S259172

# IN THE
# SUPREME COURT OF CALIFORNIA

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**JESSICA FERRA,**
**Plaintiff and Petitioner,**

**v.**

**LOEWS HOLLYWOOD HOTEL, LLC**
**Defendant and Respondent.**

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AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
CASE NO. B283218

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## REPLY TO ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

The Petition for Review in *Ferra v. Loews Hollywood Hotel* ("Loews") seeks review of two issues that demand this court's attention, the meaning in Labor Code 226.7 (c) of the words "regular rate" in the expression "regular rate of compensation", and the legality under California law of time "rounding" systems that result in some employees not being paid for all their work. The Answer to the Petition of Loews Hollywood Hotel, LLC, ("Loews") advances arguments that fail to apprehend the pressing need for review of the Court of Appeal decision.

Loews argues that review of the Court of Appeal majority opinion on the "regular rate" issue is not justified under California Rule of Court 8.500 (b) because there is no split of Appellate authority on the issue (Answer pg. 9-10), and because of its view that there is no need to settle an important question of law, contending that the Majority Opinion in *Ferra* settled the important question---got it right. (Answer pgs. 10-19).

As to the rounding issue, Loews contends that review is not necessary because (1) there is no split of appellate authority, and (2) *Troester v. Starbucks Corp*. (2018) 5 Cal.5th 829 does not support Petitioner's position. (Answer pgs. 20 -23). Loews also erroneously contends that review on the basis of *Troester* should not be granted because it was not raised below. (Answer pg. 22).

Loews' Answer actually underscores the compelling need for review by this Court of both issues.

## II. LEGAL DISCUSSION

### A. Both the "Regular Rate" And "Rounding" Issues Are Important, Impacting Employers and Employees Throughout the State.

The Petition for Review references that the issues presented are "vitally important to millions of California employees and employers" (Pet. Pg. 6). Respondent did not refute this assertion, never indicating that either issue is too narrow to warrant review. On the "regular rate" issue Loews went so far to acknowledge the breadth of the impact of the decision, confirming that tens of thousands of California employers pay meal and rest break premiums. Answer pg. 5.[1]

The statewide significance of the issues was also referenced, without dispute from Loews, in the Amicus Letter supporting review filed by California Employee Lawyers Association and Jacqueline Ibarra where they indicate the issues impact millions of employers and employees. (Amicus letter pg. 1).

### B. The Proper Application of Labor Code 226.7 (c) Is Far from Settled

The only Appellate decision thus far on the issue of the meaning of "regular rate of compensation" as it appears in Labor Code 226.7 is the majority opinion in this case. Loews did not dispute, in its Answer, the debate raging in trial courts over the

[1] The suggestion of Loews that those employers follow a settled standard practice of paying the premiums at employees' base hourly rates even when their employees have non-hourly earnings in addition to hourly earnings was not supported by the record.

proper interpretation of "regular rate of compensation", merely asserting that there were more Federal trial court judges who adopted the "base hourly rate" interpretation, than judges who recognized the meaning of "regular rate" consistent with decades of Federal and State law in a manner consistent with the use of "regular rate of compensation" in *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, and *Walling v. Harnischfeger* (1945) 325 U.S. 421.

The divergence of opinion in *Ferra*, and in the opinions of a myriad of trial Courts, establishes that this significant issue is not settled, and therefore, requires review. Respondent had no answer for the contention that the debate swirling around the issue in the Federal courts will not end simply because there is a *Ferra* majority opinion. Federal judges remain bound to the requirement to predict how this court would rule. *Kwan v. SanMedica Int'l* (9th Cir. 2017) 854 F. 3d 1088, 1093, and *Estrella v. Brandt* (9th Cir. 1982) 682 F2d. 814, 817.

There are at least two cases now pending in the 9th Circuit on the issue involving two prominent California employers.

In *Ibarra v. Wells Fargo Bank, N.A.* (C.D. Cal., May 8, 2018) 2018 WL 2146380 the trial court in a thoughtfully reasoned opinion ruled consistent with the unassailable meaning of the words of art "regular rate". The 9th Circuit, obviously unconvinced that the *Ferra* majority opinion was predictive of this Court's position on the matter, and unconvinced that the meaning of "regular rate of compensation" was *settled,* opted, after oral argument in *Ibarra*, to wait to see the outcome in this

Court of *Ferra*. Had the 9th Circuit believed the issue settled it could have easily adopted the *Ferra* majority opinion.

