

Case Number S185827

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

Anthony Kirby et al.,

Plaintiffs and Petitioners

vs.

Immoos Fire Protection, Inc.,

Defendant and Respondent

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SEP 27 2010

CLERK SUPREME COURT

Petition for Review of a Decision of the Court of Appeal,
Third Appellate District Case Number C062306

AMENDED REQUEST FOR JUDICIAL NOTICE

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.

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ATTORNEYS FOR PLAINTIFFS AND PETITIONERS
ANTHONY KIRBY AND RICK LEECH, JR.

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ATTORNEYS FOR PLAINTIFFS AND PETITIONERS
ANTHONY KIRBY AND RICK LEECH, JR.

INTRODUCTION

Pursuant to Evidence Code sections 452 and 459 and California Rule of Court 8.252, Petitioners Anthony Kirby and Rick Leech, Jr. (“Petitioners”) respectfully request that this Court take judicial notice of the following documents:

Exhibit A: *California Court Empowers Employers to Collect Attorney’s Fees From Unsuccessful Claimants for Unpaid Wages or Missed Breaks*, VENABLE LLP LAB. & EMP. ALERT, Aug. 2010, available at http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf

Exhibit B: *Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit*, BARKER OLMSTED & BARNIER, APLC LEGAL UPDATE, Aug. 2010, available at <http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php>

Exhibit C: Posting of Robin E. Weideman, Attorneys' Fees Properly Awarded to Prevailing Employer in Wage Case, to <http://www.callaborlaw.com/archives/283216-print.html> (Aug. 3, 2010 7:38 PM).

Exhibit D: Kathy Robertson, *Employees Ordered to Pay Attorney's Fees*, SACTO. BUS. JOURNAL, Jul. 29, 2010, available at <http://sacramento.bizjournals.com/sacramento/stories/2010/07/26/daily66.html>

Exhibit E: Posting of Garrett V. Jensen, Employees May Be Liable for an Employer's Attorneys' Fees Incurred in Successfully Defending Meal, to <http://www.wzllp.com/blog/?post=16> (Aug. 10, 2010 3:09).

Exhibit F: Posting of Robert Nudleman, Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees, to <http://blog.griegolaw.com/2010/07/28/prevailing-employer-in-mealrest-break-suit-entitled-to-attorneys-fees/> (Jul. 28, 2010).

Exhibit G: *Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims for Attorney's Fees In Actions For Unpaid Wages And*

Benefits, SEYFARTH SHAW LLP ONE MINUTE MEMO, Aug. 5, 2010, available at

http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/c5a4a669-ef20-4472-bce2-4c269df46ca1/RecoveryofAttorneysFeesinWageClaimsCaliforniaCourtOfAppealStrengthensPrevailingEmployersClaimsforAttorneysFeesinActionsforUnpaidWagesandBenefits.cfm

Exhibit H: Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery Of Attorney's Fees, <http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html> (Jul.27, 2010 10:24 PM).

Exhibit I: Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant, http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29 (Aug. 10, 2010 9:52 AM).

Exhibit J: Plaintiffs' Notice of Lodgment in Support of Plaintiff's
Appeal (Sacramento Superior Court, Case No. 07AS00032).

True and correct copies of Exhibits A-J are attached. (See
Declaration of Ellyn Moscovitz).

ARGUMENT

I. THIS COURT SHOULD JUDICIALLY NOTICE EXHIBITS A-I,
NEWS AND LEGAL INDUSTRY ARTICLES REPORTING ON
EMPOWERING EMPLOYERS TO COLLECT ATTORNEY'S
FEES FROM EMPLOYEES.

Petitioners request that this Court take judicial notice of Exhibits A-

I. These exhibits should be judicially noticed under Evidence Code section
452 (h).

Exhibits A, B, and G are newsletters issued by counsel for
employers relevant to this case in that they demonstrate that the Court of
Appeal's decision is now in the employers' arsenal to be used against
workers who seek redress for violations of section 226.7.

Exhibits C, E, and F are blogs written by employers' attorneys after
the Court of Appeal's decision, relevant to this case in that they show
positive developments for employers, providing a precedent for an award of
attorney's fees in actions for meal periods.

Exhibit D is an article in a business journal, regarding the same precedential developments in actions for meal periods.

Exhibits H and I are blogs written by practitioners in the attorney's fees and wage and hour fields, regarding the impact of the Court of Appeal's decision on their fields of expertise.

Judicial notice of Exhibits A-I is appropriate and may be considered by this Court for persuasive value. (*Seelig v. Infinity Broadcasting Corp., et al.* (2002) 97 Cal. App.4th 798, 808, fn. 5 (“[D]efendants ask this court to take judicial notice of news articles... [w]e grant the request, exercising our discretion to judicially notice matters that were subject to discretionary judicial notice”); *Hurvitz v. Hoefflin, et al.* (2000) 84 Cal. App.4th 1232, 1235 fn. 1 (Court can take judicial notice of the content of what has been reported in news articles).)These exhibits are important in understanding the impact that the Court of Appeal's decision has had on the wage and hour arena, and the misinterpretation of California's public policy concerning workers and minimum labor standards, such as rest periods and meal periods.

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II. THIS COURT SHOULD JUDICIALLY NOTICE EXHIBIT J, LODGMENT OF SETTLEMENT AGREEMENTS WITH THE TRIAL COURT TO SHOW THAT PETITIONERS RECEIVED ALL THE WAGES OWED.

Petitioners request that this Court take judicial notice of Exhibit J.

This exhibit should be judicially noticed under Evidence Code, §452 (d)(1).

