CASE NO. S253677

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,

Plaintiff and Appellant,

v.

AMN SERVICES, LLC,

Defendant and Respondent.

After a Published Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865

San Diego Superior Court, The Honorable Joel Pressman, Judge (Ret.)
Case No. 37-2014-00012605-CU-OE-CTL

CONSOLIDATED RESPONSE TO AMICUS CURIAE BRIEFS OF (1) CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND (2) MOON AND YANG, APC AND MOSS BOLLINGER, LLP

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I. Introduction.

Defendant and Respondent AMN Services, LLC ("AMN") hereby submits this consolidated response to the two amicus briefs filed in support of Plaintiff, one by California Employment Lawyers Association ("CELA") and one by Moon, Yang, APC, Its Clients, and Clients of Moss Bollinger, LLP ("M&Y"). Amici collectively maintain that (1) this Court should prohibit any time rounding by California employers, and (2) this Court should declare that any showing of missed, late, or short meal periods in employee time records be considered a presumptive violation of meal period laws. Neither position should be adopted.

II. Amici Seek to Outlaw All Time Rounding and to Force the Ongoing Review of Meal Punches in Contravention of *Brinker*.

A. The Summary Judgment Ruling Dealt With Two Distinct Claims Regarding Unpaid Work Time and Meal Period Violations.

This case concerns the grant of summary judgment in a certified meal period class action, nothing more. Amici's attempt to inject issues that are not properly presented by this case should be rejected.

The operative Second Amended Complaint ("SAC") asserts two distinct causes of action: One cause of action is based on a supposed failure to pay all compensation due, including overtime, and alleges that such failure was a result of "time shaving," or rounding of recorded work time. *See* 1 AA 14 ¶ 35[1]. Another asserts that class members were not provided with compliant meal periods in violation of Labor Code Sections

[1] Citations to the Record on Appeal appear as "[Vol.] AA [Pg.]". Citations to AMN's Answer Brief on the Merits appear as "AB, at [__]."

226.7 and 512. 1 AA 13 ¶¶ 29-31. There is no mention of time rounding in the meal period cause of action.

At summary adjudication, Plaintiff attempted to merge (a) rounded time records and (b) meal period compliance issues to seek unpaid wages as well as meal premiums. As stated in AMN's Answer Brief, Donohue argued that the *See's Candy* neutrality analysis should not apply to the punches surrounding meal periods and that she was owed unpaid wages for time lost as a result of rounded meal punches – without having to offset such losses with minutes gained in the rounding process. AB, at 19. But AMN's expert refuted that claim by showing that when both gains and losses attributable to rounding were analyzed in connection with meal periods, the employees came out ahead. 13 AA 3472.

The claim for unpaid time based on meal period records disappeared in Plaintiff's Opening Brief to this Court, and we are now left with a claim that rounding "causes" meal violations. Never mind that Plaintiff failed to identify a single instance where she was not provided the opportunity to take a meal break. Never mind that the average recorded meal period was 45.6 minutes and started before the end of the fifth hour of work – *based on actual rather than recorded punch times*. And never mind that Defendant's expert determined that the rounding was mathematically neutral and benefitted class members with respect to compensable work time.

At summary judgment, AMN moved on all claims in the lawsuit. The trial court granted summary adjudication on the overtime claim because Plaintiff had failed to create a triable issue in response to Defendant's evidence that AMN's rounding practice was fair and neutral consistent with California law. In particular, the trial court agreed with AMN that Donohue's expert erred in his rounding calculations when he

failed to offset both losses as well as gains in reporting supposed unpaid time. As stated by the trial court, "his testimony does not rebut AMN's evidence that the system did not fail to compensate employees over time for all time they actually worked." 13 AA 3472. With no triable issue, AMN won on the uncompensated time claim.

