Case No. S234969

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DOUGLAS TROESTER, et al.,
Plaintiff - Appellant- Petitioner,

vs.

STARBUCKS CORPORATION, et al.,
Defendant – Appellee - Respondent.

On a Certified Question from the United States Court of Appeals
for the Ninth Circuit
Case No. 14-55530

APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT STARBUCKS CORPORATION; BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT

MITCHELL SILBERBERG & KNUPP LLP
Emma Luevano (State Bar No. 198421), eyl@msk.com
Justine Lazarus (State Bar No. 247471), jwl@msk.com
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000, Facsimile: (310) 312-3100

Attorneys of Record for *Amici Curiae*
EMPLOYERS GROUP and CALIFORNIA EMPLOYMENT
LAW COUNCIL

Case No. S234969

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DOUGLAS TROESTER, et al.,
Plaintiff - Appellant- Petitioner,

vs.

STARBUCKS CORPORATION, et al.,
Defendant – Appellee - Respondent.

On a Certified Question from the United States Court of Appeals
for the Ninth Circuit
Case No. 14-55530

APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT STARBUCKS CORPORATION; BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT

MITCHELL SILBERBERG & KNUPP LLP
Emma Luevano (State Bar No. 198421), eyl@msk.com
Justine Lazarus (State Bar No. 247471), jwl@msk.com
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000, Facsimile: (310) 312-3100

Attorneys of Record for *Amici Curiae*
EMPLOYERS GROUP and CALIFORNIA EMPLOYMENT
LAW COUNCIL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF POSITION OF RESPONDENT

Pursuant to California Rule of Court 8.520(f), Employers Group and California Employment Law Council ("CELC") (together "Employer Amici") respectfully request leave to file a Brief *Amici Curiae* in support of Respondent Starbucks Corporation ("Respondent" or "Starbucks").

The proposed brief is combined herewith. Cal. R. Ct. 8.520(f)(5).

I. STATEMENT OF INTEREST AND DISCLOSURES

Employers Group is the nation's oldest and largest human resources management organization for employers. It represents approximately 3,800 California employers of all sizes and in every industry, which collectively employ approximately three million employees. Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships for the benefit of its employer members and the millions of individuals they employ. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. Employers Group has been involved as *amicus* in many significant employment cases.[1]

---

[1] Prominent examples include: *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014); *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir. 2010); *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Edwards v. Arthur Andersen*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Smith v. L'Oreal USA, Inc.*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005);

(...continued)

CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable and progressive rules of employment law. CELC's membership includes approximately 70 private sector employers in the State of California, who collectively employ hundreds of thousands of Californians. For over a quarter century, CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.[2]

Starbucks is not a member of Employers Group or CELC. Moreover, no party's counsel has authored this brief, either in whole or in part, nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the *amici curiae*, their members or counsel have contributed money intended to fund the preparation or submission of this brief. *See* Cal. R. Ct. 8.520(f)(4).

(...continued)
Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264 (2006); *Miller v. Dep't of Corrections*, 36 Cal. 4th 446 (2005); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

[2] Prominent examples include: *Brinker Res. Corp. v. Super. Ct.* 53 Cal. 4th 1004 (2012); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007); *Green v. State of California*, 42 Cal. 4th 254 (2007); *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007); *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264 (2006); *Armendariz v. Found. Health Psychare Servs.*, 24 Cal. 4th 83 (2000); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

II. PROPOSED *AMICUS CURIAE* BRIEF

The central issue in this case – whether the *de minimis* rule applies to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197 – is of critical importance to California businesses and, therefore, to the Employers Group and CELC. The proposed *amicus curiae* brief will assist the Court in deciding this matter by highlighting the practicalities that necessitate the adoption of the *de minimis* rule in California. The brief also explains why Plaintiff/Petitioner Troester's position that the Court rely solely on his interpretation of the statutes and wage orders (rather than adopting the *de minimis* rule) is neither practical nor reasonable to the extent it fails to delineate a standard that comports with the realities of the workplace.

