No. 17-3663

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

BRISTOL EXCAVATING, INC.; CALVIN BRISTOL,
Individually and as owner of Bristol Excavating, Inc.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

BRIEF OF THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 217. Jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (vesting jurisdiction in the district courts over suits commenced by an agency or officer of the United States).

This Court has jurisdiction pursuant to 28 U.S.C. 1291. The district court entered an order on November 7, 2017 granting summary judgment in part to Plaintiff-Appellee Secretary of Labor ("Secretary") and denying summary judgment to Defendants-Appellants Bristol Excavating, Inc. and Calvin Bristol (collectively "Bristol"), and entered a final judgment on November 7, 2017. Appendix ("A") 21-22. Bristol filed a timely notice of appeal on December 5, 2017. A23; *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that Bristol violated the overtime compensation requirement of the FLSA, 29 U.S.C. 207(a)(1), by failing to include bonus payments in the regular rate of pay for purposes of calculating the overtime compensation due to its employees.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings pending before this Court.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On July 22, 2016, the Secretary filed a complaint against Bristol alleging that it violated the overtime provision in section 7(a) of the FLSA, 29 U.S.C. 207(a). A3. The Secretary sought to recover unpaid overtime compensation owed to employees under the FLSA and an equal amount in liquidated damages, as well

as a permanent injunction to enjoin Bristol from committing future violations of the FLSA. A3; *see* 29 U.S.C. 216(c), 217.[1]

On November 7, 2017, the district court granted in part the Secretary's motion for summary judgment, concluding that Bristol violated the FLSA's overtime requirements by not including bonuses in the regular rate of pay for purposes of calculating overtime compensation, that Bristol's owner Calvin Bristol was an individual employer under the FLSA, and that liquidated damages were warranted. A1-19.[2] The court denied the Secretary's request for injunctive relief, concluding that such relief was unnecessary given the facts of the case. A20.[3] The district court denied Bristol's motions for summary judgment. A20.[4]

On November 7, 2017, the district court entered judgment awarding damages in the amount of $16,001.74, comprised of $8,000.87 for unpaid overtime

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[1] As with back wages, any liquidated damages recovered by the Secretary will be paid to the employees.

[2] Bristol did not counter the Secretary's arguments that Calvin Bristol was an individual employer under the FLSA and that Bristol was liable for liquidated damages under the statute. A16. Bristol has not raised either of these issues in its appeal.

[3] The Secretary has not appealed the district court's denial of the requested injunctive relief.

[4] Bristol Excavating, Inc. and Calvin Bristol each filed a motion for summary judgment; they filed one brief in support of both motions. A1 n.2.

compensation and $8,000.87 for liquidated damages. A21-22. Bristol's appeal followed. A23.

B. Statement of Facts

Bristol is an excavation contractor doing business in Pennsylvania. A2. Beginning in 2010, it contracted with Talisman Energy, Inc. ("Talisman") to provide excavation services, known as "mix off" services, at Talisman's natural gas drilling sites. A2, 13, 63-64. Bristol's employees performed these mix off services at Talisman's sites, working long hours, typically 12½ hours per day for 14 days straight, followed by seven days off; this equates to approximately 87½ hours of work per workweek. A60-61; Br. 5.

Soon after Bristol began performing services for Talisman, Bristol's employees learned that employees of other contractors working on Talisman sites were receiving bonuses sponsored by Talisman. A2, 13, 223. The employees relayed this information to Bristol's Office Manager at the time, Krystle Bristol. A2, 223. After speaking with Talisman about the bonus program, Bristol's Office Manager learned that Bristol's employees were eligible for the program and arranged for them to be included. A2, 224, 227-28. The bonus program consisted of three types of bonuses: (1) safety bonuses, awarded if there were no safety incidents during the workday; (2) Pacesetter bonuses, awarded if a well was drilled deeper than anticipated in a specified amount of time; and (3) AFE bonuses,

awarded if a well was completed ahead of schedule. A2-3, 120, 162-63, 184, 205; Br. 4, 11.

Bristol's Office Manager explained the bonus program to its employees. A2, 13, 83, 227-28. Specifically, she explained to the employees the work requirements for receiving the bonuses; she did this before the employees performed the work for which they could earn the bonuses. A2, 228. Additionally, the terms of the bonuses were explained to the employees at daily safety meetings, which included the presentation of charts that explained why a well was or was not eligible for a bonus. A163, 187, 192, 209.