In *Magadia v. Walmart*, which is also presently pending in the 9th Circuit, Appellant Walmart's Opening Brief (available on Westlaw 2019 WL 5579356) at page 50, takes issue with the District Court decision that ruled consistent with the reasoning of the *Ferra* dissent. *Magadia v. Walmart* (N.D. Cal. 384 F. Supp. 3d 1058, 1078 and 1080).

Clearly, the "regular rate" issue under Labor Code 226.7 is not settled. With the compelling arguments at odds with the majority opinion in *Ferra*, including, but not limited to those expressed in Judge Edmonds' dissent, and given the number and fact of conflicting decisions in both State and Federal trial courts, it is inevitable that absent review in *Ferra*, the issue will make its way to this court eventually if not through this Petition, either through 9th Circuit panels that seek your guidance, or conflicting State Appellate Court decisions.

Review granted now will provide courts, employers and employees, with finality that will put the issue to rest one way or another sooner rather than later, serving the important purpose of limiting the time and effort litigants and jurists will otherwise invariably be spending on the issue in lower courts, in other cases.

### C. Loews' Answer to The Petition Fails to Effectively Address the Persuasive Rationale of The *Ferra* Dissent.

Loews argues that "the majority opinion *correctly settles* this [the interpretation of "regular rate of compensation"] issue as

a matter of California appellate precedent." (Answer pg. 11). Ultimately, the fundamental task of the courts in statutory construction cases is to ascertain the intent of lawmakers so as to effectuate the purpose of the statute.

Unreviewed, the *Ferra* majority opinion will take on the status of precedent binding on State trial courts despite the significant arguments articulated by Justice Edmonds and Petitioner that call into question whether the majority *correctly* ascertained the intent of the Legislature. As made clear in the Petition for Review and in Justice Edmonds dissent, the *correctness* of the majority opinion is not settled. There are simply too many arguments, grounded in the history of "regular rate", precedent, the meaning of "compensation" and "pay", and the interchangeability of those terms , as well as tenets of statutory construction, to conclude without further review that the Legislature abandoned the 60 year history behind the meaning of the words of art "regular rate", when it adopted Labor Code 226.7 (c).

If this court in reviewing the Petition and Answer, as well as the majority and dissenting opinions in *Ferra* has any reasonable doubts about the majority's conclusions regarding legislative intent, the law is *not settled*, and review is warranted.

The unsettled nature of this issue is highlighted by what the Answer did not and could not address:

Respondent's answer does not refute that "Regular rate" is a term of art in California Wage and Hour law with origins in the

Fair Labor Standards Act, and decisions of the United States Supreme Court interpreting the Fair Labor Standards Act.

Respondent's answer does not refute the contention that the regulations of the Industrial Welfare Commission adopted the term "regular rate" from the FLSA (acknowledged by cases such as *Huntington Memorial Hosp. v. Superior Court* (2005) 131 CA 4th 893. 902-903; *Kao v. Holiday* (2017) 12 Cal. App. 5th 947, 960 fn. 5, and *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542). and confirmed in decades of DLSE Opinion letters explaining the Federal source of the words "regular rate". See Slip Opinion dissent pgs. 4-10, Petition pgs. 20 -30.

Respondent's answer does not refute the legislative history that establishes that the Legislature chose the words "regular rate of compensation" to match the IWC's use of that expression. Nor does it refute the fact that the quasi-legislative history of the IWC's use of the term establishes that the expression "regular rate of compensation" as used by the IWC is interchangeable with "regular rate of pay" which had been used by the IWC for decades to include "all remuneration" not simply base hourly rates. Petition 24-25, quoting the IWC's Statement of Basis; and Slip Opinion dissent pg. 12.

Respondent's answer does not address the reality that "pay" and "compensation" share the same plain meaning in the employment context, nor refute that plain meaning is a primary source of discernment of legislative intent.

Respondent's answer does not refute how this Court in cases like *Alvarado, supra*, *passim*, for example, used "regular

rate of pay" in an overtime case focused on Labor Code § 510, while in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, at fn. 1, described how Labor Code § 510 "requires payment at a rate of no less than time and one half *the regular rate of compensation*."

Respondent's answer does not refute the dissent's references to how the Legislature uses the terms "regular rate of compensation" and "regular rate of pay" interchangeably, and how tenets of statutory construction recognize that legislatures use synonyms interchangeably. See Slip Opinion dissent pgs. 18-21.

Respondent does not refute the reference in the dissent to how the United States Supreme Court and other Federal Courts have used "regular rate of compensation" long before enactment of Labor Code 226.7 in contexts where other forms of compensation were required to be added to base hourly rates to determine the "regular rate of compensation" . See *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, and *Walling v. Harnischfeger* (1945) 325 U.S. 421 and the other cases l cited in the Slip Opinion dissent fn. 4 pgs. 7-8.

