No. S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,
Plaintiff and Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,
Defendant and Respondent.

SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B283218
LOS ANGELES SUPERIOR COURT NO. BC586176

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT LOEWS HOLLYWOOD HOTEL, LLC.

LATHROP GPM LLP
LAURA REATHAFORD
(BAR NO. 254751)
2049 CENTURY PARK EAST, SUITE 3500S
LOS ANGELES, CALIFORNIA 90067
(310) 789-4600 • FAX: (310) 789-4601
Laura.Reathaford@lathropgpm.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

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IN THE
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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT LOEWS HOLLYWOOD HOTEL, LLC.

Under California Rules of Court, rule 8.200(c), the Association of Southern California Defense Counsel (ASCDC) requests permission to file the attached amicus curiae brief in support of Defendant and Respondent Loews Hollywood Hotel, LLC.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

As civil trial and appellate practitioners, ASCDC members are well versed in the wage and hour provisions of the California Labor Code, including the provision of overtime pay and meal and rest period premiums. In addition, ASCDC members are vitally interested in the issue before this Court regarding the proper interpretation of Cal. Lab. Code § 226.7 as it applies to the proper calculation of meal and rest period premiums. If appellant's interpretation is adopted, and the Court of Appeal's decision below reversed, plaintiff (along with all California employees) will be allowed to collect the equivalent of "overtime" pay when and if their employers cause them to miss a meal or rest period premium.

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This case presents the Court with an opportunity to affirm that employees have always and only been entitled to recover one wage premium when their employers cause a missed meal or rest period; an extra hour of pay at their regular rate of compensation as opposed to a second additional type of premium in the form of overtime pay. Accordingly, ASCDC requests that this Court accept and file the attached amicus curiae brief.

September 30, 2020

LATHROP GPM LLP
LAURA REATHAFORD

By: _____
Laura Reathaford

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

AMICUS CURIAE BRIEF

INTRODUCTION

At issue before this Court is whether the "regular rate of compensation" in Labor Code section 226.7 has the same meaning as the "regular rate of pay" in Labor Code section 510(a), governing California's payment of overtime. It does not. California's overtime law is modeled on the FLSA and shares its purposes. Both the FLSA and section 510(a) are coercive statutes that use additional pay to achieve a distinctive set of policy goals—objectives not shared by section 226.7. Because the purposes of the two laws in question differ so dramatically, Ferra's theory that they can be read in concert with each other is untenable, and the Court of Appeal decision below should be affirmed.

Since its passage in 1938, the Fair Labor Standards Act ("FLSA") has used time-and-a-half pay to achieve its two core policy objectives of reducing unemployment and limiting overwork. Faced with the prospect of paying one employee at least 50% more than their standard base pay to work overtime, employers have a strong incentive to either hire more workers, distribute their hours more fairly among existing workers, or both.

Central to the FLSA's effectiveness as a behavior-shaping statute is the inclusion of "all remuneration" in its calculation of employee overtime premiums. Rather than limiting overtime pay to the base hourly rate, Congress—supported by the U.S. Supreme Court—requires employers to consider other payments such as non-discretionary bonuses and commissions as part of an employee's "regular rate" from which overtime payments are derived. This robust approach to regular rate works hand-in-glove with the underlying purposes of the FLSA (and by extension California Labor Code Section 510), as it helps steer employers away from the overuse of overtime and toward a more equitable distribution of employment and hours.

California Labor Code Section 226.7 has a different purpose: to compensate employees if and when they fail to receive a meal or rest period. Thus, to incorporate other forms of remuneration such as commission or bonus pay into the calculation of a missed meal or rest period premium would effectively require employers to pay twice for the same injury. Not only does this run contrary to the plain language of Labor Code Section 226.7, but this form of calculation has never been proffered or enforced by California's wage and hour enforcement agency, the Division of Labor

Standards Enforcement ("DLSE"). There is simply no basis (other than Ms. Ferra's first time assertion in this litigation) to undo decades of clear guidance applying the "regular rate of pay" only to the payment of overtime and the "regular rate of compensation" only to the payment of missed meal and rest period premiums.

