), stating that a gift is "[t]he act of voluntarily transferring property to another without compensation." Plaintiffs argue the bonuses they received were compensation for achieving performance and seniority goals. According to Plaintiffs, this means that the bonuses were not gifts, and therefore were not part of IMWL's exceptions.

Defendant contends that the Plaintiffs' interpretation is incorrect. In its reply brief, Defendant states that the IMWL excludes "sums paid as gifts such as those made at holidays *or other amounts that are not measured by or dependent on hours worked*." Ill. Adm. Code tit. 56 § 210.410(a) (2021) (Emphasis added). Defendant contends that the expressed language of the statute provides that any type of compensation which is not dependent on working hours is not used to calculate overtime pay. Defendant cites to *Ultsch v. Illinois Mun. Ret. Fund,* which held that statutory interpretation does not "authoriz[e] a court to declare that the legislature did not mean what the plain language of the statute says," and only when a statute is ambiguous should a court use other forms of statutory canons. *Ultsch v. Illinois Mun. Ret. Fund*, 226 Ill. 2d 169, 184.

It is well settled that a court's primary objective when construing a statute is to ascertain and give effect to the intent of the legislature. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279 (2003). In determining legislative intent, the court's inquiry begins with the plain language of the statute, which is the most reliable indication of the legislature's objectives in enacting a particular law. *In re Madison H.*, 215 Ill. 2d 364, 372 (2005). A fundamental principle of statutory construction is to view all provisions of a statutory enactment as a whole. *Id.* Accordingly, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000). In construing a statute, courts presume that the legislature, in its enactment of legislation,

did not intend absurdity, inconvenience or injustice. *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 40 (2001).

The IMWL states that "no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 11/2 times the regular rate at which he is employed." 820 ILCS 105/4a (West 2021). Section 210.410 of Illinois Administrative Code excludes "sums paid as gifts, such as those made at holidays or other amounts that are not measured by or dependent on hours worked" when calculating overtime payments. Ill. Adm. tit. 56 § 210.410(a) (2021).

Plaintiffs argue that the statue's plain meaning results in an absurd interpretation that is inconsistent with the rest of IMWL, concluding that the court should use canons outside of the plain meaning to interpret IMWL. They argue that because there are other sections of IMWL that calculate overtime in circumstances where compensation is not based upon hours worked, interpreting the exception to exclude any compensation not based off hours is absurd. They point out that regulations for pieceworkers specifically include bonuses in their regular rate of pay.

This Court rejects Plaintiffs argument. This Court acknowledges that section 210.420(b) provides that non-hourly employees': ". . . earnings may be determined on a piece-rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed *on a basis of the hourly rate derived from such earnings*." Ill. Adm. tit. 56 § 210.420(b) (2021) (emphasis added.). Section 210.430 states that "for the overtime work the piece worker is entitled to be paid, in addition to the total straight time weekly earnings, one-half this regular rate for each hour over the maximum set by statute." Ill. Adm. tit. 56 § 210.410(a) (2021). The section addressing pieceworkers calculates overtime based upon a formula that is based upon an hourly rate even though they are not paid on an hourly basis. The Court does not view this as being inconsistent with the plain meaning of the exceptions listed in section 210.410 (a). This is because section 210.430 specifically includes bonuses in the calculation of the regular rate of pay which the Plaintiffs concede. This appears to be a legislative exception to the exception which may have been put in place because of the nature of the work.

Because this Court finds no absurd interpretation, the plain meaning will be followed without use of other statutory canons. Under the plain meaning, any bonuses received by Plaintiffs that were paid "as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked . . ." should not have been used to calculate overtime payments.

The remaining question is whether at the time in question, the KPI, MIS success sharing, or the seniority award fall under the section 210.410(a) exception. The evidence of this offered by the Defendant is the affidavit provided by Aurelie Richard, Defendant's Chief Human Development and Strategy Officer. Only paragraph 2 of the affidavit address this issue. Paragraph 2 states: "None of the incentives alleged in the Amended Complaint, including KPI, MIS, success sharing, or the seniority award, are measured or dependent on hours worked by team members." The Court finds this statement to be conclusory. There are no other facts in the affidavit to support

with particularity Aurelie Richard's conclusory statement that the bonuses were "not measured by or dependent on hours worked by team member". There are no facts that explain the reason the bonuses were given, the criteria required to receive any one of the bonuses, or how the Defendant arrived at the dollar amounts given. This Court finds that Paragraph 2 of the affidavit violates Supreme Court Rule 191(a) and will not be considered by this Court. Supreme Court Rule 191(a) governs affidavits that are offered in support motions filed pursuant to 2-1005, 2-619 and 2-301 of the Code of Civil Procedure. Supreme Court rule 191(a) requires such affidavits to be made with personal knowledge and to set forth with particularity the facts upon which the claim, counterclaim or defense is based. 210 Ill. 2d R.191(a). "When an affidavit contains unsupported assertions, opinions or conclusory statements that do not comply with Rule 191(a), the court will not consider the affidavit." *First American Bank v Poplar Creek, LLC*, 2020 Il App (1st) 192450 at P24. *Citing Geary v Telular Corp.* 341 Ill. App. 3d 694 at 699. *Robidoux v. Oliphant,* 210 Ill. 2d 324 at 335-36. Since the Court is not considering paragraph 2 of the Defendants affidavit, it finds an issue of material fact as to whether the bonuses given were "not measured by or dependent on hours worked" in order for them to be excluded from the overtime calculation. The Court denies the Defendant's motion on this issue.

*b. Underpayment*

Defendant also argues that the Court should grant their Motion to Dismiss because Plaintiffs failed to prove that they suffered from any underpayments. Because S&C provided adjustment payments to both Plaintiffs, which they did not refuse or return, there is no underpayment.

Plaintiffs respond stating that the IMWL states that any employee who receives wages less than what the Act states, may recover any underpayments. 820 ILCS § 105/12a. Plaintiffs assert that because of S&C's failure to include nondiscretionary bonuses in their regular rate of pay when making overtime payments, they were underpaid. Although Defendant gave both Mercado and Lopez an adjusted payment, those payments were made after their employment had ended. According to 820 ILCS § 105/12a, damages for underpayments include each month that the employee was underpaid. Because Plaintiffs left before Defendant gave them their adjusted payments, Plaintiffs claim that Defendant owes them damages for the months without the overtime payments.

Defendant replies that as noted above, the regular rate of pay was not required to include Plaintiffs' bonuses. Because these bonuses were not owed to Mercado and Lopez, there was no underpayment. Even if there was an underpayment, that the adjusted payments would have satisfied them. Defendant also states that because there was no underpayment, there would be no damages necessary. Alternatively, Defendant argues that if there was an underpayment, there was not a deadline for S&C to have made the payment. As a result, the months missed would not entitle Plaintiffs to damages.