Respondent's answer also fails to address the contention that chaos and mischief will ensue absent reversal of the *Ferra* majority opinion. Respondent never explains how employees who are paid exclusively on a commission, piecework, per mile driven, or salary basis will be paid their *base hourly rate* for break violations per the *Ferra* majority opinion when they do not have *base hourly rates*. Nor has Respondent refuted the conclusion

that the type of mischief the United States Supreme Court prevented through its "regular rate" jurisprudence in the overtime context, would be avoided in the context of break premium contexts absent review. Absent review, given the *Ferra* majority opinion, employers who regularly violate break laws will be incentivized, absent reversal, to lower base hourly wages and raise or create other forms of remuneration to minimize the amount they pay per violation.

### D. Contrary to Loews' Answer to the Petition for Review, Overtime Laws and Meal and Rest Break Laws Share the Same Policy Objective of Discouraging Employer Conduct That Is Harmful to The Health and Welfare of Working Men and Women.

Loews contends in support of its position that "regular rate of pay" and "regular rate of compensation" have different meanings that the policy objectives of overtime laws and break violation premium laws are different. Loews never explains how using the word "compensation" instead of "pay" in Labor Code 226.7 illustrates the supposed difference in policy objectives.

Significantly, however, Loews presumption is erroneous. Overtime laws and break violation laws both share the same objective, providing for the health and welfare of workers. Each create a disincentive for specific employer conduct. The disincentive for employers in overtime laws designed to serve the health needs of workers is payment of a monetary premium when employees are required to work long hours. The disincentive in break laws designed to serve the health needs of workers is similarly a monetary premium required when timely breaks or

sufficiently long breaks are not provided. Both disincentives involve payment of money. The fact that one is tied to increases in the monetary premium as more hours are worked, and the other is a fixed sum, does not alter the analysis.

Loews acknowledges that meal and rest break laws are concerned with the health and welfare of employees. (Answer Pg. 16, citing *Kirby v. Immoos Fire Protection* (2012) 53 Cal. 4th 1244,1255), but Loews fails to recognize that overtime laws have the same objective.

In *Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690 (1980) this court was faced with challenges to Wage Orders of the Industrial Welfare Commission that were adopted when men were first covered by the terms of the wage orders. The challenge to the orders claimed in part that the IWC's Statement of Basis was inadequate. The Court upheld the Wage Orders and the underlying Statement of Basis. In doing so, it pointed out the health and welfare basis of overtime laws, quoting the Statement of Basis, which provided in relevant part in support of overtime provisions:

> " 'The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order..'." *Id,* 27 Cal.3d at 713.

After quoting much of the remainder of the Statement of Basis at length, this Court pointed out the following, acknowledging the employee health basis of the overtime provisions:

> "In questioning the adequacy of this lengthy statement, the employers concede that '[i]t would be difficult to attack the Commission's apparent

> conclusion that an eight hour day is consistent with the health and welfare of employees but argue that the statement is deficient for failing to indicate why the Commission concluded that 'an eight-hour day is the *only* work day consistent with the health and welfare of employees.' (Employers' italics.) ..." *Id,* at 713.

*California Manufacturers Assn. v. Industrial Welfare Com.*, 109 Cal.App.3d 95 (1980) also references the health object of overtime laws:

> "The association objects to this portion of the statement [of Basis] on the ground that it does not describe evidence that proves that the health and welfare of male employees demand that they be included in the standard conditions of labor contained in the order." *Id,* 109 Cal.App.3d at 110
>
> "Section 3, subsection (A) provides that the maximum hours of work for adults shall be an 8-hour day, 40-hour week, with time and a half for overtime and for double time in special circumstances" *Id,* 109 Cal.App.3d at 110
>
> "The basic determination that the health and welfare of employees require maximum hours of work, and that the eight-hour day, five-day week is consistent with that requirement has already been made, and the statements of basis provide a sufficient explanation of the commission's choice, and demonstrate reasonable support in the record for that determination." *Id,* 109 Cal.App.3d at 112

Related to the foregoing is *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, at 1110 that expressly references how both overtime payments and break violation premium payments are disincentives designed to impact the way employers work their employees.