ARGUMENT

A. Labor Code Section 226.7 Cannot Be Equated With Section 510(a) Because Each Has A Different Intended Purpose

Ferra urges this Court to conclude that "regular rate of compensation" in Labor Code section 226.7 has the same meaning as "regular rate of pay" under Labor Code section 510(a). Appellant's Opening Brief at 10. As the concurring and dissenting opinion from the court below noted, California's overtime law is modeled on the FLSA. *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th 1239, 1260, 253 Cal. Rptr. 3d 798, 814 (2019) ("California's current wage orders are closely modeled after section 7(a)(1) of the FLSA."); *see also Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1263 (C.D. Cal. 2007), aff'd sub nom. *D'Este v. Bayer Corp.*, 492 F. App'x 721 (9th Cir. 2012); *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal.App.3d 16, 31 and 39 ("California courts have

recognized that California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance to state courts" and "the purpose of the overtime provisions of FLSA parallels the purpose of IWC's wage orders.").

Equally important is the fact that "California looks to the Fair Labor Standards Act to determine what . . . constitutes the regular rate of pay for overtime purposes." *Zator v. Sprint/United Mgmt. Co.*, No. 09cv0935–LAB (MDD), 2011 WL 1157527, at *3 (S.D.Cal. Mar. 29, 2011); *see also Advanced–Tech Sec. Servs., Inc. v. Superior Court*, 163 Cal.App.4th 700, 707, 77 Cal.Rptr.3d 757 (2008) (noting that California courts rely on Department of Labor interpretations of "regular rate" under the FLSA to interpret that term as used in California Labor Code § 510); DLSE Manual § 49.1.2 ("In not defining the term 'regular rate of pay,' the Industrial Welfare Commission has manifested its intent to adopt the definition of 'regular rate of pay' set out in the [FLSA].").

That California's overtime law so closely mirrors the FLSA is crucial to the issue currently before this Court. As demonstrated below, the dual purposes of the FLSA's overtime provisions—and the regular rate mechanism for calculating overtime—are to

increase the spread of employment and protect workers by applying pressure on employers by way of time-and-a half-wages. *See Overnight Motor*, 316 U.S. at 577–78. This is a distinctive set of policy objectives not shared by section 226.7, which is designed to compensate employees for not receiving meal and rest periods. Indeed, as this Court explained in *Murphy v. Kenneth Cole Prods., Inc.*, "whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to compensate employees for their injuries." 40 Cal. 4th 1094, 1110–11, 155 P.3d 284, 294 (2007).

B. The FLSA and California's Overtime Laws Accomplish Their Policy Goals Through Additional Pay in Order to Regulate Employer Conduct

The FLSA's overtime requirements are grounded in two policy objectives: to reduce unemployment and to reduce overwork. *See, e.g., Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943) ("The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health."). By making it more costly for employers to pay fewer workers overtime than to pay more workers at a standard rate, the FLSA was engineered to increase the number of employed workers while simultaneously

protecting those workers from the health risks associated with long workdays and workweeks. *See, e.g.*, *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009) ("The overtime requirements of the FLSA were meant to apply financial pressure to spread employment to avoid the extra wage and to assure workers additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act."); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("The FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay.").

The policy objectives embedded in the FLSA were, of course, a response to both the Great Depression and a heightened national awareness of issues related to worker health and well-being. And Congress understood that the most effective way to combat these ills was to regulate employer conduct—that is, to deter employers from overworking employees via the time-and-a-half wage for workers who exceed the statutory weekly maximum.

This coercive dimension of the FLSA's overtime requirements has been clear to courts since the law's infancy. Indeed, just four years after the FLSA's passage, the United States Supreme Court confronted the question of the law's purpose in *Overnight Motor Transportation Co. v. Missel*, a case involving a claim for unpaid overtime compensation by an employee who worked irregular hours at a fixed weekly rate. 316 U.S. 572 (1942). Assessing the legislative purpose of the Act's overtime rules, the Court observed:

> By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning.

Overnight Motor, 316 U.S. at 577–78.

And just years later, the Court once again affirmed that "by increasing the employer's labor costs," the FLSA's overtime scheme "achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek."

Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423–24 (1945).