Because of the deficiency in the affidavit discussed above, the Court cannot determine whether there was an original underpayment. The remaining portions of the affidavit indicate that

the bonuses at issue were accounted for in the calculation of the adjustments paid to Plaintiffs. Plaintiffs are not claiming that they did not receive or that they returned the adjustment payments. Plaintiff also fails to offer evidence of how or to what degree the adjustment payments were insufficient. Plaintiffs also concede that there is no payment "deadline" in the IMWL. Plaintiff fails to offer any authority for damages for the months without the overtime payments beyond what the IMWL requires. The Court finds that the adjustments satisfied the underpayment. The Court grants the 2-615 motion on this issue with prejudice.

**CONCLUSION**

Defendant's motion to dismiss on the issue of whether KPI, MIS, success sharing, or the seniority award should have been included in calculating Plaintiffs' overtime pay is denied. Defendant's motion to dismiss on the issue of the underpayment in light of the adjustment is granted with prejudice.

DATE: December 10, 2021

ENTERED:

Allen Price Walker
Associate Judge

Dec. 10, 2021

Allen P. Walker, Judge Presiding

Circuit Court - 2071

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Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-22-0020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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|---|---|
| CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>S&C ELECTRIC COMPANY,<br><br>Defendant-Appellee. | Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois<br><br>No. 2020CH7349<br><br>The Honorable ALLEN P. WALKER, Judge Presiding. |

# BRIEF OF AMICUS CURIAE STATE OF ILLINOIS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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## POINTS AND AUTHORITIES

## INTEREST OF AMICUS CURIAE

This appeal raises two important issues of first impression regarding the Illinois Minimum Wage Law ("IMWL") and its implementing regulations. Plaintiffs allege that they worked for defendant S&C Electric Company as hourly-paid factory assembly workers, and that S&C compensated them in part by making regular, non-discretionary incentive payments—"bonuses" tied to the quality or quantity of their work, their success at meeting various metrics, or their tenure at the company. S&C, however, did not include these payments in calculating plaintiffs' regular pay rate, and so when it paid plaintiffs overtime wages, it calculated those wages using a baseline rate that plaintiffs say was too low. When plaintiffs sought to remedy what they viewed as an underpayment, S&C ultimately paid them the back wages they were owed, but not the statutory damages that the IMWL requires as a remedy for wage-and-hour violations.

The circuit court granted S&C's motion to dismiss. It reasoned, first, that S&C's payment of back wages, but not statutory damages, satisfied any underpayment that might have existed—effectively mooting plaintiffs' IMWL claims. And, second, it reasoned that non-discretionary incentive payments of the kind plaintiffs allege were made likely should not have been included in the regular rate in the first place, because a regulation interpreting the IMWL allows employers to exclude from that rate "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on

hours worked," 56 Ill. Admin. Code § 210.410(a)—and incentive payments of this sort were, the court reasoned, "not measured by or dependent on hours worked." Plaintiffs appealed.

The State of Illinois, its agencies, and its officials have a substantial interest in the proper interpretation and application of the IMWL and its regulations. Specifically, the Illinois Department of Labor is a state agency charged by the legislature with the responsibility to "foster, promote, and develop the welfare of wage earners" within the State and to "[a]ct in relation to the payment of wages due employees from their employers." 20 ILCS 1505/1505-15, 1505/1505-120. The legislature has also tasked the Illinois Attorney General with "protecting the State's workforce," and specifically directed him "to ensure workers are paid properly, guarantee safe workplaces, and allow law-abiding business owners to thrive through healthy and fair competition." 15 ILCS 205/6.3(a).

Pursuant to these directives, the Department and the Attorney General each have authority to enforce Illinois' wage laws, including the IMWL. *See* 15 ILCS 205/6.3(b); 20 ILCS 1505/1505-120. The IMWL also confers additional authority on the Department's Director to "make and revise administrative regulations, including definitions of terms, as he deems appropriate to carry out the purposes of this Act." 820 ILCS 105/10. Pursuant to this authority, the Department has promulgated regulations interpreting and defining provisions of the IMWL, including regulations defining the statutory term

"regular rate" that help answer the question whether S&C appropriately withheld the incentive payments from plaintiffs' regular pay rate. *See* 56 Ill. Admin. Code §§ 210.410, 210.420, 210.430.

Given all this, the Department and the Attorney General have a substantial interest in this case. Both issues raised by this appeal concern the proper interpretation and application of the IMWL and its implementing regulations. To the State's knowledge, both issues are questions of first impression for the State's appellate courts, and both are consequential. As discussed further below, if the circuit court was correct that an employer can moot an accrued IMWL claim by providing back pay, but not statutory damages, employers will be able to evade their statutory obligations and "pick off" IMWL claims by offering a fraction of what employees are owed. And if the circuit court was correct that all payments "not measured by or dependent on hours worked" can be withheld from an employee's regular pay rate, employers will be able to shift substantial portions of their employees' compensation to a non-hourly format and, in doing so, reduce their obligations to make overtime payments. Both results would frustrate the Department and the Attorney General's ability to "protect[] the State's workforce," 15 ILCS 205/6.3(a); *see also* 20 ILCS 1505/1505-15, and so they have an interest in this appeal.

Finally, the Department also has an interest in interpreting and defending the regulations it has promulgated to implement the IMWL. As this

Court has noted, "an agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference given that agencies make informed judgments on the issues based upon their experience and expertise." *Cigna v. Illinois Hum. Rts. Comm'n*, 2020 IL App (1st) 190620, ¶ 31 (internal quotation marks omitted). Here, the Department has promulgated regulations that address whether the incentive payments were properly excluded. *Infra* pp. 16-21. It thus has an interest in the application of those regulations and ensuring that the circuit court's opinion, which would undermine the general approach taken by the Department, is not affirmed by this Court.

For these reasons, the State has a substantial interest in this case and can assist this Court by presenting its perspective on the important issues that it raises.

## ARGUMENT

The circuit court misread the IMWL in two ways. First, the circuit court erred in holding that S&C had effectively mooted plaintiffs' IMWL claims by providing them with some, but not all, of the relief to which they were entitled under that statute. Second, the circuit court incorrectly interpreted the IMWL to allow employers to exclude non-discretionary incentive payments from employees' regular pay rates as long as those payments are not directly tied to employees' hours.

In applying the IMWL and its implementing regulations, the Court should place significant weight on the Department's interpretation of the law and the regulations. As noted, "an agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference" given the agency's "experience and expertise." *Cigna*, 2020 IL App (1st) 190620, ¶ 31 (internal quotation marks omitted). And this Court has often deferred to the Department's views in interpreting the IMWL. *See Kerbes v. Raceway Assocs., LLC*, 2011 IL App (1st) 110318, ¶ 23; *People ex rel. Dep't of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 21 (1st Dist. 2003). It should do so here, too. Although the plain language of both the IMWL and its implementing regulations establishes that the circuit court erred on both issues, even if the plain language did not command that result, principles of deference would require reversal. Either way, the Court should reverse the judgment below and remand for further proceedings.

## I. The Circuit Court Erred In Holding That An Employer Can Moot An Accrued IMWL Claim By Providing Back Pay But Not Statutory Damages.