With respect to the meal period cause of action, the trial court "agree[d] with AMN that the pleadings frame the issues on a motion for summary adjudication," and "limit[ed] the issues to be adjudicated to those pled in the Second Amended Complaint." 13 AA 3471. Because "meal period rounding" was never asserted in the Second Amended Complaint, the trial court did not address that issue. On the meal claim that was pled—failure to provide meal periods—the court found that Plaintiff had failed to raise a triable issue of fact when confronted with a) data showing compliant meal periods; b) Plaintiff's deposition testimony wherein she was unable to identify a single circumstance when a meal period had not been provided to her; c) Plaintiff's regular certifications regarding provision of meal periods and payment for all time worked; and d) evidence of myriad meal premiums being paid during the statutory period, including to Donohue herself. *See, e.g.*, 13 AA 3473 ("Donohue, the class representative was unable to identify a single occasion when she was denied a compliant meal period . . . .").

The court of appeal's affirmance is therefore unremarkable. With no issue of fact created with respect to either (1) unpaid time based on rounding or (2) meal period compliance, the trial court's ruling was unassailable. And on the "meal period rounding" issue, apart from its never having appeared in the SAC, AMN never argued that the rounding of time for purposes of wage calculation could be used to mask or excuse a failure

to provide a 30-minute meal period in accordance with the requirements of the California Labor Code. That is a fiction created by Donohue at summary adjudication in response to the overwhelming evidence of AMN's compliance with the law. But it has now become a launching pad for two amici to argue that the punches surrounding meal periods cannot be rounded and, indeed, that this Court must prohibit all time rounding. One amicus further argues that the contents of time records alone can create a presumption of liability. This Court should not adopt either position.

B. In *Donohue*, There Was No Showing That Any Employee Lost Wages as a Result Of Rounding, Or That Rounding Was Used to Excuse Meal Period Violations.

M&Y open their amicus brief referring to the first issue to be decided by the Court, as framed by Donohue:

> Can employers use rounding practices, upheld only in the overtime context, to shorten or delay meal periods despite the clear statutory mandate that employees are to be provided a meal period of "not less than 30 minutes" that starts "no later than the end of an employee's fifth hour of work?"

M&Y Brief at 1. But as stated in AMN's Answer Brief on the Merits, this question improperly conflates two distinct lines of legal inquiry: 1) neutral time rounding for wage calculation purposes and 2) meal period compliance pursuant to Labor Code Sections 226.7 and 512. AB, at 2-3.

Consider the following scenario, where two workers clock in and out to work on the same day. One worker, Employee A, clocks out one minute late for a meal period. Employee B clocks out just before the end of the fifth hour in accordance with California Law.

Employee A

IN	OUT
8:00 a.m.	1:01 p.m.
1:30 p.m.	4:30 p.m.

Employee B

IN	OUT
8:00 a.m.	12:59 p.m.
1:30 p.m.	4:30 p.m.

In the above example, Employee A worked 8 hours and one minute; Employee B worked 7 hours and 59 minutes. With respect to compensation for time worked, neutral rounding will result in payment to both for 8 hours worked, with no unpaid compensation over time. But as for meal period premiums, Employee A would be owed an additional hour of pay if the employer was at fault for the late meal, irrespective of rounding.

Nowhere in the case below did AMN use rounded time punches to excuse meal period violations. Indeed, the Company affirmatively solicited employee reports of meal violations and routinely paid meal premiums. In the end, the opportunity to take a fully compliant meal period was available and established by AMN at the summary judgment stage.

Amicus ignores such facts and proceeds to argue that "[t]here is an unsupported notion spreading among some California courts, a notion that it is okay to use time clock entry rounding to shortchange the rights of some employees, so long as the employer over-provides benefits . . . to some other employees . . . ." M&Y Brief, at 1. Unsupported indeed. Amicus cites to no such decision, let alone to any record evidence in the *Donohue* case, where rounding served to benefit workers, including Donohue herself. AB, at 10.