Exhibit J is the Notice of Lodgment in Support of Plaintiffs' Appeal that was filed with the trial court on July 1, 2009. This notice is relevant to this case in that it demonstrates that Petitioners entered in settlement agreements with the general contractors Meritage Homes of California, Inc., Hilbers Inc., DR Horton and Shea Homes Inc. ("2810 Defendants") and obtained all the wages that they were owed by Immoos Fire Protection, Inc. ("Immoos"). Exhibit J contains the actual settlement agreements.

In order to take judicial notice of court records outside of the record on appeal, "the litigant must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before the Court." (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418). Since Immoos raised in its Answer to Petition for Review ("Answer") a misleading assertion about the non- existence of these agreements, judicial notice of Exhibit J is appropriate and may be considered by this Court to show that these agreements actually were executed by Petitioners and 2810 Defendants between November 2008 and January 2009. Exhibit J also demonstrates that Petitioners obtained the

monies owed and Immoos had actual notice of the existence of these settlement agreements. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 59 fn.5, mod. on denial of reh., cert. den. 117 S.Ct. 108, 519 U.S. 835, 136 L.Ed.2d 61. (“Supreme Court would not take judicial notice of documents reference to which was unnecessary to court's discussion of issues raised by defendant.”))


CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court take judicial notice of Exhibits A-J.

Dated: September 27, 2010

Respectfully submitted,

**LAW OFFICES OF
ELLYN MOSCOWITZ, P.C.**
Ellyn Moscowitz
Jennifer Lai



ELLYN MOSCOWITZ

Attorneys for Anthony Kirby and
Rick Leech, Jr., Petitioners and
Plaintiffs

DECLARATION OF ELLYN MOSCOWITZ

I, Ellyn Moscowitz, declare as follows:

1. I am an attorney licensed to practice before this Court. I am an attorney of record for Petitioners Anthony Kirby and Rick Leech, in the above-captioned action. I have personal knowledge of the facts stated herein, and if called as a witness I would testify competently thereto.
2. I make this declaration in support of the attached Amended Request for Judicial Notice.
3. Attached as Exhibit A is a true and correct copy of *California Court Empowers Employers to Collect Attorney's Fees From Unsuccessful Claimants for Unpaid Wages or Missed Breaks*, VENABLE LLP LAB. & EMP. ALERT, Aug. 2010, available at http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf
4. Attached as Exhibit B is a true and correct copy of *Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit*, BARKER OLMSTED & BARNIER, APLC LEGAL UPDATE, Aug. 2010, available at <http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php>

5. Attached as Exhibit C is a true and correct copy of Posting of Robin E. Weideman, *Attorneys' Fees Properly Awarded to Prevailing Employer in Wage Case*, to <http://www.callaborlaw.com/archives/283216-print.html> (Aug. 3, 2010 7:38 PM).

6. Attached as Exhibit D is a true and correct copy of Kathy Robertson, *Employees Ordered to Pay Attorney's Fees*, SACTO. BUS. JOURNAL, Jul. 29, 2010, available at <http://sacramento.bizjournals.com/sacramento/stories/2010/07/26/daily66.html>

7. Attached as Exhibit E is a true and correct copy of Posting of Garrett V. Jensen, *Employees May Be Liable for an Employer's Attorneys' Fees Incurred in Successfully Defending Meal*, to <http://www.wzllp.com/blog/?post=16> (Aug. 10, 2010 3:09).

8. Attached as Exhibit F is a true and correct copy of Posting of Robert Nudleman, *Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees*, to <http://blog.griegolaw.com/2010/07/28/prevailing-employer-in-mealrest-break-suit-entitled-to-attorneys-fees/> (Jul. 28, 2010).

9. Attached as Exhibit G is a true and correct copy of *Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims for Attorney's Fees In Actions For Unpaid*

Wages And Benefits, SEYFARTH SHAW LLP ONE MINUTE MEMO, Aug. 5, 2010, available at

http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/c5a4a669-ef20-4472-bce2-4c269df46ca1/RecoveryofAttorneysFeesinWageClaimsCaliforniaCourtofAppealStrengthensPrevailingEmployersClaimsforAttorneysFeesinActionsforUnpaidWagesandBenefits.cfm

10. Attached as Exhibit H is a true and correct copy of Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery Of Attorney's Fees,

<http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html> (Jul.27, 2010 10:24 PM).

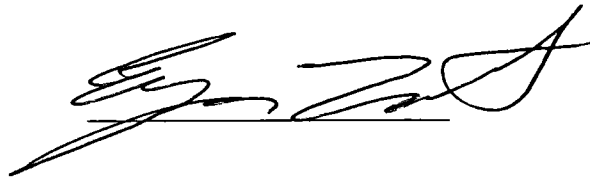
11. Attached as Exhibit I is a true and correct copy of Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant,

http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29 (Aug. 10, 2010 9:52 AM).

12. Attached as Exhibit J is a true and correct copy of Plaintiffs' Notice of Lodgment in Support of Plaintiffs' Appeal (Sacramento Superior Court, Case No. 07AS00032).

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

Executed in Oakland, California, on September 27, 2010.

A handwritten signature in black ink, appearing to read 'Ellyn Moscovitz', written over a horizontal line.

Ellyn Moscovitz

EXHIBIT A



Please contact any of the attorneys in our Labor and Employment if you have any questions regarding Alert.

Daniel B. Chammas
dchammas@Venable.com
310.229.0302

Christin J. Kim
ckkim@Venable.com
310.229.0306

California Court Empowers Employers To Collect Attorneys' Fees From Unsuccessful Claimants For Unpaid Wages or Missed Breaks

In California, employees have been able to assert claims for unpaid wages without any consequences for an unsuccessful – or even frivolous – claim. Employees often extracted settlements from employers who knew that they would have to spend more money fighting a claim than paying it outright. Worse yet, if an employer lost, not only would it have to pay the judgment, it would be required to pay its own lawyer, as well as the employee's lawyer. This menu of bad choices frequently resulted in the payment of money to undeserving former employee claimants.