The circuit court's opinion rests primarily on its conclusion that the "adjustments" that S&C provided plaintiffs months and, in some instances, years after the pay periods in question "satisfied [any] underpayment," such that plaintiffs' IMWL claims failed as a matter of law. A7.[1] That reasoning is flawed, and would allow employers to "pick off" IMWL claims by providing employees back pay but not the statutory damages they are owed—and would disincentivize employers from properly calculating overtime in the first place. The judgment below should be reversed.

### A. An IMWL claim, once accrued, cannot be mooted by a payment only of back pay and not statutory damages.

Under Illinois law, if an employee is not paid the wages that he or she is owed, he or she is entitled to bring suit under the IMWL—that is, the underpayment gives rise to an IMWL claim. Once that claim has accrued, it cannot be mooted by an employer's payment of some (but not all) of what the employee is owed. These straightforward principles resolve the primary question presented by this appeal.

1. The IMWL requires an employer to pay its employees "at a rate not less than [one and one-half] times the regular rate" at which they are paid for every hour worked over forty in the employee's workweek. 820 ILCS 105/4a(1). An employee who is not paid "the wage to which he is entitled . . .

[1] Citations to "A__" are to the appendix.

may recover in a civil action treble the amount of any such underpayments," costs, attorney's fees, and additional damages equivalent to five percent of the underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* 105/12(a).[2] Such an employee, that is, has an IMWL claim against his or her employer for back pay and damages.

Generally, an IMWL claim accrues on the relevant payday—i.e., the day the employee should have been, but was not, paid the wages that he or she was owed. A separate Illinois law, the Illinois Wage Payment and Collection Act (IWPCA), requires an employer to "pay every [covered] employee" "at least semi-monthly . . . all wages earned during the semi-monthly pay period." 820 ILCS 115/3. Specifically, the employer must pay such wages "not later than 13 days after the end of the pay period in which such wages were earned," or, in the case of an employee paid weekly, "not later than 7 days after the end of the weekly period." *Id.* 115/4. An employee who is not paid "timely" wages under this Act is "entitled to recover . . . in a civil action . . . the amount of any such underpayments," costs, attorney's fees, and statutory damages in the same amount as the IMWL—that is, five percent of the underpayment "for each month following the date of payment during which such underpayments remain unpaid." *Id.* 115/14(a).

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[2] This brief uses "damages" or "statutory damages" to refer to both the treble damages and the five percent monthly damages awarded by the IMWL. *See id.* Because plaintiffs pursued their IMWL remedies in court, they may also now be entitled to costs and attorney's fees, *id.*; S&C's tender of back pay also does not moot any claim plaintiffs have as to costs and fees.

The natural reading of these provisions is that claims for violating the IMWL and the IWPCA accrue on "the date of payment," 820 ILCS 105/12(a), 115/14(a)—that is, the day on which an employee should have been paid the wages to which he or she was entitled, but was not. On that date, an employee may bring a "civil action" to recover the underpayment and any damages to which he or she is entitled. *Id.* That conclusion accords with this court's own caselaw, which has referred to the payment date as the date on which wage-and-hour claims generally accrue. In *Sommese v. American Bank & Trust Co., N.A.*, 2017 IL App (1st) 160530, for instance, this court considered whether an employee whose last payment date was before an amendment to the IWPCA could take advantage of that amendment. *Id.* ¶ 16. The court concluded that the employee could not, explaining that because his "last date of payment" was before the amendment's effective date, his wage-and-hour claim "accrued prior to the amendment," and so would require the amendment to be applied retroactively, contrary to the legislature's intent. *Id.*

This commonsense rule accords with the rule under the federal Fair Labor Standards Act (FLSA). As this court has explained, "in light of the[] substantial similarities" between the FLSA and the IMWL, "provisions of the FLSA and interpretations of that legislation can be considered in applying the [IMWL]." *Kerbes*, 2011 IL App (1st) 110318, ¶ 25; *see also Samano v. Temple of Kriya*, 2020 IL App (1st) 190699, ¶ 46 (similar). Indeed, the Department's regulations provide that federal guidance as to the meaning of the FLSA is

probative of the meaning of the IMWL. *See* 56 Ill. Admin. Code § 210.120. And federal courts have long held that a FLSA claim accrues on the date of payment (or, in a case in which no payment was made, the date on which it was owed). *See, e.g.*, *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946) (employee's "cause of action for overtime compensation accrued on each payday"); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) (similar). Federal regulations today likewise establish that a FLSA claim accrues "when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." 29 C.F.R. § 790.21(b). For the reasons discussed, *supra* pp. 6-9, the same is true of an IMWL claim.

2. Once an IMWL claim has accrued, it cannot be mooted by an employer's payment of only some, but not all, of the amount the employee is owed. A claim is moot "if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Joiner v. SVM Mgmt., LLC*, 2020 IL 124671, ¶ 24. But where an employer provides an employee only with part of what he or she is owed under the IMWL, it is still possible for a court to grant relief—specifically, the rest of what the employee is owed. If an employee is entitled to $100 in back pay under the IMWL, that is, an employer cannot moot the employee's IMWL claim by giving him or her $10. Doing so would not provide the employee everything to which the law entitles her, and so a court could still "grant effectual relief" (i.e., by awarding

$90 in back pay), and the case would not be moot. *Id.*; *accord Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

That principle applies with equal force where, as here, an employer provides an employee with an accrued IMWL claim with the back pay to which he or she is entitled, but not the statutory damages. Such an employee has not been made whole, for the same reason—the employee is entitled by law to damages, not merely back pay. Many courts have reached this conclusion in the FLSA context. *See, e.g.*, *Atlantic Co.*, 146 F.2d at 482 (employer's payment of "the balance due as wages, even though made prior to suit, does not release the accrued liability for liquidated damages," in part because such damages are intended "as compensation for detention of a workman's pay"); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (employer's failure to pay overtime when due yields "a single and entire liability[,] . . . not discharged in toto by paying one-half of it"); *see also Berger v. Perry's Steakhouse of Illinois, LLC*, 430 F. Supp. 3d 397, 407 (N.D. Ill. 2019) (rejecting argument that payment of back pay, but not "attorney's fees, costs, or liquidated damages" mooted wage-and-hour claim under FLSA and IMWL (footnote omitted)). The same is true here.

To hold otherwise would create perverse incentives for employers. If an employer could moot an accrued IMWL claim by paying an employee the back

pay, but not the statutory damages, to which he or she was entitled, employers would in effect never have to pay statutory damages, as long as they were willing to tender back pay—allowing employers to moot individual IMWL claims at will, and to "pick off" uncertified class actions by mooting the named plaintiffs' claims, by paying only a fraction of what they owe. Indeed, if an employer could moot an accrued IMWL claim simply by tendering back pay, employers would have little reason to calculate overtime correctly in the first instance, because they would face no consequences from simply withholding it until threatened with liability. All that would circumvent the regime established by the General Assembly, under which employers are required to pay not just what their employees should have been given in the first instance but additional "compensation for detention of [the employees'] pay," *Atlantic Co.*, 146 F.2d at 482.