Finally, the employee health basis of overtime laws is set forth in the Legislature's own words when they restored overtime

pay for work over 8 hours in a day in enactment of AB 60 in 1999:

> "Section 1. This act shall be known and may be cited as the 'Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.'
> Sec. 2 The Legislature hereby finds and declares all of the following:
> (a) The eight- hour day is the mainstay protection for California's working people, and has been for over 80 years.
> (b) In 1911, California enacted the first daily overtime law setting the eight-hour daily standard.....
> (c) Ending daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime.
> **(d) Numerous studies have linked long work hours to increased rates of accident and injury.**
> **(e) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis.**
> ***
> (g) Therefore, the Legislature affirms the importance of the eight-hour workday, declares that it should be protected and reaffirms the state's unwavering commitment to **upholding the eight-hour workday as a fundamental protection for working people**." Added Stats 1999 ch sec. 3 (AB 60). (Emphasis added)

Given the foregoing, Loews' position (Answer pgs.15-20) that overtime laws and meal and rest break laws do not share the objective of addressing the health and welfare of working men and women is not well taken. Overtime premium payments and break violation premium payments address similar objectives and are both intended as deterrents to employer imposition of working conditions that the Legislature has determined adversely impact working men and women.

### E. Conclusion On the "Regular Rate" Issue.

There is no question that review is warranted in connection with the "regular rate" issue given the well-reasoned dissent in *Ferra*, and the conflict between the *Ferra* court and other courts and administrative agencies as to the meaning of "regular rate". The majority's disregard for the words of art "regular rate" and the history related thereto calls into serious question the validity of the majority opinion.

It is difficult to argue in the face of divergent views in State and Federal litigation to date, and the serious arguments that have been posited by parties on all sides, that lower courts at every level, both State and Federal, will not be struggling with this issue in the future notwithstanding the *Ferra* majority opinion. Employers, employees and the judicial system will all benefit from review and a definitive decision by this court.

### F. Review of the Rounding Issue Is Warranted Because of A Split of Authority Between This Court's *Troester* Decision and The *Ferra* Decision.

The Court of Appeal opinion, in upholding Respondent's rounding practice, is at odds with this Court's recent repudiation of federal standards applied to State law when application of those standards facilitates a departure from the core statutory and regulatory purpose that employees be paid for all time worked. *Troester, supra, 5* Cal. 5th passim.

In *Troester,supra* 5Cal. 5th at 847, this Court concluded:

> In light of the Wage Order's remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the

> evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time, we conclude that the de minimis doctrine has no application under the circumstances presented here. [2]

The Petition for Review herein painstakingly described how step by step the *Troester, supra* analysis that led to the above conclusion that employees under California law must be paid for all their work time, applies with equal force to a rounding policy that results in employees not being paid for all their work. Petition pgs. 30-38.

Loews' Answer does not refute the applicability of *Troester's* analysis and conclusion to rounding contexts, establishing thereby a conflict between this court's *Troester* decision, and the Second Appellate District Court decisions in *Ferra* and in *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014.

Respondent offers no argument that the Wage Order's "remedial purpose requiring a liberal construction", would not apply with equal force to analysis of rounding policies.

Respondent offers no argument that the Wage Order's "directive to compensate employees for all time worked", would not apply with equal force to analysis of rounding policies.

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[2] Loews Answer does not take issue with the fact that pursuant to its rounding policy Ms. Ferra was not paid for 17.87 hours of work in a two-year period, amounting to at least $276.80 in unpaid wages for work performed. Pet. Pg. 15-16. Loews similarly does not take issue with the conclusion that under its policy one group of employees could not be paid for all their work time so long as another group of employees is overpaid an equal amount for time they performed no work. Pet. Pgs. 36-37.

Respondent offers no argument that the "evident priority [the Wage Order] accorded the [pay for all work time] mandate notwithstanding customary employment arrangements", would not apply with equal force to analysis of "customary employment arrangements" in the form of rounding policies.

Respondent offers no argument that the Wage Order's "concern with small amounts of time", somehow does not apply to the small amounts of time worked by employees subject to rounding policies like Ms. Ferra.

Finally, Respondent's Answer offers no argument that supports the conclusion that the basis of *Troester's* rejection of the applicability of Federal de minimis authority, does not form a rational basis for rejection of Federal rounding authority. See *Troester, supra* 5 Cal. 5th passim.

Given that the *Ferra* Opinion (Slip Opinion at pgs. 17-21) , and *AHMC, supra* (2018) 24 Cal.App.5th 1014 support rounding systems that result in employees not being paid for all work time so long as other employees are overpaid, there is a conflict with this court's *Troester* analysis and holding.

*Troester* makes clear that employees must be paid for all their work time. *Ferra* and *AHMC*. sanction pay practices that deprive employees of wages for all time worked.

### G. This Court Should Not Refrain from Granting Review on The Rounding Issue on Account of The Timing of The *Troester* Decision.