For the foregoing reasons, the Employer Amici respectfully request that this Court grant their application for leave to file the *amicus* brief combined herewith.

DATED: April 17, 2017 MITCHELL SILBERBERG & KNUPP LLP

By: _____

Emma Luevano
Attorneys for *Amici Curiae*
EMPLOYERS GROUP and
CALIFORNIA EMPLOYMENT LAW
COUNCIL

BRIEF IN SUPPORT OF POSITION OF RESPONDENT AND *AMICI CURIAE* EMPLOYERS GROUP AND CELC

I. INTRODUCTION

California employers and employees have a strong interest in rules of law that are practical and reflect the realities of the workplace. The *de minimis* rule is a clearly delineated, common sense approach to timekeeping which takes into account these realities. In particular, the rule recognizes that it is impractical and unrealistic to expect employers to capture each and every second of employees' work time, especially miniscule periods of time that may be worked before clocking in or after clocking out. The rule has been affirmed in wage and hour cases under the Fair Labor Standards Act ("FLSA") for more than seventy years and the Division of Labor Standards Enforcement ("DLSE," the agency responsible for enforcing California's wage and hour laws on behalf of employees) has long recognized its validity. The rule, as applied by California courts through the standard set forth in *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, further ensures that employees' interests remain protected from any abusive timekeeping practices. In short, the rule not only acknowledges that employers should not be overwhelmed with litigation over slight periods of time that cannot realistically be recorded, but also sets parameters to ensure that employees are paid for time which could and should have been captured.

Plaintiff/Petitioner Douglas Troester's ("Plaintiff's") proposed approach to timekeeping entirely ignores the realities of the workplace. By urging this Court to reject the application of the *de minimis* rule, Plaintiff essentially is arguing that even *one second* of time worked before clocking in or after clocking out is a Labor Code violation which then should subject employers to penalties dwarfing the alleged unpaid amounts. This

approach is wholly untenable for California employers, and ultimately would be detrimental to employee interests.

For the reasons discussed herein, the Court should uphold the application of the *de minimis* rule to wage claims under the California Labor Code.

II. ARGUMENT

A. The *De Minimis* Rule Addresses the Practical Concerns Employers and Employees Face in Recording Employees' Time

The *de minimis* rule "is about how precisely 'all' 'hours' can practicably be recorded and paid without there being '[s]plit-second absurdities.'" [Respondent's Answer Brief on the Merits ("ABM"), pg. 29 (citing *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692, *superseded by statute on other grounds as stated in IBP, Inc. v. Alvarez* (2005) 546 U.S. 21, 25-26).] Whether an employer is regulated by the FLSA or the California Labor Code (or both), the employer faces the same practical concern over how it reasonably can capture all of an employee's work time.

The timekeeping concern arises in a multitude of ways. For example, focusing on a retail environment:

- What if an employee clocks out, is walking to the door to go home, and then a customer approaches her and asks for the location of a particular product? If the employee spends 5 seconds pointing the customer in the right direction, should the employer be held liable for not capturing or paying for that time?
- What if an employee is walking to the time clock in the morning at the start of her shift and notices that merchandise has fallen off

the shelf onto the floor? If the employer spends a few seconds putting the product back on the shelf, should the employer be subject to penalties (including criminal penalties) for not paying the employee for those few seconds worked before she clocked in?

- What if before clocking in to the employer's computerized timekeeping system, the employee pushes the wrong button and accidently turns off his computer? Is the employer now liable for not paying the employee the two minutes it took to reboot the computer?

- What if after clocking out, a group of employees begin chatting outside the store about last night's football game and a supervisor quickly asks them about certain work items on tomorrow' calendar? Is the employer now required to pay employees for 45 seconds of the 15-minute conversation about football?

- What if after clocking out, the employee notices that the employer's bathroom needs cleaning? If the employee spends one minute to track down his supervisor to report the problem, is the employer now required to capture and pay for that one minute of time?