### B. The circuit court erred in dismissing plaintiffs' claims.

The circuit court erred in reaching a contrary conclusion. The court held that S&C's payment of back pay, but not statutory damages, months or years after the pay periods in question "satisfied the underpayment" to which plaintiffs were subjected. A7.[3] The court's decision appears to rest primarily on its view that "there is no 'payment' deadline in the IMWL," and thus S&C

[3] The circuit court also expressed uncertainty over "whether there was an original underpayment" at all, i.e., whether S&C had erred in excluding the bonuses from plaintiffs' regular pay rates. A6-7. But it assumed for the purpose of this analysis that the bonuses should have been included in the regular pay rates.

was under no obligation to pay plaintiffs any earlier than it did. *Id.* That conclusion is flawed on multiple levels.

To start, Illinois law does impose a "payment deadline." As noted, *supra* p. 7, the IWPCA establishes specific deadlines on which employers must pay employees their wages, including earned overtime wages. *See* 820 ILCS 115/4. And both the IWPCA and the IMWL tie statutory damages to these deadlines by providing that damages accrue based on the time elapsed from "the date of payment," 820 ILCS 105/12(a), 115/14(a)—i.e., the date on which an employer is required to pay its employees. In an ordinary case, then, an employer's failure to pay overtime wages (or sufficient overtime wages) on "the date of payment," *id.*, gives rise to an IMWL claim, entitling the employee to damages. *Supra* pp. 7-8. The circuit court's basic premise was therefore mistaken. An employer cannot indefinitely withhold overtime payments, only to turn around and offer "adjustment" payments when threatened with suit, as S&C did here.

To the extent the circuit court meant to suggest that Illinois law does not impose a deadline for overtime tied to incentive payments not paid on the same timetable as ordinary wages, that, too, is incorrect. An employer making such an incentive payment must generally determine whether the payment is properly considered part of the regular pay rate, and, if so, whether additional overtime payments are owed to the employee. *Infra* pp. 17-19. For instance, if an employee is paid $15 in hourly wages, and works, on average, 50 hours each

week, his or her regular paychecks must include overtime wages for the extra 10 hours (i.e., the 10 hours worked over 40), and calculated on a regular pay rate of $15 per hour. But if the employee is later given a $300 incentive payment for his or her work that quarter, and that payment is properly included in the regular rate (as it generally will be, *infra* pp. 17-18), the employer is required to include the $300 alongside the hourly wages in calculating the employee's regular rate for the relevant time period and, if necessary, make new overtime payments to the employee based on the newly calculated regular rate. *See, e.g.*, 56 Ill. Adm. Code § 210.430 (outlining this process for various forms of compensation). And an employer is also required to make those new overtime payments in a timely manner—generally on "the date of payment," 820 ILCS 105/12(a), 115/14(a), i.e., the date of the incentive payment itself.

Indeed, in the federal context, the U.S. Supreme Court has rejected the argument that there is no "deadline" for overtime tied to incentive payments. The employees in *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), were (like plaintiffs here) paid both an hourly wage and incentive payments based on production targets. *Id.* at 428-29. Their employer calculated their overtime rates based only on the hourly wages, a practice the Supreme Court explained could not be squared with the FLSA. *Id.* at 431-32. In so holding, the Court also rejected the employer's argument that the fact that the incentive payments were not paid on biweekly paydays made compliance impossible.

That such payments may not be "determined or paid until weeks or even months after . . . paydays," the Court explained, and so may require retroactive overtime calculation, does not "excuse[]" an employer "from making the proper computation and payment." *Id.* at 432. Rather, the law "requires only that the employees receive [the payments] as soon as convenient or practicable under the circumstances." *Id.* at 433. The same is true here: As explained, Illinois law generally requires employers to pay any required overtime on "the date of payment," 820 ILCS 105/12(a), 115/14(a)—that is, the date the incentive payments are paid—even where such overtime is based on an incentive payment rather than on payday wages.

The record reflects no reason why S&C should not be required to adhere to this basic rule. The incentive payments at issue were made to plaintiffs and their fellow employees regularly (either quarterly or annually). *See* A10-11 (¶¶ 12-16). If those payments were properly considered part of the regular pay rate for a given quarter or year (as they likely were, *see infra* pp. 25-26), S&C was required to recalculate that rate and pay its employees additional overtime based on the hours worked during the relevant period—just as it eventually did. *See* A30 (¶ 3) (S&C took the "total incentive payment for each period [and] divided by the total hours worked in the period[] to arrive at the change in the hourly rate," then made additional overtime payments based on that rate). Absent some reason doing so would be impractical, S&C was required to make those payments at the same time as the incentive payments themselves.

But S&C did not make additional overtime payments at that time, or at some reasonable time thereafter. Instead, S&C waited until plaintiffs told it they would sue. Nothing in the IMWL entitles S&C, or any other employer, to adopt this kind of "wait-and-see" approach to overtime payments.

The circuit court thus erred in concluding that S&C's adjustment payments "satisfied" plaintiffs, in the sense of providing them all that they were entitled to. A7. To the contrary, because S&C was required to pay plaintiffs overtime in a timely manner (rather than only after suit), but did not, plaintiffs were entitled to statutory damages in addition to back pay. *Supra* pp. 10-11. Because the adjustment payments did not include statutory damages, plaintiffs are not "satisfied," A7, and their claims are not moot.

The circuit court's decision cannot be justified on any other ground. The circuit court appeared to reason at points that plaintiffs' acceptance of the adjustment payments somehow mooted their claims. *See* A7 ("Plaintiffs are not claiming that . . . they returned the adjustment payments."). To the extent the circuit court's decision rests on that view, it is mistaken. Although the Illinois Supreme Court has held that a defendant can generally moot a case by "admit[ting] liability and provid[ing] the plaintiff with all relief requested" (i.e., by "tendering" complete relief), *Joiner*, 2020 IL 124671, ¶¶ 44-46, S&C did not tender complete relief or admit liability here. To the contrary, S&C has refused to provide plaintiffs statutory damages and insists it is not liable

for them. In such a case, the fact that plaintiffs accepted partial payment on their claims is irrelevant.[4]

In sum, the circuit court's decision that S&C's payment of back pay but not statutory damages satisfied plaintiffs' claims, thus mooting the case, is not correct. The judgment below should be reversed on that basis alone.

## II. The Circuit Court Erred In Holding That Incentive Payments Can Be Excluded From Computation Of The Regular Rate.

The circuit court also held that incentive payments can be excluded from the computation of the regular pay rate as long as they are not tied to hours worked. A5-6. Although the court went on to deny defendants relief on this issue, reasoning that the record did not show whether the payments at issue were tied to the hours the plaintiffs worked or not, A6, its decision nonetheless rests on an incorrect view of the applicable legal principles. This court should clarify those principles so that the circuit court can apply them correctly on remand.