A recent decision by the California Court of Appeal has dramatically changed this landscape and created a gateway for employers to recover attorneys' fees from employees who do not prevail on claims for unpaid wages. In *Kirby v. Immoos Fire Protection, Inc.* (Cal. Ct. of Appeal July 27, 2010), the Court held that an employer is entitled to its attorneys' fees when it prevails on a claim for missed breaks or unpaid wages (other than minimum wage or overtime). This development should make an employee think twice before filing such a claim.

Factual Background

The plaintiffs in *Kirby* were two former employees who sued their employer for failure to pay all wages at each pay period and at discharge, failure to pay overtime wages, and failure to provide rest periods. Plaintiffs moved for class certification, which the trial court denied. In the subsequent month, plaintiffs dismissed the entire action with prejudice against all parties. Following dismissal, the employer moved to recover its attorneys' fees from plaintiffs under Cal. Labor Code § 218.5. The trial court granted the employer's motion for attorneys' fees and awarded it \$49,846.05. Plaintiffs appealed.

Fee-Shifting Under Cal. Labor Code 218.5

At issue in *Kirby* was Cal. Labor Code § 218.5's fee-shifting provision, which provides that in an "action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys' fees and costs to the prevailing party. . . ." Section 218.5, however, contains a carve-out exception for "an action for which attorneys' fees are recoverable under Section 1194". Section 1194 is a unilateral fee-shifting provision that entitles only employees to recover attorneys' fees and costs against employers. Thus, § 218.5 does not apply to claims for unpaid overtime wages and a failure to pay the minimum wage.

The central issue on appeal was whether the employer's attorneys' fees were recoverable under § 218.5. The court held that the employer may recover attorneys' fees for successfully defending against individual causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds under the fee-shifting provisions of § 218.5. Even if a complaint also alleges failure to pay minimum wage and unpaid overtime wages under § 1194, an employer that prevails on other causes of action for nonpayment of regular wages is still entitled to its attorneys' fees. The court expressly found that this entitled employers to attorneys' fees for prevailing on causes of action for missed meal breaks or rest breaks.

Future Implications for Employers

California employers are no longer subject to claims for unpaid wages and missed breaks without any firepower of their own. Most importantly, employees no longer get a "free whack" to see if their claim for allegedly unpaid wages will force a settlement, because employees no longer have nothing to lose by filing such a claim. Now, employers can credibly threaten to obtain a sizable judgment against employees that should cause them to abandon frivolous or weak wage claims. Although many such awards may not ultimately become collectible in full, the prospect of such a recovery materially swings the balance of power in disputes over unpaid wages and missed breaks and gives employers important leverage that they should use wisely.

For any questions regarding how this case may affect your business, or to learn more about labor and employment claims applicable under Cal. Labor Code §§ 218.5 and 1194, please contact partner Daniel Chammas or associate Christin Kim of Venable's Labor and Employment group in Los Angeles.

If you have friends or colleagues who would find this alert useful, please invite them to subscribe at www.Venable.com/subscriptioncenter.

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EXHIBIT B

Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit



Litigation can be a losing proposition even for employers with strong defenses, what with legal fees and other costs. Many employment laws entitle the winning employee to recover fees, but do not provide the same remedy for winning employers. But there are a few exceptions. A recent California appellate court case titled *Kirby v. Immoos* examined one such exception in the context of a Labor Code claim for wages.

Anthony Kirby and Rick Leech, Jr. sued their employer, Immoos Fire Protection, Inc. for violating various California labor laws as well as the unfair competition law (Cal. Bus. & Prof. Code, § 17200 et seq.). Immoos successfully defended against allegations of labor law violations brought by two former employees. The court subsequently awarded \$49,846.05 in attorney's fees to Immoos for its defense of causes of action for failure to pay

wages due and failure to provide rest periods. The court awarded fees under Labor Code section 218.5.

So far so good, but the employees appealed. They argued that the employer was not entitled to collect attorney fees, because they had also sued under other Labor Code sections barring employer attorney fees, and those sections, they argued, trumped Section 218.5.

When Can An Employer Recover Attorney Fees?

Generally, a party may recover attorney's fees only when a statute or agreement of the parties provides for fee shifting. Typically in the employment context there are no written agreements calling for attorney fees in the event of a legal dispute. For the most part, attorney fees are awarded in lawsuits involving statutes that provide for an award of fees.

For example, the Fair Employment and Housing Act (FEHA) provides that the prevailing employee may recover attorney fees. The California Labor Code also provides that prevailing employees may recover attorney fees. Labor Code Section 1194 permits the winning employee to recover attorney fees for

overtime and minimum wage claims. However, that section does not allow a prevailing employer to recover fees.

For the most part, winning employers don't recover attorney fees, but there are exceptions. Labor Code Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits. Unlike overtime/minimum wage claims under Section 1194, which allows only employees to recover attorney fees, Section 218.5 allows the winning employee or employer to recover fees.

Immoos relied on Section 218.5 when it applied for recovery of its fees. It argued that the employees had made unsuccessful claims for unpaid wages and rest period penalties, and Section 218.5, rather than 1194 applied.

Attempting to avoid the attorney fees, the employees argued that while their lawsuit sought unpaid wages, it also sought overtime pay. They argued that therefore the attorney fee rules in Section 1194 should cover all claims in the case.

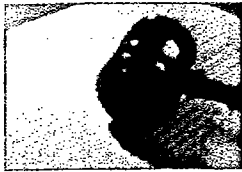
The appellate court rejected the employees' argument. It ruled that Section 1194 applies only

Generally, a party may recover attorney's fees only when a statute or agreement of the parties provides for fee shifting.