Over time, neutral rounding results in no systematic or actual loss to workers. *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889, 896 (2010), *reh'g denied* (Nov. 26, 2012), *review denied* (Feb. 13, 2013), made this very point, citing to expert analysis which compared actual time stamps with rounded time, and finding that, with respect to the entire class, the rounding policy was

> both mathematically and empirically unbiased. . . . From a mathematical perspective . . . [the time rounding was] exactly neutral. The fact that [time] came out in favor of the employees . . . is meaningless — the extremely small excess amount could have been a minutely small shortfall with a different sample of data.

In other words, if Employee A was slightly undercompensated on Tuesday when Employee B was slightly overcompensated, the results may be flipped by the next week with a different static sample. But mathematically, the rounding is exactly neutral and both Employees A and B are paid for all time worked. Moreover, no class-wide wrong could be proven in the face of neutral rounding.

Amici both intimate that a worker's rounded time must be continually "trued up" if individual workers are to be ensured payment for all time worked. That argument was rejected in *See's Candy*, and other courts have followed suit. In *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1077 (9th Cir. 2016), the Ninth Circuit, relying on *See's Candy*, found that a "mini actuarial" analysis of each worker's time every pay period would undermine all utility of rounding. It also noted that such an interpretation of the rounding rules would "unfairly reward[] strategic pleading, permitting plaintiffs to

selectively edit their relevant employment windows to include only pay periods in which they may have come out behind while chopping off pay periods in which they may have come out ahead." *Id.* Moreover, while Employee A might scope for underpayments to state his claim, other workers in the same pay period may have been overcompensated, leading to insurmountable ascertainability problems if a class action is pursued. Indeed, how could class members ever be identified when some individuals may be down 2 minutes one week and up 3 minutes in another? Any individual liability could only be divined after termination of employment.

Rounding still has its place: For those required to bill clients, such as the U.S. government, in quarter-hour increments, or who still handle paper time sheets or punch cards, rounding remains a useful tool to calculate wages. It can also be easier for employees to decipher their time worked and to predict wages when time is rounded.

At bottom, the California legislature has never seen fit to outlaw time rounding. This Court should not pronounce such a rule, particularly where Plaintiff herself came out ahead because of rounding.

C. *See's Candy* Was Never Challenged Below Because It Ensures Payment For All Time Worked.

This Court should reject amici's request to undo *See's Candy*, which employers throughout California have relied on since 2012 in their use of neutral rounding. Both reasons that amici give for upsetting these expectations are unsound.

1. *See's Candy* Was Not Based on an Unlawful "Underground Regulation."

M&Y's first rationale—that *See's Candy* was based on an "underground regulation"—is incorrect. In deciding *See's Candy*, the court

of appeals found "there is no California statute or case law specifically authorizing or prohibiting" the practice of time rounding. 210 Cal. App. 4th at 901. It went on to hold that "[i]n the absence of controlling or conflicting California law, California courts generally *look to federal regulations* under the FLSA for guidance." *Id.* at 903, *citing Huntington Memorial Hosp. v. Super. Ct.*, 131 Cal. App. 4th 893, 903 (2005) (emphasis added). Those federal regulations "recogniz[e] that time-rounding is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees . . . ." *Id.*

The *See's Candy* court specifically held that such federal regulations "apply equally to the employee-protective policies embodied in California labor law." *Id.* "Assuming a rounding-over-time policy is neutral, both facially and as applied, the practice is proper under California law . . . ." *Id.* "On the other hand, an employer's rounding policy violates the DOL rounding regulation [and therefore California law] if it 'systematically undercompensate[s] employees . . . .'" *Id.* at 902, *citing Alonzo v. Maximus, Inc.,* 832 F. Supp. 2d 1122, 1126-27 (C.D. Cal. 2011). The *See's Candy* court thus found the federal rounding rules consistent with California law. "'To hold otherwise would preclude [California] employers from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States.'" 210 Cal. App. 4th at 903, *citing East v. Bullock's Inc.*, 34 F. Supp. 2d 1176, 1184 (D. Ariz. 1998).