### A. Non-discretionary incentive payments generally cannot be excluded from the computation of the regular rate.

As discussed, Illinois law requires an employer to pay its employees "at a rate not less than [one and one-half] times the regular rate" for every hour worked over forty in an employee's workweek. 820 ILCS 105/4a(1). Although the IMWL does not define "regular rate," the Department has promulgated

[4] S&C has not argued that plaintiffs entered into any kind of formal settlement agreement under which they expressly released their claims in exchange for partial payment.

regulations that define the term expansively "to include all remuneration for employment paid to . . . the employee," subject to only a handful of exceptions. 56 Ill. Admin. Code § 210.410. The Department's regulations make clear that non-discretionary incentive payments must generally be included in the "regular rate," even if they are not tied to hours worked.

To start, the regulations establish a baseline rule under which "*all* remuneration" must be included in calculating the regular rate. 56 Ill. Admin. Code § 210.410 (emphasis added). The regulations then underscore that the regular rate is the "rate at which the employee is *actually* employed," *id.* § 210.420(a) (emphasis added), taking all forms of compensation into account. A separate regulation lays out multiple ways in which non-hourly compensation must be included in calculating the regular pay rate. *Id.* § 210.430. As one example, compensation paid out "on a piece-rate basis," i.e., per item manufactured or completed, must be included in the regular rate in the manner described above, *supra* pp. 12-13—that is, by adding "the total earnings for the workweek from piece rates and all other earnings" and then dividing the total by the number of hours worked that week. *Id.* § 210.430(b). Employers must also (and using essentially the same method) include compensation paid on a per-day or per-job basis, *id.* § 210.430(c); salaried compensation, *id.* § 210.430(d); and more in the regular pay rate. The regulations require, in other words, an employer to include all forms of "remuneration" in calculating the regular pay rate.

As a general matter, non-discretionary incentive payments are "remuneration" of this sort, and so must also be included in calculating an employee's regular pay rate. An employer that pays its employees in part by offering them regular incentive payments—whether tied to production targets, seniority, or any other metric—has simply chosen to tie its compensation, in part, to a factor other than hours worked. Indeed, an incentive payment tied to performance metrics (of the kind plaintiffs allege is at issue here, *see* A10-11 (¶¶ 13, 16)) is functionally indistinguishable from piece-rate compensation: Both compensate employees not for the time they invest in their employment, but for the output of their work. The Department's regulations expressly provide that piece-rate compensation must be included in the regular rate, *see* 56 Ill. Admin. Code § 210.430(b), and the same is true of most incentive payments.[5] Indeed, the regulations expressly link the two, providing that a piece-rate employee's regular pay rate "is computed by adding together the total earnings for the workweek from piece rates and *all other earnings (such as bonuses)*," alongside "other hours worked." *Id.* (emphasis added).

Illinois courts have applied the IMWL to "hybrid" payment systems of the kind of at issue here before. In *Tomeo v. W&E Communications, Inc.*, No.

[5] The Department's regulations provide that "[s]ums paid in recognition of services performed" can be excluded from computation of the regular rate if they are paid at the employer's "sole discretion." *Id.* § 210.410(c)(1). So an incentive payment that is not tied to specific metrics, but instead is awarded on a purely discretionary basis, need not be included in the calculation of the regular rate.

14-cv-2431, 2016 WL 8711483 (N.D. Ill. Sept. 30, 2016), a federal district court applied the IMWL to a comparable payment system, in which employees were paid both an hourly wage and a "bonus" based on a production target. *Id.* at *3-4. The court explained that the IMWL required the employer to "pa[y] its employees an overtime premium for both their base pay and their bonus pay." *Id.* at *9. Any other arrangement, the court reasoned, would result in "carving [up]" employees' total compensation into "slice[s]," one of which would earn overtime and one of which would not. *Id.* at *11.

Indeed, as the *Tomeo* court observed, the rule is the same in the federal context. As discussed, *supra* p. 8, Illinois courts frequently "look[] to federal law" for guidance on the IMWL and its implementing regulations. *Samano*, 2020 IL App (1st) 190699, ¶ 46; *see also Kerbes*, 2011 IL App (1st) 110318, ¶ 25; 56 Ill. Admin. Code § 210.120. And federal courts for decades have read FLSA to require employers to pay overtime even on forms of compensation not tied to hours worked, such as piecework wages and other incentive payments. *See Harnischfeger Corp.*, 325 U.S. at 432 ("When employees do earn more than the basic hourly rates because of the operation of [an] incentive bonus plan," the regular rate must incorporate the incentive payments, not just the hourly rates); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425-26 (1945) (similar). Given "the[] substantial similarities" between the FLSA and the IMWL, this longstanding federal caselaw strongly suggests that the same rule should apply here. *Kerbes*, 2011 IL App (1st) 110318, ¶ 25.

Below, S&C argued (and the circuit court appeared to agree, A5-6) that incentive payments can be excluded from the regular rate as long as they are not tied to hours worked. It did so based on a Department regulation that allows employers to exempt "[s]ums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked" from the regular wage. 56 Ill. Admin. Code. § 210.410(a). But this regulation cannot be stretched to encompass incentive payments like those at issue here.

For one, the plain text of the regulation does not permit that reading. The regulation's purpose is, as it says, to allow employers to exclude "gifts" and similar payments. A non-discretionary incentive payment is not a "gift"; it is simply an alternative form of compensation for labor, in the same way that piece-rate pay is. *See Provena Covenant Med. Ctr. v. Dep't of Revenue of State*, 384 Ill. App. 3d 734, 751 (4th Dist. 2008) ("[A] gift is, by definition, free goods or services: 'something voluntarily transferred by one person to another without compensation.'" (quoting Merriam-Webster's Collegiate Dictionary 491 (10th ed. 2000)). The relevant federal regulation, 29 C.F.R. § 778.212(b), says as much explicitly, explaining that "[t]o qualify for exclusion under [the FLSA's gift exception], the bonus must be actually a gift or in the nature of a

gift." The same rule should apply here. *See Samano*, 2020 IL App (1st) 190699, ¶ 46.[6]

To be sure, such a payment may not be "measured by or dependent on hours worked." But the IMWL and its implementing regulations do not allow employers to exclude all payments not tied to hours worked. If that were so, an employer could exclude all manner of non-hourly compensation, including piece-rate pay and monthly or salaried compensation—none of which is "measured by or dependent on hours worked." But the regulations expressly provide that such payments—indeed, that "all remuneration," 56 Ill. Admin. Code. § 210.410, subject to a small handful of exceptions—must be included in calculating the wage rate. *Id.* § 210.430. An expansive reading of the "gifts" exception of the kind S&C has suggested would thus swallow the regulations' specific and detailed treatment of non-hourly compensation and conflict with the regulations' broader command to consider all compensation in calculating the regular rate. It cannot be correct.