(Continued from page 2)
able to document infractions. An employee will be hard pressed to refute the record at the EDD hearing.

Wage and Hour Update: Employer Beats Hyper-technical Wage Statement Class Action



The California Labor Code is very specific about what information must be included on an employee's wage statement (paystub). Employee-side attorneys often sue employers over technical violations of this rule. For example, an employer is required to list the "total hours worked" during the pay period—but is it sufficient to list the total regular hours and the total overtime hours, or must the employer also list the total combined hours? Such issues are grist for the employment law litigation mill. A California court recently addressed this issue in a case titled *Morgan v. United Retail*.

Lawyers Seek A Payday Off Of Employee Paystubs

The California Labor Code is very specific about what information must be included on an employee's wage statement (paystub).

Mr. Morgan was employed by United Retail as a non-exempt co-manager from about October to November 2005. During this time, United Retail issued to each non-exempt California employee a weekly itemized wage statement that included information regarding the employee's hours worked, wages earned, rates of pay, deductions from pay, and other similar topics.

For employees who did not work any overtime hours during the pay period, their wage statements separately listed the total regular hours worked and the total overtime hours worked by the employee. However, the statements did not add the regular and overtime hours together and list the sum of those hours in a separate line.

Morgan filed a class action complaint against United Retail for violation of various wage and hour laws, including a statutory claim for violation of section 226. Morgan alleged that United Retail's wage statements failed to comply with the requirements of section 226 because the statements showed regular hours and overtime hours worked, but did not add the two together to show the total hours worked by the employee.

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Morgan filed a class action complaint against United Retail for violation of various wage and hour laws, including a statutory claim for violation of section 226. Morgan alleged that United Retail's wage statements failed to comply with the requirements of section 226 because the statements showed regular hours and overtime hours worked, but did not add the two together to show the total hours worked by the employee.

Lawyers Seek A Payday Off Of Employee Paystubs

to causes of action for minimum wage and overtime. If an employee loses on a minimum wage or overtime cause of action, the employer cannot recover fees. However, if the employee loses on an unpaid wage or rest period claim, the employer can in fact recover its fees from the employee.

Some accounting news in order to determine exactly how much fees should be awarded to the employer. The employer could not recover its expenses for the time the attorneys spent defending the minimum wage and overtime claims. The attorneys would have to account for the time spent defending the unpaid wage and rest period claim.

lecting attorney fees from former employees. Many employees are not in a financial position to reimburse the employer for such fees. Nevertheless, few employees want to face the prospect of a judgment lien on property and the black mark on credit. This may be sufficient to dissuade some employees from making unmeritorious wage claims.

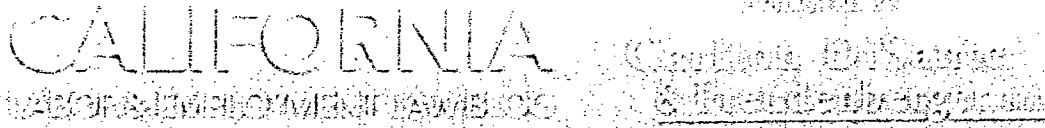
Practical Tips:

Although the case is good news for employers, as a practical matter, employers cannot count on col-

(Continued on page 5)



EXHIBIT C



Posted at 7:38 PM on August 3, 2010 by Cal Labor Law

Attorneys' Fees Properly Awarded to Prevailing Employer in Wage Case

By [Robin E. Weideman](#)

In [Kirby v. Inmoos Fire](#), a California court held that attorneys' fees were properly awarded to an employer who prevailed in a putative class action alleging missed rest breaks. The court relied on the bilateral fee-shifting provision of Labor Code section 218.5, which provides that the prevailing party in an action alleging violations of certain provisions of the Labor Code is entitled to recover its attorneys' fees. Section 218.5's fee-shifting provision excludes actions alleging claims for unpaid minimum wages or overtime wages covered by Labor Code section 1194 (which has a unilateral fee shifting provision allowing only a prevailing plaintiff to recover attorneys' fees). In this case, the plaintiff alleged (among other things) a claim for unpaid overtime wages, as well as a claim for missed rest periods. The court held that the employer could not recover its fees incurred in defending the overtime claim, but could recover its fees incurred in defending the rest period claim. This case presents a positive development for employers by providing precedent for an award of attorneys' fees in actions alleging meal and rest period violations should the employer prevail.

EXHIBIT D

Sacramento Business Journal - July 29, 2010
http://www.bizjournals.com/sacramento/stories/2010/07/26/daily_66.html

http://bizjournals.com



Thursday, July 29, 2010

Employees ordered to pay attorney's fees

Sacramento Business Journal - by Kirby, Bolzernig et al. writer

A California appeals court has ruled that an employer that defeats a claim for alleged missed rest periods can get its attorney's fees paid by the workers who filed the losing lawsuit.

The Third Appellate District Court of Appeal ruled Tuesday in Kirby v. Immooss Fire Protection Inc. In 2007, Anthony Kirby and another former employee sued the Wilton fire company for alleged unfair competition and labor law violations.

The plaintiffs also requested class certification on behalf of other employees like them. When the trial court denied class status, the plaintiffs dismissed the case — but the trial court awarded attorney's fees on three of the causes of action.

Kirby appealed the ruling. The appeals court reversed award of attorney's fees on two of the causes of action but sent the matter back to the trial court to award attorney's fees on a complaint that Immooss failed to provide Kirby with rest periods.

A proliferation of lawsuits are being filed in California alleging violations of labor law related to employee meal and rest periods, Sacramento attorney Bob Rediger said in an e-mail. Many are brought as class actions, and plaintiffs' attorneys sue for one hour of straight time pay for each employee for each alleged missed meal or rest period. The lawsuits seek wages for four years for each employee — and attorney's fees.