Only after its review of the federal regulation did the *See's Candy* court turn to the DLSE, noting specifically that "[s]tatements in the DLSE Manual are not binding on the courts because the rules were not adopted under the Administrative Procedure Act." 210 Cal. App. 4th at 902.

Nonetheless, the DLSE Manual similarly approved the rounding of time, "provided that such a practice is used in a manner that will not result, over a period of time, in a failure to compensate employees properly for all the time they have actually worked." DLSE Manual §§ 47.1, 47.3. Reference to such a source was in no way improper. *See Alvarado v. Dart Container Corp.,* 4 Cal. 5th 542, 559-560 (2018) ("Agency interpretations set forth in void underground regulations . . . may very well be correct and the public benefits from knowing them . . . . [T]he DLSE's policy is not necessarily wrong just because it is set forth in a void underground regulation. The policy interprets controlling state law, and that interpretation may be correct.").

This Court (a) let stand the *See's Candy* ruling (twice), *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889 (2010) *reh'g denied* (Nov. 26, 2012), *review denied* (Feb. 13, 2013); *Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235, 254 (2016), *review denied* (Mar. 22, 2017), (b) refused a depublication request, *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889 (2010), *depublication request denied* (Feb. 13, 2013), and (c) cited to it approvingly in *Troester v. Starbucks*, 5 Cal. 5th 829, 847 (2018). In the latter, the Court held that "critically, *See's Candy* rested its holding on its determination that the rounding policy was consistent with the core statutory and regulatory purpose that employees be paid for all time worked." 5 Cal. 5th at 847. Employers have thus properly relied on *See's Candy* with respect to their continued use of neutral time rounding. *E.g.*, *AHMC Healthcare, Inc. v. Super. Ct.*, 24 Cal. App. 5th 1014, 1027 (2018). Amici have offered no good reason to discard this rule now.

2. Electronic Time Records are Not Required.

M&Y's second rationale—*i.e.*, given technological advances, all California businesses from taco trucks to lawn services should be forced to record time electronically, which then cannot be rounded—fares no better. There is nothing in the Labor Code that mandates electronic timekeeping. Only accurate records are required. And while employers are required to keep proper records, it is usually the workers themselves reporting time worked. As long as accurate records are maintained, as was the case in *Donohue*, nothing more is required. And the rounding of such time for calculating wages does nothing to undermine their accuracy.

Amici both try to import the reasoning of *Troester*, which deals with time never recorded, into *Donohue*, where Plaintiff's SAC asserts that recorded work time was improperly rounded. 1 AA 14 ¶ 35. They maintain that "*Troester*'s take on the challenges of tracking small amounts of time applies with equal force in the rounding context." *See* M&Y Brief, at 6. But *Troester* has no application because one cannot round what was never recorded. Indeed, *Donohue* is not an unpaid time case at all, because lawful rounding does not result in unpaid time. Donohue's own records underscore this point. And amici's argument that rounding "records a non-compliant meal period as compliant" is fallacious. Actual to-the-minute records were kept and analyzed in the *Donohue* case, and potential meal period infractions were revealed in those detailed records. Rounding came into play only with respect to calculating work time for payroll purposes. Further, there is nothing in the case at bar to suggest that the de minimis time rule, rejected in *Troester*, was somehow used to excuse meal period violations at AMN. It was not. *See* AB, at 8, n.1 (AMN expert finding that

"[b]ased on Nurse Recruiters' *actual* punch times, the average length of a Nurse Recruiter meal period . . . was 45.6 minutes") (emphasis in original).

AMN ascertained the time worked and rounded time up and down to calculate each individual's wages every two weeks. Just as in *See's Candy*, the practice was neutral and lawful. *See also AHMC Healthcare, Inc. v. Superior Court*, 24 Cal. App. 5th 1014 (2018) (finding timekeeping system that rounded to the nearest quarter hour mathematically neutral consistent with *See's Candy).* Where are amici finding these routine 15 minute shortfalls resulting in thousands of dollars lost to workers? Not in this case.