If, as Plaintiff argues, the employer is obligated to pay employees for the few seconds or minutes of time under these scenarios, how will employers be expected to keep track of that time if the employee has not already clocked in or already has clocked out? Short of monitoring an employee's every movement with a stopwatch from when they step foot onto the employer's premises to when they leave the parking lot, it would be nearly impossible for any timekeeping system or method to capture each and every second of work.

These are not mere hypotheticals intended to sound alarmist. The real-world concern over how employers could possibly record "all hours" worked has been raised and addressed in numerous California cases discussing the *de minimis* rule. Courts, for example, have acknowledged

that there are occasions when the employer has no realistic mechanism for capturing the *de minimis* time spent on certain tasks. *See, e.g., Corbin v. Time Warner Ent't-Advance/Newhouse P'ship* (9th Cir. 2016) 821 F.3d 1069, 1081-1082 & fn.11 (holding that one minute of time employee worked when he mistakenly opened an auxiliary computer program before clocking into the employer's timekeeping software was *de minimis* and not owed); *Waine-Golston v. Time Warner Entertainment-Advance* (S.D.Cal., March 27, 2013, 11cv1057-GPB(RBB)) 2013 U.S. Dist. LEXIS 43899, *2, 18-19 (time spent by call center employees logging into computers before logging into employer's time-keeping system was not owed; such time would be administratively difficult to track "because of factors that vary among employees such as whether they locked their computers or were dexterous with the log-in program").

Courts also have recognized that forcing employers to capture the *de minimis* time may dramatically change the workplace itself to the detriment of other employee interests (such as employee morale) and at significant costs to the employer. *See, e.g., Alvarado v. Costco Wholesale Corp.* (N.D.Cal., June 18, 2008, No. C 06-04015 JSW) 2008 U.S. Dist. LEXIS 48935, *3-4 (repositioning time clock so employees could clock out after bag check would cause administrative difficulties as employees could (and often did) participate in noncompensable activities after the end of their shift but before leaving the warehouse, such as shopping, attending the restroom, socializing, and other personal activities); *Cervantez v. Celestica Corp.* (C.D.Cal. 2009) 618 F.Supp.2d 1208, 1216-1217 (if employer "were required to account for each second of time associates spend passing through security or clocking in or out, it would have to impose substantial restrictions on associates with respect to the time they could arrive at or leave Celestica's Fontana facility, as well as their activities while present on the premises ...."). In other words, if employers were forced to face the

threat of liability for not capturing every second worked, then they necessarily would be forced to implement draconian rules to try to comply with otherwise unrealistic expectations, including not allowing employees on the premises until the very moment the shift starts (preventing the socializing or other personal activities which employees have come to expect at the workplace), or requiring employees to immediately leave the premises without speaking to anyone after clocking out. Courts acknowledge that such unintended consequences would not be good for employees.

Ultimately, the *de minimis* rule recognizes that timekeeping is inherently imprecise for both employers *and* employees. And, although Plaintiff's unspoken premise is that every employee works every second while on-the-clock, that premise does not comport with the realities of the workplace either. In fact, it is expected that at several points during the work day, employees will stop working while on-the-clock to make brief personal phone calls about the babysitter, or text their child's teacher, or grab coffee, or clear their minds for a few minutes while socializing about last night's television fare. Yet, employees typically are not expected to (and would not want to) clock in and out for every moment during the day they are not working. California employers, therefore, need the *de minimis* rule, not because they wish to shirk their responsibilities under the Labor Code, but because it is a common sense approach to timekeeping that benefits both employers and employees.