When Talisman determined that any of the three bonuses had been earned at a particular well site, a Talisman representative sent an email to Bristol's Office Manager (and later its Account Manager) with the details of which bonuses were earned for particular wells. A3, 72-73, 113-15, 118-30. Bristol's Office or Account Manager then reviewed the relevant employee timecards to determine which employees worked on particular wells, and prepared and sent an invoice to the Talisman supervisor at the particular drilling site for approval, and then submitted the invoice for payment through Talisman's invoice processing company. A3, 73-76, 113-15, 118-30. Bristol then distributed the bonus payments to its employees in the form of a check or direct deposit. A80, 131-32, 137, 169-70, 211. It proceeded to record the payments in its payroll. A80, 130-32, 250.

Bristol withheld twenty-five percent from each bonus payment for taxes, insurance, and "a reasonable processing fee." A228-29; *see* A3, 130-31, 138-39.

Bristol did not include the bonus payments in the regular rate of pay when calculating the overtime compensation owed to its employees. A3, 231, 244-46.

C. Decision of the District Court

On November 7, 2017, the district court granted summary judgment to the Secretary, concluding that Bristol violated the overtime requirements of the FLSA, 29 U.S.C. 207, when it failed to include the bonuses in the regular rate of pay. A1. The court noted that the FLSA requires employers to pay employees overtime compensation at one and one-half times the employees' regular rate of pay for all hours worked over 40 in a workweek and that the statute defines the "regular rate" to include all remuneration paid to employees, with eight exceptions provided for in the statue. A5 (citing 29 U.S.C. 207(a)(1) and (e)(1)-(8)). The court further noted that the statutory exceptions are narrowly construed and the employer bears the burden of establishing the applicability of an exception. A5 (citing *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1459 (3d Cir. 1988)).[5]

[5] There is no indication that, in reaching its conclusion, the district court relied upon the narrow-construction principle at the expense of engaging in a fair reading of the relevant statutory provision. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (rejecting the use of a narrow-construction principle "as a useful guidepost for interpreting [exemptions to] the FLSA"; rather, exemptions must be given "a fair reading").

The court first analyzed and rejected Bristol's argument that the bonus payments qualified as gifts, excludable from the regular rate by the exception set out in section 7(e)(1), 29 U.S.C. 207(e)(1). A6-7. The court concluded that the bonus payments could not be characterized as gifts because section 7(e)(1) explicitly references amounts that are "'measured by or dependent on hours worked, production, or efficiency'" as not qualifying as excludable gifts and the payments at issue here were "dependent on work factors such as production and efficiency." A6 (quoting 29 U.S.C. 207(e)(1)).

The district court also rejected Bristol's argument that the bonus payments qualified as payments made for occasional periods when no work is performed, which are excludable under the exception set out in section 7(e)(2), 29 U.S.C. 207(e)(2). A6-8. The court explained that the bonus payments were not tied to periods when no work was performed, such as vacation or sick time; rather, they were "tied to hours of employment, as they could only be earned while on the clock." A7-8.

The court then analyzed and rejected Bristol's argument that the bonus payments qualified as discretionary bonuses, excludable from the regular rate by the exception set out in section 7(e)(3), 29 U.S.C. 207(e)(3). A8-10. Citing the language in section 7(e)(3) and in the regulation at 29 C.F.R. 778.211, which addresses discretionary bonuses, the court noted that four factors must be met in

order for a payment to be an excludable discretionary bonus under section 7(e)(3): (1) the employer must retain discretion as to whether the payment will be made; (2) the employer must retain discretion as to the amount; (3) the employer must retain discretion as to the payment of the bonuses during the period (or until a point close to the end of such period) for which the bonuses were earned; and (4) the bonus must not be paid pursuant to a promise, agreement, or contract. A8-9.

The district court concluded that all four of these factors supported the conclusion that Bristol's bonus payments were non-discretionary bonuses and therefore must be included in the regular rate. A9. Bristol did not have discretion over the fact that a bonus would be paid or over the amount of the bonus. A9. Further, because it had no discretion in bonus determinations, it similarly had no discretion as to the payment of bonuses during the period (or until a point close to the end of such period) for which the bonuses were earned. A9-10. Lastly, the bonus payments were subject to a prior agreement or promise in that, based on information provided by both Talisman and Bristol, Bristol's employees knew "prior to their incentivized [job] performance" of "the specific terms necessary for earning a bonus[.]" A10.

The court also rejected Bristol's argument that Talisman's role in originating the bonuses relieved Bristol of the obligation to include the bonuses in the regular rate for purposes of calculating overtime compensation for its employees. A11-16.