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[6] To be sure, as S&C observed below, the text of the relevant FLSA provision differs from the text of § 210.410(a), insofar as it states that employers cannot exclude payments "dependent on hours worked, production, or efficiency." *See* 29 U.S.C. § 207(e)(1). But federal courts reached the same result with respect to incentive payments before the relevant provision was added to the FLSA in 1949. *See Harnischfeger Corp.*, 325 U.S. at 432; *Youngerman-Reynolds*, 325 U.S. at 425-26. Those courts' pre-amendment reading of FLSA is entitled to persuasive weight here.

### B. The circuit court erred in applying the wrong standard to the incentive payments at issue here.

The circuit court nonetheless appeared to adopt that reading of the IMWL and its regulations, reasoning that the exclusion for "gifts" set out in § 210.410 encompassed all payments made to employees "not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a). *See* A5-6. The circuit court ultimately denied S&C relief on this issue, holding that the record did not show whether the incentive payments at issue here were tied to hours worked. A7. But the court's underlying interpretation of the IMWL and its rules was incorrect, and this court should correct that interpretation so that the proper interpretation may be applied on remand.

1. The circuit court justified its decision on the ground that the "plain meaning" of the gifts provision allows employers to exclude payments that are "'not measured by or dependent on hours worked.'" A5 (quoting 56 Ill. Admin. Code § 210.410(a)). That is not correct. As discussed, *supra* pp. 20-21, the plain language of the regulation allows employers to exclude "gifts," not all non-hourly compensation. Specifically, the regulation states that employers may exclude from the regular rate "sums paid as gifts such as those made at holidays or other amounts that are not measured by or dependent on hours worked." 56 Ill. Admin. Code § 210.410(a). The purpose of the regulation is to allow employers to exclude "gifts"—the term at the start of the regulation—and other payments that are not meant as "remuneration," *id.* § 210.410. The remaining text in the rule, including the phrase on which the

circuit court relied, simply helps illustrate the kinds of "gifts" that can be excluded. It explains that a "gift" can include a sum paid "at holidays," but can also include an "amount[]" that is "not measured by or dependent on hours worked." *Id.* § 210.410(a).

Thus, the regulation does not allow employers to exclude *all* payments "not measured by or dependent on hours worked." To read the regulation in this manner is to overlook the key term—"gift"—around which the regulation revolves. *Cf. Bullman v. City of Chicago*, 367 Ill. 217, 226 (1937) ("It has been repeatedly held by this and other courts that, where general words follow particular and specific words in a statute, the general words must be construed to include only things of the same kind as those indicated by the particular and specific words . . . ."). And it would put the regulation in conflict with the rest of the Department's regulatory regime, which directs employers to include "all remuneration" in the regular pay rate as a general matter, 56 Ill. Admin. Code § 210.410, and instructs them specifically to *include* compensation not tied to hours worked, including piece-rate pay, in that rate, *id.* § 210.430. In reading a regulation, as with a statute, a court "must view each phrase or part . . . in the context of the [regulation] as a whole." *Grady v. Illinois Dep't of Healthcare & Fam. Servs.*, 2016 IL App (1st) 152402, ¶ 23. Here, doing so requires reading the "hours worked" language, on which the circuit court relied, in light of the inclusive approach taken by the Department's regulations more generally. The circuit court failed to do so.

The circuit court acknowledged the tension between its reading of the regulations and § 210.430(b)'s treatment of piece-work compensation. A5. But the court dismissed the relevance of that regulation, describing it as an "exception to the exception," speculating that it "may have been put in place because of the nature of [piece-work]," and concluding that it would not be "absurd" to exclude incentive payments of the kind at issue here. *Id.* This reasoning is flawed on multiple levels. For one, the court erred in analyzing this question under the guise of the absurdity doctrine, under which a court may deviate from the "literal reading of a statute" if it produces "absurd" results, *see People v. Hanna*, 207 Ill. 2d 486, 498 (2003). The question is not whether to deviate from the plain language of the gifts provision, but rather how to interpret that provision in the first instance. As discussed, *supra* pp. 20-21, the best reading of the provision, when viewed in the context of the Department's regulatory regime "as a whole," *Grady*, 2016 IL App (1st) 152402, ¶ 23, is that it permits an employer to exclude "gifts" and payments not intended as compensation, not all payments not tied to hours worked.

For another, the circuit court misunderstood the nature and scope of the incongruity created by its reading of the gifts provision. The court appeared to view its reading of the gifts provision as in tension only with § 210.430(b)'s treatment of piece-work compensation—an arrangement it posited might have been "put in place because of the nature" of piece-work. A5. But the court's interpretation creates far broader issues than that. The

court's reading of the gifts provision puts that provision in tension with the Department's treatment of *all* non-hourly compensation—piece-work compensation, salaries, monthly and semi-monthly pay, and more. *See* 56 Ill. Admin. Code § 210.430. Indeed, the court's reading of the gifts provision wholly inverts the default rule set out in the regulations: Instead of including "*all* remuneration" in the regular pay rate, *id.* § 210.410 (emphasis added), an employer must include *only* hourly remuneration (as well as those categories of compensation separately enumerated in § 210.430) in that rate. The circuit court identified no reason to give the gift provision a meaning so incongruous with the rest of the Department's regulations.

2. The circuit court thus applied the wrong legal standard to the incentive payments at issue here. Because the court resolved the case on S&C's threshold motions, however, it is not possible to determine on the present record whether the incentive payments plaintiffs have alleged were made should have been excluded. The case should be remanded for further proceedings so that the correct legal standard can be applied to plaintiffs' claims.

Nonetheless, the complaint's allegations, taken as true, *see Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (on section 2-615 motion, court must accept all well-pleaded facts), suggest that at least some of the payments at issue should have been included in the regular rate. Plaintiffs allege that the "KPI Incentive" payments that both plaintiffs received were given to them

"for achieving certain previously announced performance and safety metrics on [their] production line[s]." A10-11 (¶¶ 13, 20). Plaintiffs likewise allege that they were given an "MIS" bonus "designed to reward [them] for the number of hours that [they] worked during the previous year." A10 (¶ 13) (Mercado); *see also* A11 (¶ 20) (Lopez). If these incentive payments, at least, were made for the reasons set out in the complaint, they are just an alternative form of compensation for labor, and if they are not otherwise excludable they should have been included in plaintiffs' regular pay rate.

Indeed, S&C's conduct since the filing of this lawsuit reflects its tacit agreement that the incentive payments at issue should have been reflected in the regular pay rate. S&C did not just make adjustment payments to plaintiffs; it "changed the way that it calculates the regular rate for purposes of calculating overtime and now includes incentive payments" of the kind at issue here "in the regular rate for purposes of calculating overtime." A31 (¶ 9). That decision presumably reflects S&C's determination that it is required by the IMWL to include such payments in the regular rate.

Nonetheless, because the circuit court has not had the opportunity to apply the appropriate legal standard to plaintiffs' claims, this court should remand to permit it to do so in the first instance.