3. The Federal Rounding Regulations Are Entirely Consistent With California Law.

Contrary to amici's arguments, adoption of federal rounding regulations has done nothing to weaken California's mandate that employees be paid for all time worked. Indeed, its neutrality requirement guarantees proper payment. And the fact that the Industrial Welfare Commission ("IWC") never expressly adopted the federal standard is of no moment given that a) the elimination of neutral time rounding would not increase workers' overall wages, b) state courts of appeal have found the federal standard in keeping with the employee-centric policies of California, and c) the IWC is long defunct. Thus, Justice Cuéller's concurrence in *Troester* cited with approval the majority's focus "on reasonable solutions such as . . . *rounding strategies*" to facilitate the capturing of time worked. *Troester* 5 Cal. 5th at 852 (emphasis added).

In fact, M&Y recognize that a "form of rounding with a lawful end result, assuming all else [sic] compliant, is rounding coupled with work policies where an employer gives employees the option to clock in early and clock out late, so long as they are also prohibited under the policy from

working until their shift starts, and prohibited from working once their shift ends." M&Y Brief, at 28 (emphasis deleted). This was the exact circumstance in the *Donohue* case. As such, there was a lawful end result here. Using amicus's own standard, the lower court judgment should not be disturbed.

III. The Amicus Who Argues for "the Werdegar Presumption" at the Liability Stage of Meal Claims Improperly Relies on Pre-*Brinker* Authority.

CELA goes to great lengths to recite the history of the meal period tracking requirement. CELA Brief, at 22-23. They then turn to *Murphy v. Kenneth Cole*, 40 Cal. 4th 1094 (2007) which discussed the importance of time records to enforce California labor laws. But the *Kenneth Cole* instruction regarding immediate payment for a meal violation was rendered five years before *Brinker*, which expressly held that "[p]roof an employer had knowledge of employees working through meal periods *will not alone subject the employer to liability for premium pay*." 53 Cal. 4th at 1040 (emphasis added).

No one disputes that meal period records aid in the enforcement of the California Labor Code. But it does not follow that the appearance of a missed, late, or short meal should create a presumption of liability.

Recall Employee A who clocked out late for his meal in Section II above. Now imagine that this individual left the workforce 3 years ago, moved to another state, and a class action lawsuit has been filed alleging meal period violations. If Employee A's late meal period is presumed to be a violation, how could the employer ever hope to obtain rebuttal evidence in order to avoid liability? It could not.

In her *Brinker* concurrence, Justice Werdegar opened by stating that meal period claims were not "*categorically* uncertifiable" where there were questions as to why meals were missed, late, or short. But she also did not state that such issues were always certifiable or liability–inducing either. What she did offer by way of guidance was that "[e]mployers covered by ... wage order No. 5-2001 have an obligation both to relieve their employees for at least one meal period for shifts over five hours *and* to record having done so . . . . If an employer's records show *no* meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1052-53 (2012) (citations omitted) (second emphasis added).

Thus, when the corporate records are devoid of recorded meal times, courts may presume a systemic violation suitable for class treatment. The concurrence goes on, squarely focused on the issue of certification, stating that "[w]hile individual issues arising from an affirmative defense can in some cases support denial of certification, they pose no per se bar." *Id.* at 1053 (citations omitted).

CELA now tries to extend Justice Werdegar's discussion about the propriety of certification where records show no meal periods to a presumption of legal liability at the merits phase where any missed, late, or short meal appears in the timekeeping data. But the California Legislature has not seen fit to create such an automatic liability standard. This Court should not do so either.