The court noted that the FLSA defines "regular rate" to include all remuneration for employment paid by an employer to an employee and that there is a presumption that remuneration in any form is included in regular rate calculations. A11-12 (citing 29 U.S.C. 207(e) and *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 187 (3d Cir. 2000)). The court also noted that the regulation at 29 C.F.R. 778.208 states that bonuses that do not qualify for exclusion from the regular rate must be included in the regular rate for calculating overtime compensation. A12. Thus, "[t]he language of the statute and regulations is clear and unambiguous: where no exception applies, bonus payments must be included in the regular rate." A12. There was no reason, the court concluded, to deviate from this plain language merely because the bonuses were determined and paid by a third party contracting with the employer. A13-14. The court further noted that a 2005 opinion letter issued by the Department of Labor's Wage and Hour Division ("Wage and Hour"), which administers and enforces the FLSA, was consistent with this conclusion. A14-15.

The district court also concluded that Calvin Bristol, the president and sole owner of Bristol Excavating, was an employer under the FLSA and therefore jointly and severally liable for the FLSA violations. A16-17. Lastly, the court concluded that liquidated damages were warranted because Bristol presented no evidence that it undertook any effort to determine if the bonuses should be

included in the regular rate, and therefore failed to show that it acted in good faith. A17-18.

SUMMARY OF ARGUMENT

The bonus payments that Bristol paid to its employees are non-discretionary bonuses that must be included in the regular rate when calculating overtime compensation owed to employees under the FLSA. The payments are indisputably remuneration for employment within the meaning of section 7(e), 29 U.S.C. 207(e), because they are payments made to Bristol's employees that are directly tied to the hours and quality of work that the employees performed for Bristol.

Further, the payments do not qualify as discretionary bonuses excludable from the regular rate under section 7(e)(3), the only exception arguably relevant here. The regulation at 29 C.F.R. 778.211, which interprets section 7(e)(3) of the FLSA, makes clear that when an employer announces in advance that it will pay bonuses to employees in order to induce the employees to work more rapidly or efficiently, the employer abandons its discretion and the bonuses must be included in the regular rate. Here, the bonuses were announced to Bristol's employees in advance to induce them to work safely and efficiently. As such, neither Talisman nor Bristol retained discretion over the fact and amount of payment of bonuses during the period (or until a point close to the end of such period) for which the bonuses were earned. The contingent nature of the bonuses does not make them

discretionary given that such bonuses were promised to be paid upon the occurrence of certain events (i.e., working quickly and without safety incidents). As non-discretionary bonuses, section 7(e) requires that they be included in the regular rate for purposes of calculating overtime compensation. *See* 29 C.F.R. 778.208.

Moreover, Talisman's role as a third party in establishing the performance metrics that Bristol's employees were required to meet in order to earn the bonuses and in conveying the bonus amounts to Bristol is not determinative of whether the bonuses themselves that Bristol paid to its employees were discretionary or non-discretionary.

Lastly, the interpretative regulation at 29 C.F.R. 778.211 explaining the factors for determining whether bonuses are discretionary within the meaning of section 7(e)(3) should be accorded deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

STANDARD OF REVIEW

This Court employs a de novo standard of review of a district court's grant of summary judgment. *See Sec'y U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 424 (3d Cir. 2017), petition for cert. filed (U.S. Jan. 11, 2018) (No. 17-995).

ARGUMENT

BRISTOL VIOLATED THE OVERTIME PROVISION OF THE FLSA BY FAILING TO INCLUDE THE BONUSES IT PAID TO ITS EMPLOYEES IN THE REGULAR RATE WHEN IT CALCULATED THE OVERTIME COMPENSATION OWED TO THE EMPLOYEES

A. The Bonuses Paid to Bristol's Employees Were Remuneration for Employment within the Meaning of Section 7(e).

The FLSA requires employers to pay their employees one and one-half times the "regular rate" at which the employees are employed for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1). Section 7(e) defines the "regular rate" at which an employee is employed to include "all remuneration for employment" paid to the employee, but excludes eight specific categories of payments set out in subsections (e)(1) through (e)(8). 29 U.S.C. 207(e) (emphasis added). Therefore, any payment or compensation made to an employee must be included in the regular rate unless it falls within one of the categories set out in subsections (e)(1)-(8). *See* 29 C.F.R. 778.200(c).[6] Because the FLSA expressly provides that all

[6] The regular rate plays a significant role in the overtime provision of the FLSA. As section 7(a)(1) of the FLSA makes clear, it is central to determining the amount of overtime compensation owed to employees. *See* 29 U.S.C. 207(a)(1). "The keystone of Section 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). The regulations explain that the regular rate "is determined by dividing [the employee's] total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. 778.109. The

compensation is included in the regular rate unless it falls within one of the exceptions specifically enumerated in the statute, "there is a statutory presumption [under the FLSA] that remuneration in any form is included in the regular rate calculation." *Madison*, 233 F.3d at 187.