## CONCLUSION

For these reasons, the court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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April 20, 2022

**SUPREME COURT RULE 341(c)**
**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 27 pages.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on April 20, 2022, I electronically filed the foregoing Brief of Amicus Curiae State of Illinois with the Clerk of the Court for the Illinois Appellate Court, First District, using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and that on April 20, 2022, I served them by transmitting a copy from my e-mail address to the following e-mail addresses for those participants.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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No. 1-22-0020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | |
|---|---|
| CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>S&C ELECTRIC COMPANY,<br><br>Defendant-Appellee. | Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois<br><br>No. 2020CH7349<br><br>The Honorable ALLEN P. WALKER, Judge Presiding. |

**ORDER**

THIS CAUSE COMING TO BE HEARD on motion of the State of Illinois for leave to file a brief amicus curiae in support of Plaintiffs-Appellants, due notice having been given, and the court being fully advised.

IT IS HEREBY ORDERED that the motion is ALLOWED/~~DENIED~~.
The brief of the appellee, responding to both the appellants' and the amicus's brief, is due June 1, 2022.

ENTER:

Mathias W. Delort
JUSTICE

ORDER ENTERED

APR 27 2022

APPELLATE COURT FIRST DISTRICT

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, CHANCERY DIVISION**

| | | |
|---|---|---|
| **CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,** | ) | **Case No. 2020 CH 7349** |
| **Plaintiffs,** | ) | **Judge Allen Price Walker** |
| **v.** | ) | |
| **S&C ELECTRIC COMPANY,** | ) | **CLASS ACTION** |
| **Defendant.** | ) | |

## AMENDED CLASS ACTION COMPLAINT

Plaintiffs Carmen Mercado and Jorge Lopez, on behalf of themselves and other persons similarly situated, through their attorney, Hughes Socol Piers Resnick & Dym, Ltd., complain against Defendant S&C Electric Company ("S&C Electric") as follows:

## NATURE OF THE ACTION

1. This is a class action, under 735 ILCS 5/2-801, for unpaid wages brought against Defendant S&C Electric Company ("Defendant" or "S&C Electric") for wage and hour violations stemming from Defendant's miscalculation of Plaintiffs' regular rate when determining overtime pay. Plaintiffs bring this action against Defendant to recover unpaid wages, interest, statutory penalties, liquidated damages, and attorneys' fees and costs owed to them and other similarly situated current and former employees. Plaintiffs also bring this action to obtain declaratory and injunctive relief as well as all other relief that the Court deems appropriate.

## JURISDICTION AND VENUE

2. Pursuant to 735 ILCS 5/2-209(a), the Court has jurisdiction over Defendant because it transacts business in Illinois.

3. Pursuant to 735 ILCS 5/2-102(a), venue is proper in this Court because Defendant S&C Electric does business and has offices in, and thus resides in, Cook County.

**PARTIES**

4. Carmen Mercado ("Mercado") worked for Defendant S&C Electric in Chicago, IL as an hourly-paid factory assembly worker for sixteen years, from in or around 2004 until June 2020. She is a resident of Cook County, Illinois.

5. Jorge Lopez ("Lopez") worked for Defendant in Chicago, IL from in or around February 2019 to in or around September 2019 as an hourly-paid factory assembly worker. He is a resident of Cook County, Illinois.

6. Defendant S&C Electric is a Delaware corporation with its headquarters in Chicago, Illinois. S&C Electric designs and manufactures switching, protection and power-quality products for electric power transmission and distribution systems.

**FACTS**

7. During the relevant time periods, Defendant failed to pay Plaintiffs and other hourly-paid workers appropriate overtime premium pay as required by the IMWL.

8. Defendant's IMWL violations stemmed from a miscalculation of Plaintiffs' regular rate of pay.

9. As part of its regular business practices, Defendant promised and paid to Plaintiffs and other hourly employees nondiscretionary bonuses in various forms. These bonuses were not in the nature of gifts. Instead, Defendant paid the bonuses in recognition of and to compensate Plaintiffs for their services performed at the company. The bonus payments were not made pursuant to a bona fide thrift or savings plan, and they were not paid in recognition of any special talent.

10. When calculating Plaintiffs' and other workers' regular rate of pay, Defendant failed to include bonuses that formed part of Plaintiffs' compensation.

11. Consequently, when Plaintiffs and other hourly employees worked more than forty hours in a workweek, Defendant paid them substantially less than one-and-a-half times Plaintiffs' regular rate for hours worked in excess of forty in a workweek.

12. For example, in July 2019, Defendant paid Plaintiff Mercado an hourly rate of $14.20 for up to 40 hours of work in a workweek and an overtime rate of $21.30 for hours worked in excess of 40 hours a week. On July 26, 2019, Defendant paid Plaintiff a $300 KPI Incentive bonus and a $640.97 "MIS bonus". *See* Exhibit A (2019 Mercado Paystubs). Neither bonus was reflected in Plaintiff's regular rate for purposes of calculating overtime pay, even though Plaintiff Mercado worked overtime hours in June and early July 2019.

13. On information and belief, the 2019 KPI Incentive bonus rewarded Plaintiff and other employees for achieving certain previously announced performance and safety metrics on her production line during the previous quarter. On information and belief, the 2019 MIS bonus was designed to reward Plaintiff for the number of hours that she worked during the previous year.

14. Defendant paid both bonuses in recognition of and to compensate Plaintiff for her services performed for the company. The bonuses were not in the nature of a gift. They were paid because she satisfied performance or seniority goals.

15. In 2020, Defendant paid Plaintiff Mercado an hourly rate of $14.20 for up to 40 hours of work in a workweek and an overtime rate of $21.30 for hours worked in excess of 40 hours a week. Defendant paid Plaintiff a $300.00 nondiscretionary "KPI Incentive" bonuses on January 31, 2020 and April 24, 2020; a nondiscretionary $909.00 "success sharing" bonus on

February 28, 2020; and a nondiscretionary $900.00 "seniority award" on April 24, 2020. *See* Exhibit B (2020 Mercado Paystubs).

16. On information and belief, the 2020 KPI Incentive bonus rewarded Plaintiff Mercado and other employees for achieving certain previously announced performance and safety metrics on her production line during the previous quarter. The 2020 success sharing bonus and seniority award bonus also were in recognition of and to compensate Plaintiff Mercado for her services performed for the company. The bonuses were not in the nature of a gift.

17. Mercado's overtime rate did not account for any bonus pay in any pay periods in 2020.

18. Following her termination, on or around July 31, 2020, Defendant paid Plaintiff an "adjustment payment" of $486.74. To the extent Defendant intended this "adjustment payment" to correct any miscalculation of Plaintiff's regular rate of pay for the relevant time period, it was insufficient to cover the entirety of the shortfall and statutory damages and penalties owed to Plaintiff Mercado.

19. As a further example, in 2019, Defendant paid Plaintiff Lopez an hourly rate of $14.00 for up to 40 hours of work in a workweek and an overtime rate of $21.00 for hours worked in excess of 40 hours a week. In July 2019, Defendant paid Plaintiff Lopez additional nondiscretionary bonus compensation, a $100 KPI Incentive Bonus and a $425.58 MIS Bonus.