This recognition of the coercive, employer conduct-regulating dimension of the FLSA has been echoed widely by other courts in California and nationwide. *See, e.g., Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1010–11 (N.D. Cal. 2009) ("This higher rate for overtime is intended to apply financial pressure on employers to spread employment and to compensate employees for the burden of a workweek exceeding forty hours.") (internal quotes omitted); *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 87 (9th Cir. 1975) ("The legislative policy of the overtime provisions of the Act is to spread employment throughout the work force by putting financial pressure on the employer, and to compensate employees for the burden of overtime workweeks."); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999), *holding modified by Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003) ("[The FLSA] was designed to regulate the conduct of employers for the benefit of employees.").

As courts have long observed, therefore, the FLSA's overtime requirements are "coercive." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 459 (1948) (noting that the requirements are

"coercive in the sense that they were intended to exert pressure on employers to carry on their activities in the straight time hours"). By design, the time-and-a-half requirement sanctions employers who elect to concentrate work hours in fewer employees instead of distributing that work among a greater number of employees. In this way, the overtime requirements create a powerful disincentive for employers who seek to thwart its goals of reduced unemployment and worker health and well-being.

C. Overtime Laws Are Effective Because "Regular Rate of Pay" Necessarily Includes More Than Wages

Further highlighting the extent to which the overtime provisions of the FLSA use strong financial (and proportional) disincentives to regulate employer conduct is the fact that the overtime rate itself is calculated on the basis of all of the payments the employee regularly receives, not just their base hourly wages. Under the FLSA's overtime provisions, an employee who works more than a forty-hour workweek must be paid for that overage at one-and-a-half times "the regular rate at which he is employed." 29 U.S.C. § 207(a). As it applies to FLSA overtime rules, "regular rate" includes "all remuneration" paid the employee, subject to certain exceptions. 29 U.S.C. § 207(e).

Initially, however, Congress did not define "regular rate," leaving it to courts to flesh out the meaning of that term. But as a series of key U.S. Supreme Court decisions shortly after the FLSA's passage made clear, Congress's purpose was to make the regular rate of pay sufficiently robust to alter employer behavior and, by extension, enable the Act to realize its goals.

First, in *Walling v. Helmerich & Payne*, 323 U.S. 37, 38 (1944), the Court considered a challenge to an employer's "split-day" plan designed to offset the effects of the then-new FLSA requirements. Under the scheme, the employer lowered the standard hourly rate that it paid its employees for their first forty hours of work, and then paid them time-and-a-half for each hour over forty hours. *Id*. The employer contended that this approach was consistent with the FLSA because the employees were receiving the required 50% premium for time worked over forty hours. *Id*. The Court disagreed, finding that even if it was technically true that the employer was paying a 50% for what it called "overtime," the split-day plan thwarted the "purpose" of the FLSA because it enabled the employer to avoid paying "real" overtime. This essentially neutralized "any possible effect such a payment might have had upon the spreading of employment." *Id*.

at 40. Moreover, the employer's calculation of "regular rate" in an "artificial manner"—lowering the base rate in order to create the illusion of overtime—subverted the purpose of the regular rate provision and, as the Court put it, "would open the door to insidious disregard of the rights protected by the Act." *Id.* at 42; *see also id.* at 40 ("No plan so obviously inconsistent with the statutory purpose can lay a claim to legality.").

The next year, the Court decided two more cases that further vindicated Congress's effort to accomplish its policy goals via a higher and more meaningful "regular rate" of pay. In *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 421 (1945), the Court struck down an employer's wage scheme that artificially depressed hourly rates to offset the new overtime rules. Under that scheme, the employer (a lumberyard) abandoned its old wage framework that paid workers by the amount of wood stacked and replaced it with a system that paid them hourly. *Id.* But under the new system, the hourly wage was appreciably lower than it would have been had the employer accurately converted its per-stacked calculations to an hourly rate. *Id.* The Court concluded that this was at odds with the statutory purpose of regular rate under the FLSA. *Id.* at 423. As the Court explained, "[a]s long as the

minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit." *Id.* at 424 (emphasis added). In other words, the regular rate must include all payments made to the employee to ensure that the employee is being paid *at least* what the FLSA requires. *Id.* at 424 ("The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.").