"In Kirby v. Immooss Fire Protection Inc., the court held that an employer that defeats a claims for alleged missed rest breaks ... may obtain an award of attorney's fees against the unsuccessful employees who brought the action," Rediger said. "The Kirby court's decision should also apply to successful employers who prevail against a claim for alleged missed meal periods."

Ellyn Moscowitz, an Oakland lawyer who represents Kirby, said Thursday she plans to file a petition for hearing by the state Supreme Court.

"We got most of it reversed," she said. "We think they are flat out wrong on state law that deals with wages."

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EXHIBIT E

Employees May Be Liable for an Employer's Attorneys' Fees Incurred in Successfully Defending Meal

August 9, 2010

By: Garrett V. Jensen

The 3rd District Court of Appeals recently held in *Kirby v. Immoos Fire Protection* that Labor Code Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits; however, it does not allow employers to recover fees in any action for minimum wages or overtime compensation. Immoos was allowed to recover for defense of Kirby's sixth cause of action for failure to provide rest periods, but not for Kirby's first (unfair practices act) and seventh (violation of Labor Code section 2810--entry into contracts by parties who knew that the contract failed to provide sufficient funds for payment of all required wages) causes of action.

Labor Code Section 218.5 provides: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action....[paragraph] This section does not apply to any action for which attorney's fees are recoverable under Section 1194."

Plaintiff cited to *Murphy v. Kenneth Cole Productions*, a 2007 California Supreme Court case which held that the additional hour of compensation for a missed rest break constituted a wage, in support of his argument that any unpaid wage is less than the statutorily mandated wages and therefore subject to section 1194. The 3rd District Court of Appeals disagreed in examining the *Murphy* Court's description of the remedy of the remedial hour of compensation as premium pay. Thus, as an addition to regular pay, the remedy was not one for failure to pay the minimum wage and would not be subject to section 1194.

The *Kirby* decision illustrates that an employee may be liable for the attorneys' fees an employer incurs in defending against claims for missed meal and rest breaks if the employee does not prevail on those claims. In light of *Kirby*, employers should continue to keep accurate records of what transpired.

Posted by: on: Aug 10, 2010 @ 03:09

EXHIBIT F

Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees

July 28, 2010 by [Rob](#)

In 2000, the California legislature added some teeth to California's meal and rest break laws. Prior to 2000 employers were required to give employees meal and rest breaks, but there was no penalty if the employer refused to allow employees to take their legally mandated breaks. In 2000 the legislature enacted California Labor Code Section 226.7 which requires employers to pay an additional hour's pay for each day in which a meal and/or rest break is not provided.

The California Supreme Court later decided that the additional hour's pay is a "wage" and not a "penalty." See *Murphy v. Kenneth Cole*. Since that time we have since a proliferation of suits alleging a violation of Labor Code Section 226.7. If court filings are to be believed there is hardly an employee in California that is allowed to take the required meal and rest breaks. I rarely see an overtime case filed that does not include a missed meal and/or rest break claim.

When the court first decided *Murphy* I recall thinking about how it would affect the attorneys' fees provisions in the Labor Code. Under Labor Code Section 1194 the prevailing employee is entitled to recover his/her attorneys' fees in an action for unpaid minimum wage or overtime. The employer can never recover its attorneys' fees in an unpaid minimum wage or overtime case. Labor Code Section 218.5, however, allows the "prevailing party" to recover attorneys' fees in any action for nonpayment of wages other than minimum wages or overtime.

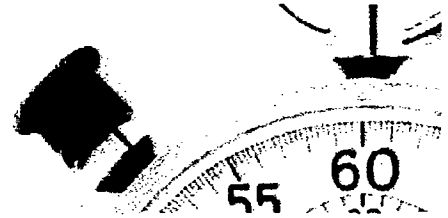
Based on *Murphy* and the language of Labor Code Sections 218.5 and 1194, I theorized that an employer that successfully defeats a claims for unpaid meal and/or rest breaks would be entitled to recover its attorneys' fees. In the common unpaid overtime case where the employee "throws in" a claim for missed meals/rest breaks I believe the employee is at risk of having to pay a portion of the employer's attorneys' fees even if the employee prevails on the unpaid overtime claim unless the employee also prevails on the missed meal/rest break claim.

Well, the Third Appellate District agrees. In *Kirby v. Immoos Fire Protection* (10 C.D.O.S. 9451), the court came to the same conclusion I did: because a claim for missed meal/rest breaks is a claim for "wages" other than minimum wage and overtime, an employee who does not prevail on those claims is liable for the employer's attorneys' fees incurred in defending against those claims.

Attorneys representing employees in unpaid overtime and minimum wage cases need to carefully consider whether to include the unpaid meal/rest break claim. Considering the fact that employers are not required to force employees to take rest breaks (whether this is true with regard to meal breaks remains to be seen) or to track the rest breaks (which is not the true with regard to meal breaks) means prevailing on a rest break case may be difficult. Good attorneys will carefully interview their clients, and hopefully other percipient witnesses, before deciding to add the rest/meal breaks claim as a matter of course.

Employers should not treat this as a license to violate the law. To the contrary. Although you may be able to offset a judgment against you by the amount awarded to you in attorneys' fees, actually collecting an award of attorneys' fees is usually problematic at best. The best policy is to know the law, follow the law, and ensure you have accurate records reflecting what occurred. But you already knew that!

EXHIBIT G



One Minute Memo

Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims For Attorney's Fees In Actions For Unpaid Wages And Benefits

Under California law, a party may recover attorney's fees only when a statute or agreement of the parties specifically provides for fee-shifting. California Labor Code Section 218.5 is a fee-shifting statute generally providing for the recovery of attorney's fees by the prevailing party (either employee or employer) in actions for unpaid wages and employment benefits. Labor Code Section 1194 also provides for an award of attorney's fees in actions for unpaid overtime or minimum wages, but only to the prevailing employee.