There is no merit to Bristol's contention, Br. 6, 12, 16, that the bonus payments were not payments for employment with Bristol. Bristol acknowledges that the employees at issue were employed by Bristol, not by Talisman. Br. 11. The payments were explicitly paid for work performed by Bristol's employees, i.e., the safety bonuses were for work performed without a safety incident, and the Pacesetter and AFE bonuses were for work performed quickly and ahead of schedule. A2-3, 120, 162-63, 184, 205. As the district court noted, "[t]he bonuses were tied to hours of employment, as they could only be earned while on the clock." A8.

Bristol seems to contend that, because the payments originated from Talisman and Talisman was not the employees' employer, the payments could not have been remuneration for employment. As discussed in more detail below, the fact that the payments originated with Talisman does not negate the fact they were payments to Bristol's employees for work performed by Bristol's employees.

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regulations further explain how to include bonuses in the regular rate. *See* 29 C.F.R. 778.209(a). Thus, a higher regular rate results in a higher rate of pay for overtime hours worked.

"Bristol sent the employees to Talisman worksites. Bristol compensated the employees for their time at Talisman worksites. The employees were on duty at a prescribed workplace at the behest of Bristol. . . . [T]he conduct of the employees remained squarely within the interests of Bristol and directly related to on-the-clock performance." A8; *see* 29 U.S.C. 207(a)(1) ("[N]o employer shall employ any of his employees" for more than 40 hours in a workweek unless the employees receive overtime compensation); 29 U.S.C. 203(g) (defining "employ" as "to suffer or permit to work").

Moreover, regardless of whether the bonuses were contrary to Bristol's financial interests (i.e., Bristol's contract with Talisman was for Talisman to pay Bristol a flat amount for each day that Bristol's employees worked at Talisman's site and the bonuses decreased the total number of days that Bristol's employees worked at Talisman's sites, Br. 4, 11), that fact would not change the nature of the payments and somehow convert compensation for work paid to Bristol's employees (i.e., "remuneration for employment") into some other type of payment.[7] Bristol cites no authority for its contention that the bonus payments are

[7] The Secretary does not concede that the bonus payments were necessarily contrary to Bristol's financial interests. Certainly safety cannot be said to be against any employer's interest. Further, even if Bristol earned less on a particular project because of the Pacesetter or AFE bonuses, there may be other benefits that accrue to Bristol as a result of such bonuses, such as demonstrating to Talisman that Bristol's workers are quick and efficient (and safe), which might make Talisman more likely to contract with Bristol again in the future.

not compensation for performing work under section 7(e), 29 U.S.C. 207(e), or that bonus payments that negatively impact an employer's own financial interests somehow make the bonus payments not compensation for performing work. Thus, there is no basis to view the payments as anything other than compensation for performing work, i.e., "remuneration for employment" within the meaning of section 7(e).

B. The Payments to Bristol's Employees Do Not Qualify for Exclusion from the Regular Rate under Section 7(e)(3) Because They Were Non-Discretionary Bonuses and Therefore Must Be Included in the Regular Rate.

1. The regulations at 29 C.F.R. 778.208-.215 address bonuses and when they must be included or can be excluded from the regular rate. Section 778.208 states generally that bonuses that "do not qualify for exclusion from the regular rate" as one of the eight specified types of payments that are excluded by section 7(e)(1)-(8) of the statute "must be totaled in with other earnings to determine the regular rate on which overtime pay must be based." 29 C.F.R. 778.208. Moreover, the employer bears the burden of showing that particular payments to employees fall within one of the exceptions to the regular rate. *See Smiley v. E.I.DuPont De Nemours & Co.*, 839 F.3d 325, 330-31 (3d Cir. 2016) (citing *Minizza*, 842 F.2d at 1459), petition for cert. filed (U.S. Mar. 30, 2017) (No. 16-1189); *Madison*, 233 F.3d at 187.

As relevant here, section 7(e)(3) excludes the following type of compensation from the regular rate:

> Sums paid in recognition of services performed during a given period if . . . both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]

29 U.S.C. 207(e)(3)(a). Section 778.211 of the regulations specifically addresses discretionary bonuses. It reiterates the statutory language in section 7(e)(3) and explains that "[i]f the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it." 29 C.F.R. 778.211(b). It further explains:

> Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently . . . are regarded as part of the regular rate of pay. . . . [I]ndividual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is made and the like are in this category. They must be included in the regular rate of pay.