Walling v. Harnischfeger Corp., 325 U.S. 427 (1945), decided the same day as *Youngerman-Reynolds*, added to the robustness of the regular rate provision by clarifying that bonuses must be included. In *Harnischfeger*, an electrical parts producer paid half of its employees a combination of hourly wages and incentive bonuses. *Id.* at 428. The employer paid overtime on the hourly wages, but it did not calculate the bonuses as part of the regular rate. *Id.* The Court concluded that permitting the employer to exclude the bonuses defied the purpose of the FLSA and "open[ed] an easy path for evading the plain design of [the overtime provisions]." As the Court explained, "When employees do earn

more than the basic hourly rates because of the operation of the incentive bonus plan the basic rates lose their significance in determining the actual rate of compensation." *Id*. at 432.

Taken together, these cases highlight the extent to which Congress intended for the FLSA's regular rate provision to apply meaningful pressure to employers to ensure compliance with the Act. Restricting the regular rate component of overtime calculation to wages alone subverts the Act's purposes by allowing employers to more easily avoid the monetary burdens of asking workers to go over forty hours. If that coercive element lacks teeth, the legislation cannot as readily accomplish its goals.

Because section 226.7 and section 510(a) are grounded in such different policy objectives, Ferra's theory that the "regular rate" mechanisms in both statutes are interchangeable is untenable. Moreover, forcing employers to include other forms of remuneration (such as commissions and bonuses) in the calculation of a missed meal or rest period premium, would effectively and unduly punish employers by forcing them to compensate employees twice for the same injury. Given the two independent purposes of Sections 226.7 and 510, it would be

illogical to adopt Ferra's interpretation regarding the calculation of meal and rest period premiums.

D. DLSE Has Never Indicated An Intent To Include Other Remuneration Besides The Base Hourly Rate In The Calculation of Missed Meal or Rest Period Premiums

Respondent Loews correctly points out that, "the DLSE has no record of directing employers to pay meal or rest period premiums at the overtime rate rather than the base hourly rate." *See* Answer brief at p. 37). Indeed, ASCDC members (a large number of whom practice employment law exclusively) report that that when determining the amount of missed meal or rest period premiums due in a particular case, the DLSE has never questioned whether the employee earns or the employer pays a commission or bonus. Instead, in these cases, the DLSE has applied the base rate of pay when calculating meal and rest period premiums.

Moreover, the DLSE has a long history of providing detailed guidance regarding wage and hour calculations and has never outlined any calculation for the payment of meal and rest period premiums which incorporates other remuneration such as commissions or bonuses.

For instance, the 2002 Update of DLSE Enforcement Policies and Interpretations Manual (rev. 2019) (DLSE Manual) in Section 35.7 says the following regarding "Bonuses":

> Calculation Of "Regular Rate Of Pay" Where Bonus Is Involved. When calculating the regular rate of pay for ***purposes of overtime calculation*** under the IWC Orders, non-discretionary bonuses must be calculated into the formula. This is discussed in detail in the Section of this Manual dealing with calculation of regular rate of pay. (See Section 49 of this Manual; see also O.L. 1991.03.06)

Absent in the discussion of "Bonuses" is a direction for employers to include non-discretionary bonuses (or any other type of bonus for that matter) in the calculation of meal or rest period premiums.

Similarly, Section 49 of the Manual contains a detailed discussion of how to calculate the "Regular Rate of Pay" in a variety of circumstances. *See e.g.*, the discussion (and mathematical computations) in paragraphs 49.2.1.1 through 49.2.6.1. However, nowhere does the DLSE discuss, let alone reference, how to calculate the "regular rate of pay" for purposes of

paying a missed meal or rest period premiums. It is also noteworthy that Section 49 is titled, "Computation of Regular Rate of Pay ***and Overtime***." [emphasis added]. There is no section, provision or paragraph in the Manual referencing "Regular Rate of Pay and Meal Period Premiums," or "Regular Rate of Pay and Rest Period Premiums." There is also no indication anywhere in the Manual that the calculation of "Regular Rate of Pay" is meant to be applied to anything other than overtime. This is not surprising since, as discussed above, including remuneration in an employee's regular rate of pay was only ever meant to apply to overtime pay.

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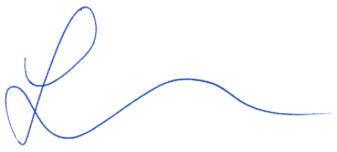
CONCLUSION

California's overtime law, modeled on the FLSA, has a distinctive set of purposes that set it apart from Section 226.7. Overtime payments are aimed at encouraging employers to hire more workers rather than overwork existing employees. By contrast, section 226.7 is compensatory. Accordingly, and for the reasons set forth above, Ferra's attempt to equate section 226.7 with section 510 runs counter to settled California labor law.