On July 27, 2010, in *Kirby v. Immoos Fire Protection, Inc.*, the California Court of Appeal ruled on the following issue: May a prevailing employer recover attorney's fees under Section 218.5 when the lawsuit includes both claims for unpaid minimum or overtime wages, and other wage claims? The Court of Appeal affirmed the trial court's award of attorney's fees to the employer under Section 218.5, holding that the inclusion of a claim for unpaid minimum or overtime wages does not preclude recovery of attorney's fees by a prevailing employer for separate causes of action otherwise subject to Section 218.5.

Anthony Kirby filed a class action against his former employer, Immoos Fire Protection, Inc., for various Labor Code violations as well as violation of the Unfair Practices Act (Business and Professions Code Section 17200 *et seq.*) Kirby dismissed the case after the trial court denied class certification. The trial court subsequently awarded attorney's fees to Immoos in part for its defense of Kirby's cause of action for failure to authorize and permit rest periods.

In reaching its decision, the Court of Appeal harmonized Labor Code Sections 218.5 and 1194. Section 218.5 includes an express exception to its provision allowing an award of attorney's fees to prevailing employers: "This Section does not apply to any action for which attorney's fees are recoverable under Section 1194." Section 1194 provides that employees—but not employers—who prevail in an "action" to recover unpaid minimum wages or overtime may also recover their reasonable attorney's fees. Arguing that an "action" refers to an entire case, Kirby asserted that Immoos could not recover fees because his complaint included causes of action for unpaid minimum and overtime wages. The Court of Appeal disagreed, holding that Kirby's approach would lead to absurd results as it "would allow the exception of Section 1194's unilateral fee-shifting to eviscerate the rule of Section 218.5." Moreover, plaintiffs would be able to insulate claims against employers from otherwise applicable fee-shifting provisions by simply adding a cause of action for unpaid minimum or overtime wages.

The court also rejected Kirby's characterization of his cause of action for failure to provide rest periods as one for unpaid minimum wages. Kirby alleged that he was owed an additional hour of wages per day per missed rest period under Labor Code Section 226.7. According to Kirby, any unpaid wage is necessarily less than statutorily mandated wages and therefore

subject to Section 1194. The Court of Appeal disagreed. If Kirby's claim for failure to provide rest periods had succeeded, he would have been entitled to an *additional* wage "at the employee's rate of compensation" under Labor Code Section 226.7. The "employee's rate of compensation" refers to the contractual rate of compensation, not the legal minimum wage. Thus, Kirby's claim was not one based on any failure to pay the minimum wage, and Section 1194 did not apply.

Although the Court of Appeal affirmed the trial court's award of attorney's fees to Immoos for prevailing on the rest period cause of action, the court reversed the trial court's award of attorney's fees to Immoos for prevailing on Kirby's Labor Code Section 2810 and Unfair Practices Act causes of action. The Court of Appeal remanded the case back to the trial court to determine the reasonable amount of fees to award to Immoos for prevailing on the rest break cause of action only.

What Kirby Means For Employers

While *Kirby* will not halt the filing of class actions for unpaid wages and benefits, it will cause attorneys to think twice about filing marginal complaints for wage claims subject to the bilateral fee-shifting provision of Section 218.5. *Kirby* also gives employers additional leverage in negotiating settlements of wage and hour class actions where the prospect of success in certifying the class or on the merits is in question.

For more information, please contact the Seyfarth attorney with whom you work, or any Labor and Employment attorney on our website.



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EXHIBIT H

CALIFORNIA ATTORNEY'S FEES

July 27, 2010

Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery of Attorney's Fees

Third Appellate District Remands So Trial Court Can Determine Reasonable Fees for Employer Who Successfully Defended Against Alleged Failure to Provide Rest Periods.

The next case is all about entitlement to attorney's fees under the Labor Code. *Kirby v. Immoos Fire Protection, Inc.*, No. C062306 (3rd District July 27, 2010) (published).

On appeal, plaintiff/employee Kirby *first* challenged an award of fees under Labor Code section 218.5, a bilateral fee-shifting provision subject to a carve-out that is unilateral in favor of employees for any action for which fees are recoverable under section 1194. "Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits. . . . This section does not apply to any action for which attorney's fees are recoverable under Section 1194." Section 1194 relates to actions for minimum wages or overtime compensation. Therefore, the question was whether the ambiguous word "action" applied to the entire lawsuit, or just to claims for minimum wages or overtime compensation. The latter, said the Court. Thus, if a cause of action is part of a larger lawsuit, for which the employer could recover for other causes of action under section 218.5, a prevailing employer can still do so – only the individual causes of action for minimum wages or overtime compensation result in unilateral fee shifting in favor of the employee.

Second, Kirby argued that the unilateral fee-shifting provision in section 1194 barred recovery to the successful employer who defended against an alleged failure to provide rest periods. Kirby analogized failure to provide rest periods to a claim of failure to provide minimum wages. One who is denied a rest period isn't being paid minimum wage for her time. Nope, said the Court, the failure is to provide a rest period, not to provide a minimum wage.

Third, the Court held that section 2810 is a unilateral fee-shifting statute that disallows an award of fees to defendant employers. By providing that "[a]n employee . . . may recover costs and reasonable attorney's fees" upon prevailing, section 2810 does not authorize fee shifting in favor of employers." Section 2810 provides (in part) that a person may not enter into a labor contract with a construction contractor, knowing that the contract does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

Fourth, the Court explained that it is settled that the Unfair Practices Act does not provide for an award of attorney's fees to any party.

Fifth, the Court determined that defendant/respondent Immoos could only recover for the successful defense against the alleged wrongfully denied rest periods, requiring a remand and determination of reasonable fees.