29 C.F.R. 778.211(c). Bristol contends that the bonus payments at issue are excludable from the regular rate under section 7(e)(3) as discretionary bonuses. Br. 6, 14-15. There is no merit to this argument. Bristol cannot satisfy its burden

to show that the bonus payments at issue satisfy the requirements to qualify as discretionary bonuses under section 7(e)(3) and the applicable regulations.[8]

2. The bonuses themselves were non-discretionary bonuses. Talisman promised to pay the bonuses if certain conditions were met (i.e., wells dug without safety incidents and quicker than anticipated). A2, 224, 227-28. Once Bristol learned about Talisman's bonus program, it agreed to participate and explained the terms of the bonus program to its employees, and did so before the employees performed the work for which they could (and did) earn the bonuses. A2, 13, 83, 224, 227-28. Indeed, Bristol agreed to accept the bonus payments from Talisman, deduct taxes and other costs and fees, and pay the remaining amounts to its employees through its payroll. A3, 80, 130-31, 138-39, 228-29, 250.

Because Talisman and Bristol each "announced" the bonuses "to employees to induce them to work more steadily or more rapidly or more efficiently[,]" the bonuses were non-discretionary. 29 C.F.R. 778.211(c). While Talisman and Bristol each had discretion at one point to decide whether to promise or agree to pay bonuses to Bristol's employees if the employees satisfied certain conditions,

[8] Unlike in its district court summary judgment motion, Bristol does not argue on appeal that the bonus payments were gifts or payments made for occasional periods when no work is performed, which are excludable from the regular rate by section 7(e)(1) and (2), 29 U.S.C. 207(e)(1) and (2), respectively. Even if it did advance such arguments on appeal, the bonus payments at issue would not qualify as either for the reasons explained by the district court – the bonuses here simply do not fit within the plain meaning of those exclusions. A6-8.

once each decided to do so and communicated that to the employees, each essentially abandoned its discretion as to the fact and amount of payment of the bonuses. *See* 29 C.F.R. 778.211(b) ("If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it.").[9] In *Mata v. Caring For You Home Health, Inc.*, 94 F. Supp. 3d 867, 876 (S.D. Tex. 2015), the employer had argued that a bonus paid to employees was discretionary because it was partially paid out from money received from a third party and could have been used to pay for employees' health insurance or other benefits. The court rejected that argument, reasoning that the employer "at best . . . had discretion whether to pay a bonus to the [employees] at one point in time." The employer "lost the requisite discretion[,]" however, when it "made the decision to pay a bonus to [its employees] as part of their wages and communicated that decision to them." *Id.* (citing 29 C.F.R. 778.211(b)). Like the employer in *Mata*, neither Talisman nor Bristol retained discretion over the fact and amount of payment of bonuses during

[9] The undisputed facts belie Bristol's assertion, Br. 6, 14-15, that it did not promise or agree to pay the bonuses to the employees. Bristol arranged for its employees to receive bonuses under Talisman's bonus program and explained the program to its employees, including the requirements for receiving the bonuses. A2, 12, 83, 224, 227-28.

the period (or until a point close to the end of such period) for which the bonuses were earned.[10]

3. The fact that the bonuses were contingent on certain conditions being satisfied does not mean that Talisman or Bristol retained discretion within the meaning of section 7(e)(3). If bonuses are promised to induce safe and/or quick work, and the bonuses are paid when those conditions are met, they are non-discretionary bonuses. "The clear thrust of § 207 is that once a bonus is promised to an employee as an inducement to achieve some business goal, even if that promise is not a guarantee of payment but contingent on other factors . . . it is to be included in the regular rate of pay if and when it is actually paid." *Gonzalez v. McNeil Techns., Inc.*, No. 1:06cv204, 2007 WL 1097887, at *4 (E.D. Va. April 11, 2007); *see Haber v. Americana Corp.*, 378 F.2d 854, 856 (9th Cir. 1967) ("Here, a fixed level of performance determined whether or not a bonus was paid, not the discretion of the employer. Not being excluded, the bonus payments should have been included in calculating the regular rate of [employees'] compensation."); *Vire v. Entergy Operations, Inc.*, No. 4:15-CV-00214 BSM, 2016 WL 10575139, at *4

[10] On this point, the Secretary differs from the district court, which essentially assumed that Talisman retained discretion over the bonuses. A3, 11. Nonetheless, the district court's assumption did not affect its analysis vis-à-vis Bristol, which, as the employer, is necessarily the focus. Moreover, this Court may affirm the district court's decision on different grounds than those relied on by the district court. *See Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 904 n.1 (3d Cir. 1997); *Friedman v. Thorofare Mkts. Inc.*, 587 F.2d 127, 140 (3d Cir. 1978).