September 30, 2020

LATHROP GPM LLP
LAURA REATHAFORD



By: _____
Laura Reathaford

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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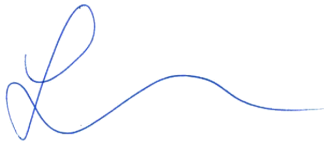

Laura Reathaford

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2049 Century Park East, Suite 3500S, Los Angeles, California 90067.

On October 1, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT LOEWS HOLLYWOOD HOTEL, LLC.** on the interested parties in this action as follows:

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

Executed on October 1, 2020, at Los Angeles, California.

PATRICIA JOHNSON

SERVICE LIST
Jessica Ferra v. Loews Hollywood Hotel, LLC.
Case No. S259172
COA 2/2 Case No. B283218 • LASC Case No. BC586176

Individual / Counsel Served	Party Represented
BALLARD ROSENBERG GOLPER & SAVITT, LLP Richard S. Rosenberg John J. Manier David Fishman 15760 Ventura Blvd., 18th Floor Encino, CA 91436 rrosenberg@brgslaw.com jmanier@brgslaw.com dfishman@brgslaw.com	Defendant and Respondent LOEWS HOLLYWOOD HOTEL, LLC
MOSS BOLLINGER LLP Dennis F. Moss Ari E. Moss 15300 Ventura Blvd., Ste. 207 Sherman Oaks, CA 91403 dennis@mossbollinger.com ari@mossbollinger.com	Plaintiff and Appellant Jessica Ferra
LAW OFFICES OF SAHAG MAJARIAN II Sahag Majarian, II 18250 Ventura Blvd. Tarzana, CA 91356 sahag@majarianlaw.com	
Michael Rubin Eileen Goldsmith ALTSHULER BERZON LLP 177 Post Street, #300 San Francisco, CA 94103 mrubin@@altshulerberzon.com egoldsmith@altshulerberzon.com	

Individual / Counsel Served	Party Represented
Office of the Clerk California Court of Appeal Second Appellate District, Division 3 300 South Spring Street Second Floor, North Tower Los Angeles, California 90013 (213) 830-7102	Electronic Filing • Service Copy Only http://www.courts.ca.gov/2dca-efile.htm
Hon. Kenneth R. Freeman Los Angeles County Superior Court Central District 111 N. Hill Street, Dept. 310 Los Angeles, California 90012 (213) 633-1061	Trial Court Judge • BC586176 REGULAR U.S. MAIL
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Supreme Court of California

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Case Number: **S259172**
Lower Court Case Number: **B283218**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **laura.reathaford@lathropgpm.com**

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Eileen Goldsmith Altshuler Berzon LLP 218029	egoldsmith@altber.com	e-Serve	10/1/2020 11:47:39 AM
Paul Stevens Stevens L.C.	pstevens@stevenslc.com	e-Serve	10/1/2020 11:47:39 AM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	10/1/2020 11:47:39 AM
David Balter DIR/Div Labor Stds Enf 136273	DBalter@dir.ca.gov	e-Serve	10/1/2020 11:47:39 AM
Jean Perley Altshuler Berzon LLP	jperley@altber.com	e-Serve	10/1/2020 11:47:39 AM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	10/1/2020 11:47:39 AM
Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	10/1/2020 11:47:39 AM
Laura Reathaford Lathrop GPM LLP	laura.reathaford@lathropgpm.com	e-Serve	10/1/2020 11:47:39 AM

254751			
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	10/1/2020 11:47:39 AM
Joshua Haffner Haffner Law PC 188652	jhh@haffnerlawyers.com	e-Serve	10/1/2020 11:47:39 AM
Laura Reathaford Lathrop GPM LLP 254751	Shar.Campbell@LathropGPM.com	e-Serve	10/1/2020 11:47:39 AM
Kiran Seldon Seyfarth Shaw LLP	kiranseldon@yahoo.com	e-Serve	10/1/2020 11:47:39 AM

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

10/1/2020

Date

/s/Laura Reathaford

Signature

Reathaford, Laura (254751)

Last Name, First Name (PNum)

Lathrop GPM LLP

Law Firm