#### *1. Petitioner Raised Troester In the Court of Appeal*

Loews Answer suggests that this court should decline the

invitation to review the rounding issue because she did not challenge the legality of rounding policies generally in the Court of Appeal (Answer pg. 22).

*Troester* was decided on July 26, 2018 and modified on August 29, 2018. Ferra filed her opening brief in the Court of Appeal in May 2018.

In Ferra's Reply in the Court of Appeal, contrary to Respondent's contention herein, Petitioner invoked *Troester* claiming Loew's rounding system was not legal, Petitioner titled one Section of the brief:

> *"Troester v. Starbucks Corporation* (2018) 5 Cal. 5th 829 Undermines Strict Adherence to Federal Rounding Doctrine." Ct. of Appeal Reply at 36.

In the above-referenced section of the Reply Brief, Petitioner stated, inter alia, that *Troester* "calls into question the applicability of Federal rounding doctrine under California law as to employees who habitually lose money on account of rounding given *Troester's* admonition that employees be paid for all hours worked." *Id* at 37.

The reply in the Court of Appeal concludes with:

> Given that the Supreme Court has acknowledged as a "core statutory and regulatory purpose that employees be paid for all time worked," summary judgment on the rounding issue was not appropriate here on grounds independent of the fact that the data demonstrates the rounding system is not neutral in application... *Id*, at 37

Clearly, the *Troester* analysis was raised as an issue in the Court of Appeal. Loews did not seek to file a sur reply based on the new argument and authority raised.

### *2. Even If Petitioner Had Not Raised Troester's Impact Review Is Warranted.*

*Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 6 (1998) provides when the Court is presented with an issue of law that does not turn on the facts of a case, the issue is a significant issue of widespread importance, and it is in the public interest to decide the issue now rather than in the context of a later Petition, it is not inappropriate to grant review even if the issue was not raised in the Court of Appeal. A significant part of the rationale is the likelihood that delaying until some future case an announcement on the issue from the Supreme Court would be extremely wasteful of the resources of both courts and parties in other cases. Here, the issue does not turn on the facts of the case, the issue is of widespread importance, and it is in the public interest to decide the issue. Absent resolution, wage and hour law practitioners will continue to litigate rounding cases with some parties relying on this Court's *Troester* analysis to support repudiation of rounding policies, and other parties concluding that until this court rules, Federal rounding doctrine applies.

## H. Review of The Rounding Issue on the Ground That *Ferra* Improperly Applied Pre-Troester Rounding Precedent Remains Viable.

Loews' Answer suggests that Ferra's Petition does not alternatively seek review on the narrower issue of inconsistency of *Ferra* with rounding precedent that pre-dated *Troester*. At pgs. 13-14, the Petition expressly sets forth as an alternative basis for review, the *Ferra* opinion's failure to adhere to pre-*Troester*

rounding precedent.

## I. Conclusion on The Rounding Issue

*Troester* enunciated the core principle of California Wage Law-- employees must be paid for all work time. The *Ferra* rounding position deviates from that principle by sanctioning a system that necessarily results in some employees not being paid for all their work time. Review is required to vindicate the core principle of California wage law in a context that impacts employees and employers throughout the State.

Dated: December 19, 2019 Respectfully Submitted,

/s/_____
By: DENNIS F. MOSS
Attorneys for Plaintiff and
Petitioner JESSICA FERRA

## RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 13-point Roman type including footnotes and contains approximately 4,172 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 19, 2019

/s/

By: DENNIS F. MOSS
Attorneys for Plaintiff and
Petitioner JESSICA FERRA

## PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on December 19, 2019 declarant served the REPLY TO ANSWER TO PETITION FOR REVIEW via TRUE FILING to:

   **BALLARD ROSENBERG GOLPER & SAVITT, LLP**
   RICHARD S. ROSENBERG
   JOHN J. MANIER
   DAVID FISHMAN
   15760 VENTURA BLVD, EIGHTEENTH FLOOR
   ENCINO, CA 91436

   And via USPS to:

   **LOS ANGELES SUPERIOR COURT**
   300 S Spring Street
   Los Angeles, CA 90012

3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of December 2019 at Sherman Oaks, California.

/s/

By: Lea Garbe

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **FERRA v. LOEWS HOLLYWOOD HOTEL**
Case Number: **S259172**
Lower Court Case Number: **B283218**

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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.

12/19/2019
Date

/s/Lea Garbe

Signature

Moss, Ari (238579)

Last Name, First Name (PNum)

Moss Bollinger LLP

Law Firm