(E.D. Ark. Oct. 31, 2016) (contrasting bonuses contingent on an employee meeting established goals, in which case the bonuses must be included in the regular rate, with bonuses that are at management's discretion, in which case the bonuses can be excluded from the regular rate).

In a similar factual scenario, this Court and other courts, as well as the relevant regulation, recognize that bonuses contingent on an employee completing a specific period of employment are non-discretionary bonuses that must be included in the regular rate. *See Minizza*, 842 F.2d at 1462 (extra payments based on length of service with company did not qualify as discretionary bonuses excludable from the regular rate); *see also* 29 C.F.R. 778.211(c) ("[B]onuses contingent upon the employee's continuing in employment until the time the payment is made . . . must be included in the regular rate of pay."); *Abbey v. United States*, 99 Fed. Cl. 430, 451 (Fed. Cl. 2011) (bonus contingent on the employee's completing a specific period of employment was not discretionary); *Levy v. Remy Cointreau USA, Inc.*, No. 14-CV-20906-UU, 2014 WL 11369633, at *8 (S.D. Fla. Nov. 6, 2014) (bonus announced to induce employee's continued employment with employer and to induce improved employee performance was non-discretionary, regardless of the fact that the employer might have reserved discretion as to whether to pay any bonus, citing 29 C.F.R. 778.211(c)), *aff'd*, 604 Fed. App'x 918 (11th Cir. 2015); *Dietrick v. Securitas Sec. Servs. USA, Inc.*, 50 F.

Supp. 3d 1265, 1273 (N.D. Cal. 2014) ("The payments at issue constitute nondiscretionary bonuses under 29 C.F.R. § 778.211(c) because they incentivize employees to continue their employment . . . until . . . the payment is made."). These authorities illustrate the principle that the fact that a bonus is contingent – i.e., an employer promises or agrees to pay a bonus to induce employees to meet certain performance metrics such as continuing in employment for a specified amount of time, working rapidly, or working without any safety incidents, but the bonus is contingent on the employees' meeting those metrics – does not render such bonus an excludable discretionary bonus under section 7(e)(3), 29 U.S.C. 207(e)(3).[11]

C. The Involvement of a Third Party in Establishing the Terms of the Bonuses and Conveying the Money for the Bonuses to Bristol for Payment to Its Employees Does Not Relieve Bristol of Its Obligation to Include the Non-Discretionary Bonuses in the Regular Rate as Remuneration for Employment.

Talisman's role as a third party that offered the bonuses, established the conditions that workers needed to meet to earn the bonuses, and paid the total amounts owed in bonuses to its contractors such as Bristol for the contractors to

[11] Additionally, the fact that Bristol did not promise or agree to pay the employees the bonuses upon hiring them or that Bristol did not know about Talisman's bonus program when it agreed to contract to perform services for a flat daily fee for Talisman does not negate the fact that Bristol agreed to pay its employees the bonuses that Talisman paid to it, after deducting for taxes and fees, and that it did so before the employees performed the work for which they earned the bonuses.

pay to their employees does not change either the remunatory or non-discretionary nature of the payments and therefore does not relieve Bristol as the employer from its obligation to include the bonuses in the regular rate of employees. Bristol has not cited any authority, nor is the Secretary aware of any, to support its argument, Br. 5-6, 14-15, that Talisman's role relieved Bristol of its statutory obligation to include the non-discretionary bonus payments in the regular rate when calculating overtime compensation owed to its employees. On the contrary, both courts and Wage and Hour have addressed analogous situations and neither has concluded that a third party's involvement changed an employer's statutory obligation to include within the regular rate, absent any applicable exceptions (which are not present here), "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. 207(e).