As a threshold matter, neither Section 226.7 nor 512, which were at issue below, are timekeeping statutes; they simply set forth meal period requirements for employers. Furthermore, the *Donohue* class was certified,

the case was heard on the merits at summary judgment, and the meal claims were entirely rebutted by AMN. But even without such proof, the mere appearance of a missed, late, or short meal period in time records could not have established liability where the company had in place both policies and practices to afford compliant meal periods, as well as pay premiums.

The majority in *Brinker* was mindful that the employment relationship is a two-way street, with employers required to provide compliant meal opportunities, and workers required to play by the rules. Thus, the Court held that "employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate [ ] liability. On the other hand, an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." *Id.* at 1040. The Court then opined that "the employer is not obligated to police meal breaks . . . ." *Id.* But that is just what will come of a ruling that every recorded missed, late, or short meal gives rise to automatic summary judgment for the employee.

M&Y argues that "[i]t is fallacious to . . . argue that rounding, or not rounding, has anything to do with the 'no policing' observation in *Brinker*." M&Y Brief, at 30. Amicus misreads the Answer Brief. AMN's "no policing" argument relates solely to Appellant's suggestion that the appearance of a missed, late, or short meal in the time records should create a presumption of liability in a meal period claim. If such is the case, continual monitoring of meal period compliance via time records would be required, notwithstanding a policy and practice of providing the opportunity for compliant meal periods. But if liability is presumed, the manager, supervisor, human resources representative, or other designated meal period enforcer would have to daily review meal punches and chase down the at-

issue employees to determine if the missed, late, or short breaks were the product of meals denied by the company, or opportunities given up by the workers. That is called "policing."

Again, the appearance of a missed, late, or short meal period, without more, does not establish an infraction. In such cases, no rebuttable presumption of liability exists. If the opportunity for a compliant meal period is provided, that is enough. *Brinker*, 53 Cal. 4th at 1040.

IV. Conclusion.

For the foregoing reasons, summary judgment should be affirmed for AMN. Additionally, *See's Candy* should be left undisturbed, and the "Werdegar presumption" relating to class certification should be rejected as a basis to impose meal period liability based on time records alone.

Dated: March 12, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the enclosed brief contains 4,174 words. Counsel relies on the word count of the computer program, MS Word 2016, used to prepare this brief.

Dated: March 12, 2020

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I further declare that this same day the original and thirteen (13) copies have been filed by a third party commercial carrier for next business day delivery to:

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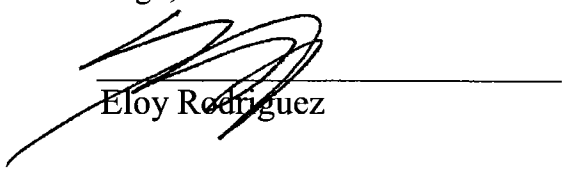
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 12, 2020 at San Diego, California.



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CA Supreme Court Court Name	**PROOF OF SERVICE**	S253677 Case Number

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/s/Mary Dollarhide
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Dollarhide , Mary (138441)
Last Name, First Name (Attorney Number)

DLA Piper LLP (US)
Firm Name

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Sullivan Law Group, APC		37bdff7a-895a-450b-acfe-cc21abdcd0d6	
Rupa G. Singh	rsingh@appealfirm.com	e-Serve	03-12-2020 1:15:59 PM
		51eae2b8-9f59-46a3-bb1d-8ec59440cdc4	
George S. Howard, Jr.	gshoward@jonesday.com	e-Serve	03-12-2020 1:15:59 PM
		59939866-222d-4ead-8c2d-c865b49ac802	
Paul Grossman	paulgrossman@paulhastings.com	e-Serve	03-12-2020 1:15:59 PM
		761929b2-8d3e-40aa-8688-a47716cd4711	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling. The contents of this proof of service are true to the best of my information, knowledge, and belief.

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

03-12-2020
Date

/s/Mary Dollarhide
Signature

Dollarhide , Mary (138441)
Last Name, First Name (Attorney Number)

DLA Piper LLP (US)
Firm Name