B. The *De Minimis* Rule Does Not Subvert California Wage and Hour Laws

Not only is the *de minimis* rule a practical means of avoiding absurdities related to timekeeping, but it also is consistent with California law. For one, principles used to interpret the FLSA may be used to

interpret California wage and hour laws where their basic premises are similar. *See, e.g., Bell v Farmers Ins. Exchange*, 87 Cal. App. 4th 805, 812-19 (2001) (holding that federal authorities were "relevant to interpretation of the term 'administrative capacity'"). Here, regardless of how "hours worked" is defined under federal or California law, the underlying premise of the *de minimis* rule is the practical concern of capturing time, an issue which is common to California and non-California employers alike.

Indeed, recognizing these practical concerns and weighing the various interests involved, the DLSE has applied the *de minimis* rule for decades. [*See* ABM, pg. 26 (citing DLSE Opinion Letters and the DLSE Manual applying the *de minimis* standard).] It certainly is not the DLSE's intent or mission to allow employers to violate or subvert wage and hour laws. But, even the DLSE recognizes that there are "periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes." [DLSE Manual, 47.2.1.] For years, therefore, California's governing agency has sanctioned the use of the *de minimis* rule as being consistent with California law.

The concept of "rounding," which was upheld by the California Court of Appeal in *See's Candy Shops, Inc. v. Superior Court* (2013) 210 Cal. App. 4th 889, further demonstrates that the *de minimis* rule comports with California law. *See id.* at 907 (holding that an employer may round employees' clock-in and -out times, provided that the rounding is "fair and neutral" and does not result in a failure to pay employees over a period of time), *review denied,* (Cal. 2013) 2013 Cal. LEXIS 1537. Rounding, in essence, is a derivative of the *de minimis* rule, as it is based on the premise that sometimes an employee will be paid a bit more as a result of rounding and sometimes he will be paid a bit less, but that it generally evens out in

the end. The same is true of the *de minimis* rule, as an employee may work a few minutes after clocking out, but he also may clock in and then spend a few minutes checking his personal email or socializing before starting actual work. The notion, therefore, that timekeeping should be fair and neutral to both employers and employees is not antithetical to the California Labor Code and, indeed, has been sanctioned by California courts.

C. Any Concern of Potential Confusion or Overreach in Using the *De Minimis* Rule Is Addressed by the Test Set Forth in *Lindow*

Plaintiff argues that confirming the application of the *de minimis* rule "would leave employers and employees with no certainty about what their legal obligations and rights are [and] would confuse the clear guidance provided by the statutes, wage orders and case law in California." [Petitioner's Opening Brief on the Merits, pg. 31.] Plaintiff has that backwards. Yes, both employees and employers need a clear standard upon which they can conduct their affairs. However, the statutes and wage orders do not provide one. Indeed, if the Court were to interpret the statutes and wage orders as Plaintiff suggests, then employees would need to be paid, in essence, for every *second* worked. As discussed in Section II(A) above, that is not a sustainable solution as it does not account for the realities of the workplace. Plaintiff, though, does not offer any other alternative.

To the extent Plaintiff is concerned about the potential misuse of the *de minimis* rule, that concern can be allayed by the three-prong standard set forth in *Lindow, supra*, 738 F.2d 1057. In short, courts can analyze: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Id.* at 1063. The *Lindow* standard protects employees

while still considering the practical and economic realities of the workplace, including the varying work environments, different scenarios under which an employee may perform work before clocking in or after clocking out, and employers' diverse timekeeping methods. *See, e.g., Gomez v. Lincare, Inc.* (2009) 173 Cal. App. 4th 508, 527-528 (where employees alleged that the employer failed to compensate them for time spent answering patients' telephone calls while on call in the evenings and on weekends, the California Court of Appeals applied the *Lindow* standard and found that the time spent answering calls was not *de minimis* as the employer did not present evidence that it was administratively difficult to record the time spent responding to telephone calls, did not show that the work was irregular, and the overall time was not insignificant); *Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F.App'x 712, 714 (where call center employees alleged that they performed as much as six minutes of uncompensated work at the beginning of every shift while accessing their computers and logging into the timekeeping system, the Ninth Circuit held that, although the *de minimis* standard applies to wage claims under the California Labor Code, it did not apply here because there was no evidence that it would be administratively difficult to record the time it took employees to complete their start-up sequences); *Farris v. County of Riverside* (C.D.Cal. 2009) 667 F.Supp.2d 1151, 1166 (where deputies alleged that County of Riverside failed to compensate them for time spent donning and doffing their uniforms, the employer had established that it would be administratively difficult to record the small increments of additional time).