In *Romano v. Site Acquisitions, LLC*, No. 15-cv-384-AJ, 2017 WL 2634643, at *1 (D.N.H. June 19, 2017), a factually analogous case, the employer contracted with AT&T to perform services on AT&T's cell towers and other structures and hired employees to perform those services. Sometime after beginning work on its contract with AT&T, AT&T informed the employer that it was initiating an incentive bonus program in which AT&T would award bonuses per site of work as long as conditions related to quality and speed of work at the site were met. *See id.* at *2. The employer informed its employees about AT&T's incentive bonus

program, including that the amount of any given bonus would be determined by the speed and quality of work at a particular site. *See id.* at *3. The employer received payments from AT&T under the incentive bonus program (although there were disputed facts as to whether the employer paid the bonus amounts to its employees). *See id.* at *4. The court rejected the employer's argument that the payments were necessarily discretionary bonuses excludable under section 7(e)(3), 29 U.S.C. 207(e)(3). *See* 2017 WL 2634643, at *8. Specifically, the court denied summary judgment to the employer (the employees had not moved for summary judgment) because, citing the regulation, a reasonable jury could conclude based on these facts that the employer "relinquished discretion over both the fact that these bonuses would be paid to the plaintiffs and the amount that would be paid." *Id.* Nothing in the court's decision suggested that AT&T's role in establishing the terms of the bonus program (i.e., the conditions required to earn a bonus and the bonus amount per site) or conveying the bonus amounts to the employer relieved the employer of its obligation to include such non-discretionary bonus payments in its employees' regular rate.[12] *See Mata*, 94 F. Supp. 3d at 876 (rejecting argument that a bonus paid to employees was discretionary because it was partially paid out from money received from a third party and could have been used to pay for

[12] It does not appear that the employer made this argument. In any event, AT&T's role as a third party that established the bonus program or paid the bonuses did not figure into the district court's analysis and conclusion.

employees' health insurance or other benefits, and concluding that bonus was non-discretionary because the employer decided to pay the bonus as part of the employees' wages and communicated that decision to them).

Wage and Hour has addressed analogous situations in opinion letters, which support the inclusion of the kinds of bonus payments that Bristol made in the regular rate. *See* Opinion Letter FLSA2005-4NA, 2005 WL 5419040 (July 5, 2005); Addendum A (Opinion Letter (May 25, 1967)); Addendum B (Opinion Letter (Nov. 16, 1966)). In the 2005 opinion letter, an employer's employees sold products from several vendors. *See* 2005 WL 5419040, at *1. Occasionally, a vendor sponsored a bonus program in which the vendor announced to the employees that they could earn bonuses for selling that vendor's products. *See id.* The vendor determined the amount of the bonus based upon the vendor's established formula. *See id.* When employees earned a bonus, the vendor paid the employer the bonus earned by each employee and the employer, in turn, paid the employees the bonus. *See id.* Citing section 7(e)(3) of the FLSA and 29 C.F.R. 778.211(c), Wage and Hour concluded that "[s]ince the vendor informs the employees of the requirements for the bonus prior to the work being performed, these bonuses are promised to the employees who meet the vendor's requirements, rather than being paid at the discretion of the employer" and therefore the bonuses must be included in the regular rate for overtime purposes. *Id.* The district court

in this case cited this letter and concluded that it correctly interpreted section 7(e) of the FLSA as requiring that the bonuses be included in the regular rate because "a determination on the inclusivity of third-party bonuses under § 207 does not revolve around the source of the bonus but on the applicability of the exceptions provided by the statute." A15-16.

Two earlier Wage and Hour opinion letters addressed similar situations and reached the same conclusion. In a 1966 letter, sales employees received payments from manufacturers or distributors for selling certain items. *See* Addendum B (Opinion Letter (Nov. 16, 1966)). The manufacturer or distributor paid the amounts either directly to the employees or to the employer for distribution to the employees. *See id.* Wage and Hour concluded that the payments were wages under the FLSA and must be included in the regular rate (and also that the employer could credit the payments allocable to a particular workweek toward the minimum wage requirements for that workweek). *See id.* And, a 1967 letter concluded that payments that hotel doormen received from a taxicab company whose loading zone was at the front of the hotel and from a garage where the hotel guests' cars were parked should similarly be included in the regular rate. *See* Addendum A (Opinion Letter (May 25, 1967)).[13]

[13] These conclusions are consistent with Wage and Hour's current Field Operation Handbook, Ch. 32, ¶ 32b07, available at https://www.dol.gov/whd/FOH/FOH_Ch32.pdf, which states that retail employees

As these authorities demonstrate, the source of bonus payments, which will often derive from the employer's client, is not determinative of whether the bonuses must be included in the regular rate. Rather, the factors that determine whether the bonuses at issue here must be included in the regular rate are outlined in section 7(e)(3) and 29 C.F.R. 778.211, which make clear that an employer lacks the requisite discretion when it announces bonuses to employees in advance to induce certain work by the employees, thereby making the inclusion of such bonuses in the regular rate mandatory. Thus, Talisman's role in establishing the terms under which the bonuses would be awarded and paying Bristol the bonus amounts for Bristol to pay its employees is not determinative of whether the payments themselves are excludable discretionary bonuses or non-discretionary bonuses that must be included in the regular rate.