And the winner on appeal? None. It's a mixed decision. Each party bears its own costs and attorney's fees on appeal.

Posted at 10:24 PM in [Cases: Special Fee Shifting Statutes](#) | [Permalink](#)

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EXHIBIT I

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THE CALIFORNIA WAGE AND HOUR LAW BLOG

WRITTEN BY LOS ANGELES, CALIFORNIA MEDIATOR AND ATTORNEY
STEVEN G. PEARL

TUESDAY, AUGUST 10, 2010

Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant

The First District Court of Appeal has affirmed an award of attorney fees to a defendant under Labor Code section 218.5. Kirby v. Immoos Fire Protection, Inc. (July 27, 2010) --- Cal.App.4th ---.

The plaintiffs filed a putative class action for violation of the Unfair Competition Law ("UCL") and California wage and hour laws. After the court denied class certification, the plaintiffs settled with a number of defendants and dismissed the action with prejudice as to the remaining defendant, Immoos.

Immoos moved for attorney fees under Labor Code section 218.5. The Court awarded Immoos its fees incurred in defending plaintiffs' causes of action for violation of the UCL, rest period requirements, and Labor Code section 2810.

The Court of Appeal reversed the award of attorney fees on the UCL cause of action. Kim Kralowec has a good discussion of the UCL issue on her blog, the UCL Practitioner.

The Court also reversed on the 2810 cause of action. For those not familiar with it, section 2810 provides in pertinent part:

(a) A person or entity may not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

Immoos was not a defendant on the 2810 cause of action, and the Court of

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EXPERTISE TO
WORK FOR YOU.



Call our office for a free
consultation: (818) 995-
8300 x 102.

Attorneys: The Pearl Law Firm will **consult or co-counsel** on your case, bringing value and results for your clients. Call Steve Pearl at **(818) 995-8300 x 101**.

Mediate with Steven Pearl. My knowledge of wage and hour law, my credibility on both sides of the bar, and my desire to help people resolve their cases allow me to mediate very effectively. Contact Nikki Safavi at **(818) 995-8300 x 102** or nikki@sgpearl.com to **calendar a mediation.**

Appeal held that it could not recover attorney fees on this cause of action.

The most interesting issue is on the plaintiff's rest period claim and the relationship between Labor Code sections 218.5 and 119.4. The Court put this issue as follows:

[Plaintiff] contends the trial court erred in awarding any attorney's fees to [defendant] because some of the causes of action were subject to the unilateral fee shifting provision in favor of plaintiffs provided by section 119.4. [Plaintiff] points out that section 218.5 includes an express exception to its bilateral fee-shifting provision, which states: "This section does not apply to any action for which attorney's fees are recoverable under Section 119.4." (Italics added) Arguing that an "action" refers to an entire case, [plaintiff] concludes that the inclusion of causes of action subject to section 119.4 bars [defendant's] recovery of any attorney's fees in this case. We disagree.

Slip op. at 3.

The Court first noted that 218.5(b) codifies the holding in Earley v. Superior Court (2000) 79 Cal.App.4th 1420. Earley held that 119.4 controls in an action for unpaid overtime compensation, and 218.5 does not allow a successful defendant to recover its fees in such an action.

After reviewing the legislative history, the Court then held that the section 119.4 exception to section 218.5 applies "only to causes of action for unpaid minimum and overtime wages." Slip op. at 6.

We harmonize sections 218.5 and 119.4 by holding that section 218.5 applies to causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds. If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a defendant cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. Nonetheless, the addition of a claim for unpaid minimum wages or overtime does not preclude recovery by a prevailing defendant for a cause of action unrelated to the minimum wage or overtime claim so long as a statute or contract provides for fee shifting in favor of the defendant.

Slip op. at 6.

SHARE |

POSTED BY STEVEN G. PEARL AT 9:52 AM

LABELS: ATTORNEY FEES, BUSINESS AND PROFESSIONS CODE SECTION 17200, REST BREAKS

NOW AVAILABLE FROM CONTINUING EDUCATION OF THE BAR (CEB)



California Wage and Hour Law and Litigation, Co-Authored by Steven G. Pearl

ABOUT ME



STEVEN G. PEARL
ENCINO,
CALIFORNIA

Steven G.

Pearl is an

attorney and mediator in Los Angeles, California. He is a co-author of California Wage and Hour Law and Litigation, published by California's leading legal publisher, Continuing Education of the Bar (CEB).

[VIEW MY COMPLETE PROFILE](#)

[CV of Steven G. Pearl](#)

LINKS TO RELATED PAGES

The Pearl Law Firm, A Professional Corporation

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California.
I am over the age of eighteen years and not a party to the within action; my business address is 1629
Telegraph Avenue, 4th Floor, Oakland, California 94612. On August 27, 2010, I served upon the following
parties in this action:

Robert Rediger
Laura McHugh
555 Capitol Mall, Suite 1240
Sacramento, CA 95814

Honorable Loren E. McMaster
Sacramento Superior Court
720 Ninth Street
Sacramento, CA 95814

Appellate Coordinator
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

California Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

BY FEDERAL EXPERS

BY FEDERAL EXPRESS

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

BY MESSENGER


copies of the document(s) described as:

REQUEST FOR JUDICIAL NOTICE

(FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.

BY MESSENGER SERVICE. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California, on August 27, 2010.



Maria Anderson

EXHIBIT J

COPY

1 ELLYN MOSCOWITZ; Bar No. 129287
2 CRISTINA MOLteni, Bar No. 244715
3 LAW OFFICES OF ELLYN MOSCOWITZ, P.C.
4 1629 Telegraph Avenue, Fourth Floor
5 Oakland, California 94612
6 Telephone: (510) 899-6240
7 Facsimile: (510) 899-6245
8 emoscowitz@oscowitzlaw.com
9 Attorney for Plaintiff's



10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SACRAMENTO

12 ANTHONY KIRBY and RICK LEECH JR.,
13 Plaintiffs,

14 vs.