20. On information and belief, the 2019 KPI Incentive bonus rewarded Plaintiff Lopez and other employees for achieving certain previously announced performance and safety metrics on his production line during the previous quarter. The MIS bonus also was in recognition of and to compensate Plaintiff Lopez for his services performed for the company. The bonuses were not in the nature of a gift.

21. Lopez's overtime rate did not account for any bonus pay in any pay periods in 2019, even though Plaintiff Lopez worked overtime hours in June and early July 2019.

22. On or around July 31, 2020, nearly a year after Lopez left his employment with Defendant, Defendant paid Lopez a $10.33 "adjustment payment." To the extent Defendant intended this "adjustment payment" to correct any miscalculation of Plaintiff's regular rate of pay, it was insufficient to cover the entirety of the shortfall and statutory damages and penalties owed to Plaintiff Lopez.

23. Pursuant to the IMWL, Defendant's bonus payments should have been included in these employees' regular rate of pay. 56 Ill. Admin. Code 210.410 (sums paid in recognition of services performed should be included in regular rate).

24. Pursuant to the IMWL, any payment to correct any miscalculation of Plaintiff's regular rate of pay should have included treble damages and penalties on all unpaid wages for each month the unpaid wages remained delinquent.

## CLASS ACTION ALLEGATIONS

25. Plaintiffs bring the claims in Count I, alleging violations of the IMWL, on behalf of themselves and the "**Illinois Overtime Class,"** consisting of all individuals who worked for S&C Electric as hourly, non-exempt employees in Illinois within the three (3) years immediately preceding the filing of this suit, who worked a total of more than forty (40) hours in a workweek, who received a performance bonus attributable in whole or in part to that workweek, and whose performance bonus was not included in their regular rate of pay.

26. There are legal and factual questions that are common to Plaintiffs' and the Illinois Overtime Class Members' claims under the IMWL that predominate over any question(s) solely affecting individual members of the class. These questions include whether Defendant engaged in

a pattern, practice, or policy of forcing, suffering, or permitting employees to work in excess of forty hours in a work week and failing to pay them at least one-and-a-half times their regular rate of pay for overtime hours, and whether Defendant engaged in a pattern, practice, or policy of failing to pay treble damages and statutory penalties on all unpaid wages for each month any unpaid wages remained delinquent.

27. The Illinois Overtime Class for whose benefit this action is brought is so numerous that joinder of all members is impracticable, and the disposition of the claim in a class action will provide substantial benefits to both the parties and the Court. Defendant miscalculated the regular rate of pay for, upon information and belief, many hundreds of its employees during the relevant class period.

28. Plaintiffs will fairly and adequately protect the interests of the Illinois Overtime Class that they seek to represent. Plaintiffs' claims are typical of the claims of other Illinois Overtime Class Members because Plaintiffs were hourly employees of Defendant who, like the other members of the Class, sustained damage arising out of Defendant's failure to pay the correct overtime rate of pay.

30. Plaintiffs have retained counsel competent and experienced in complex and class action litigation, including wage and hour litigation.

31. A class action is superior to other methods for the fair and efficient adjudication of the controversy alleged in this Complaint. Class action treatment will permit a large number of similarly situated persons to prosecute their modest, common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would require.

32. The Court is not likely to encounter any difficulties that would preclude it from maintaining this case as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. Individualized litigation also would present the potential for inconsistent or contradictory judgments.

**COUNT I**
**IMWL Overtime Class**
**(Illinois Overtime Class)**

33. Plaintiffs incorporate by reference each of the preceding allegations as though fully set forth herein.

34. This count is brought against Defendant on behalf of the Illinois Overtime Class.

35. At all relevant times, Plaintiff and the Illinois Overtime Class were employees of Defendant within the meaning of the IMWL, 820 ILCS 105/3.

36. At all relevant times, Defendant was an employer of Plaintiff and the Illinois Overtime Class within the meaning of the IMWL, 820 ILCS 105/3.

37. During the class period, Defendant maintained an unlawful compensation practice that failed to include all forms of non-discretionary compensation, such as monetary bonuses, incentives, awards, and/or other rewards and payments, in the Illinois Overtime Class' regular rates of pay for overtime calculation purposes, in violation of the IMWL.

38. Defendant refused to pay overtime premiums as required by the IMWL, 820 105/4, which requires an employer to pay its hourly, non-exempt employees at a rate of not less than one-and-a-half times the regular rate of pay for all hours worked in excess of forty in any workweek.

39. Defendant refused to pay treble damages and statutory penalties on all unpaid wages for each month the unpaid wages remained delinquent.

## PRAYER FOR RELIEF

Plaintiffs ask the court to enter judgment against Defendant and issue an order:

a. Certifying a class as defined herein;

b. Appointing Plaintiffs Mercado and Lopez as representatives of the class;

c. Appointing the undersigned counsel as class counsel;

d. Declaring that the actions complained of herein violate 820 ILCS 105/4;

e. Awarding unpaid wages due as provided by the IMWL;

f. Awarding prejudgment interest on the back wages in accordance with 815 ILCS 205/2;

g. For the time period post-dating February 19, 2019, awarding treble damages and 5% per-month penalties on all unpaid wages for each month the unpaid wages remain delinquent, as contemplated by 820 ILCS 105/12(a);

h. For the time period predating February 19, 2019, awarding 2% per-month penalties on all unpaid wages for each month the unpaid wages remain delinquent, as contemplated by the previous version of 820 ILCS 105/12(a);

h. Awarding reasonable attorneys' fees and costs of this action as provided by the IMWL;

i. Providing injunctive relief requiring Defendant to pay all statutorily required wages and penalties and barring future violations; and

j. Awarding such other relief as this Court deems just and proper.

March 5, 2021

Respectfully submitted,

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**APPEAL TO THE APPELLATE COURT OF ILLINOIS**
**FIRST DISTRICT**
**FROM THE CIRCUIT COURT OF COOK COUNTY**

| | | |
|---|---|---|
| **CARMEN MERCADO and JORGE LOPEZ, on behalf of themselves and all others similarly situated,** | ) | **Case No. 2020 CH 7349** |
| **Plaintiffs-Appellants,** | ) | **Judge Allen Price Walker** |
| **v.** | ) | **CLASS ACTION** |
| **S&C ELECTRIC COMPANY,** | ) | |
| **Defendant-Appellee.** | ) | |

## PLAINTIFFS' NOTICE OF APPEAL

An appeal is taken from the order and final judgment of December 10, 2021, by the Honorable Judge Allen P. Walker. Plaintiffs-Appellants Carmen Mercado and Jorge Lopez seek reversal of the Section 2-615 dismissal with prejudice of their amended complaint erroneously interpreting the Illinois Minimum Wage Law to mean that any bonuses not measured by hours worked may be properly excluded from overtime calculations and concluding that damages were not adequately established, and they seek remand to the trial court for further proceedings and any other relief the court deems appropriate.

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## CERTIFICATE OF SERVICE

Pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned attorney, hereby certifies that she caused the foregoing **PLAINTIFFS' NOTICE OF APPEAL** to be served on:

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