As these cases demonstrate, given the varying methods by which California employers track employees' time, the *Lindow* standard is a fair and practical means of applying the *de minimis* rule to the workplace. Any other rule or standard will serve only to significantly burden California

employers in an already highly-litigious landscape over miniscule periods of time. *See, e.g., Corbin*, 821 F.3d at 1072 ("This case turns on $15.02 and one minute.").

III. CONCLUSION

Plaintiff ultimately urges the Court to reject the *de minimis* rule, but has not proposed any alternative method for avoiding the type of absurdities discussed in Section II(A) above. There is a reason that California courts (including those addressing claims under the California Labor Code), the DLSE, and numerous California employers have applied the *de minimis* rule in tracking employees' time; namely, because tracking time worked *to the second* (as Plaintiff suggests) simply is not possible for many employers.

Accordingly, this Court should uphold the application of the *de minimis* rule (as expressed by the Court in *Lindow*) to claims brought under the California Labor Code.

DATED: April 17, 2017 MITCHELL SILBERBERG & KNUPP LLP

By: _____
Emma Luevano
Attorneys for *Amici Curiae*
EMPLOYERS GROUP and
CALIFORNIA EMPLOYMENT LAW
COUNCIL

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT STARBUCKS CORPORATION; BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT is produced using 13-point Times New Roman type including footnotes and contains approximately 3,308 words (778 words for the Application and 2,530 words for the Brief), which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: April 17, 2017 MITCHELL SILBERBERG & KNUPP LLP

By: _____
Emma Luevano
Attorneys for *Amici Curiae*
EMPLOYERS GROUP and
CALIFORNIA EMPLOYMENT LAW
COUNCIL

PROOF OF SERVICE

TROESTER v. STARBUCKS CORPORATION
Supreme Court Case Number S234969

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business email address is igm@msk.com.

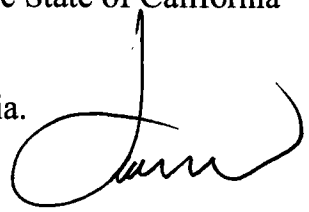
On April 17, 2017, I served a copy of the foregoing document(s) described as **APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT STARBUCKS CORPORATION; BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF RESPONDENT** on the interested parties in this action at their last known address as set forth below by taking the action described below:

[SEE ATTACHED SERVICE LIST]

☑ **BY PLACING FOR COLLECTION AND MAILING**: I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

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

Executed on April 17, 2017, at Los Angeles, California.



Isabel G. Moreno

SERVICE LIST

TROESTER v. STARBUCKS CORPORATION
Supreme Court Case Number S234969

Party	Attorney
Douglas Troester, Plaintiff and Appellant	Shaun Setareh - ***(Lead counsel)*** Thomas Alistair Segal H. Scott Leviant Setareh Law Group 9454 Wilshire Boulevard, Suite 907 Beverly Hills, CA 90212 Telephone: (310) 888-7771 David Glenn Spivak Spivak Law Firm 9454 Wilshire Boulevard, Suite 303 Beverly Hills, CA 90212 Telephone: (310) 499-4730 Louis Max Benowitz Law Office of Louis M. Benowitz 9454 Wilshire Boulevard, Penthouse 3 Beverly Hills, CA 90212 Telephone: (310) 844-5141
Starbucks Corporation, Defendant and Respondent	Rex S. Heinke Akin Gump Strauss Hauer & Feld LLP 1999 Avenue of the Stars, Suite 600 Los Angeles, CA 90067 Telephone: (310) 229-1000