D. This Court Should Accord *Skidmore* Deference to Section 778.211.

This Court should defer to 29 C.F.R. 778.211 as persuasive authority under *Skidmore*. *Skidmore* provides that "the rulings, interpretations and opinions of the [Wage and Hour] Administrator . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness

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may receive, in addition to wages, payments from vendors for selling certain items or brands, either directly from the vendor or through the employer, and that all such payments must be included in the regular rate.

evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140; *see Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 304-05 (3d Cir. 2012). This Court has interpreted "the *Skidmore* framework as a 'sliding-scale' test in which the level of weight afforded to an interpretation varies" depending on the Court's analysis of the factors outlined in *Skidmore*. *Hagans*, 694 F.3d at 304; *see Am. Future Sys.*, 873 F.3d at 427-29 (according "the highest level of deference under *Skidmore*" to Wage and Hour's interpretation of the FLSA set out at 29 C.F.R. 785.18 regarding the compensability of short breaks).

Consideration of these factors counsels strongly in favor of according substantial deference to section 778.211's explanation of what constitutes a discretionary bonus excludable from the regular rate under section 7(e)(3). As outlined above, Wage and Hour has consistently interpreted section 7(e)(3)'s exclusion of discretionary bonuses from the regular rate to be inapplicable to bonuses that an employer announces to its employees in advance to induce them to work more rapidly or efficiently, which includes bonuses that are contingent on the employees satisfying some performance metrics. Section 778.211, which was promulgated in 1968, *see* 33 Fed. Reg. 986, 1968 WL 128099 (Jan. 26, 1968) (Final Rule), explains that such bonuses are non-discretionary and therefore must

be included in the regular rate. Further, as Wage and Hour opinion letters dating from 1966, 1967, and 2005 make clear, the involvement of a third party in offering, setting the terms of, and paying bonuses is not determinative of whether a bonus is an excludable discretionary bonus or a non-discretionary bonus that must be included in the regular rate. Thus, Wage and Hour's interpretation is long-standing and unchanged since at least 1966. Bristol has not pointed to any other Wage and Hour interpretation that is inconsistent with the regulation at section 778.211.

Additionally, the interpretation in section 778.211 is within Wage and Hour's expertise in administering the FLSA. Congress delegated authority to the Wage and Hour Administrator to administer and enforce the FLSA, *see* 29 U.S.C. 204(a), 211(a), and 216(c), and the interpretation that discretionary bonuses within the meaning of section 7(e)(3) do not include bonuses that are promised to employees in advance to induce them to work more quickly or efficiently is the product of Wage and Hour's expertise in carrying out that authority. *See Am. Future Sys.*, 873 F.3d at 429 (Wage and Hour's interpretation of the FLSA set out at 29 C.F.R. 785.18 regarding the compensability of short breaks is "well within [Wage and Hour's] expertise"); *Townsend v. Mercy Hosp.*, 862 F.2d 1009, 1012-13 (3d Cir. 1988) ("[T]he [Wage and Hour] Administrator's expertise acquired

through day-to-day application of the statute makes us hesitant to contravene such opinions unless the statute plainly requires otherwise.").

Lastly, including all remuneration in the regular rate is reasonable in light of the purpose of the FLSA – indeed, it is essential to further the purpose of the FLSA to ensure that employees are paid the proper overtime premium for all overtime hours worked. *See Youngerman-Reynolds Hardwood*, 325 U.S. at 424. This Court has long recognized the FLSA's broad remedial purpose. *See De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007). Congress enacted the FLSA to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and the general well-being of workers …." 29 U.S.C. 202(a). Including the bonus payments at issue here in the regular rate for purposes of calculating the overtime compensation owed to Bristol's employees is in keeping with this remedial purpose.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision in all respects.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (7). This document is proportionally spaced in 14-point font, and contains 6,895 words, based on the word count provided by my word processor and Microsoft software.

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Dated: May 4, 2018

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned counsel certifies that she is a member in good standing of the District of Columbia Bar, No. 53351. As an attorney representing an agency of the United States, she is not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

Dated: May 4, 2018

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I hereby certify that on May 4, 2018, a true and correct copy of the foregoing Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and that service on all counsel of record will be accomplished by this system.

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