15 IMMOOS FIRE PROTECTION, INC., SHEA
16 HOMES INC., HILBERS, INC., MERITAGE
17 HOMES OF CALIFORNIA, INC., D.R.
18 HORTON, INC. - SACRAMENTO and
19 DOES 5-750, inclusive,

20 Defendants.

CASE No. 07AS00032

NOTICE OF LODGMENT IN
SUPPORT OF PLAINTIFFS'
APPEAL

BY FAX

24 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

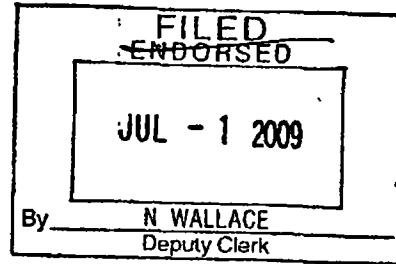
25 PLEASE TAKE NOTICE THAT Plaintiffs Anthony Kirby and Rick Leech Jr.

26 ("Plaintiffs") hereby lodge the following exhibits in support of their Appeal.

27 1. A true and correct copy of Settlement Agreement and General Release between
28

ORIGINAL

1 ELLYN MOSCOWITZ, Bar No. 129287
2 CRISTINA MOLteni, Bar No. 244715
3 LAW OFFICES OF ELLYN MOSCOWITZ, P.C.
4 1629 Telegraph Avenue, Fourth Floor
5 Oakland, California 94612
6 Telephone: (510) 899-6240
7 Facsimile: (510) 899-6245
8 emoscowitz@moscowitzlaw.com



6 Attorney for Plaintiffs

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SACRAMENTO

11 ANTHONY KIRBY and RICK LEECH JR.,
12 Plaintiffs,

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16 HOMES OF CALIFORNIA, INC., D.R.
17 HORTON, INC. - SACRAMENTO and
18 DOES 5-750, inclusive,

19 Defendants.

CASE No. 07AS00032

NOTICE OF LODGMENT IN
SUPPORT OF PLAINTIFFS'
APPEAL

BY FAX

24 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE THAT Plaintiffs Anthony Kirby and Rick Leech Jr.

26 ("Plaintiffs") hereby lodge the following exhibits in support of their Appeal.

- 27 1. A true and correct copy of Settlement Agreement and General Release between
28

1 Meritage Homes of California, Inc. and Plaintiffs is attached hereto as Exhibit A.

2 2. A true and correct copy of Settlement Agreement and Release between Hilbers
3 Incorporated. and Plaintiffs is attached hereto as Exhibit B.

4 3. A true and correct copy of Settlement Agreement and Release between DR Horton,
5 Inc. and Plaintiffs is attached hereto as Exhibit C.

6 4. A true and correct copy of Settlement Agreement and General Release between
7 Shea Homes, Inc. and Plaintiff Rick Leech is attached hereto as Exhibit D.

8 5. A true and correct copy of Settlement Agreement and General Release between
9 Shea Homes, Inc. and Plaintiff Anthony Kirby is attached hereto as Exhibit E.

10
11 Dated: July 1, 2009

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.

12
13
14 By: 

Ellyn Moscowitz
Cristina Molteni
Attorney for Plaintiffs

EXHIBIT A

SETTLEMENT AGREEMENT AND GENERAL RELEASE

MERITAGE HOMES OF CALIFORNIA, INC., ("MERITAGE"), and ANTHONY KIRBY and RICK LEECH, JR. ("PLAINTIFFS"), their heirs, executors, administrators, successors, and assigns (collectively referred to throughout this Agreement as "the Parties"), agree that:

1. **Consideration.** In consideration for signing this Settlement Agreement and General Release and compliance with the promises made herein, MERITAGE shall pay the total sum of ONE THOUSAND DOLLARS (\$1,000.00). This amount shall be paid by check made payable to "Law Offices of Ellen Moscovitz." MERITAGE shall issue an IRS Form 1099 for this amount, and the Law Offices of Ellen Moscovitz shall provide a signed W9 form to MERITAGE. The settlement proceeds shall be delivered to counsel for PLAINTIFFS within 10 business days following receipt by counsel for MERITAGE of both the signed W9 and this Settlement Agreement and General Release executed by PLAINTIFFS; and receipt by counsel for MERITAGE of a signed Request for Dismissal, with prejudice, executed by PLAINTIFFS and/or their counsel.

2. **No Consideration Absent Execution of this Agreement.** PLAINTIFFS understand and agree that they would not receive the monies and/or benefits specified in paragraph "1" above, except for their execution of this Settlement Agreement and General Release and the fulfillment of the promises contained herein. The payment reflected in paragraph "1" is made in full and final settlement and resolution of the causes of action PLAINTIFFS have against MERITAGE.

3. **General Release of Claims By PLAINTIFFS.** PLAINTIFFS knowingly and voluntarily release and forever discharge, to the full extent permitted by law, MERITAGE, its parent corporations, affiliates, subsidiaries, divisions, predecessors, successors and assigns, joint employers, and the current and former employees, officers, directors, owners, and agents thereof (collectively referred to throughout the remainder of this Settlement Agreement as "MERITAGE"), of and from any and all claims, known and unknown, asserted and unasserted, PLAINTIFFS has or may have against MERITAGE as of the date of execution of this Settlement Agreement and General Release, including, but not limited to, any alleged violation of the California Labor Code or other provisions of state or federal law. The parties agree that all rights under California Civil Code section 1542 relating to unknown claims are hereby waived by PLAINTIFFS. Section 1542 provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

This provision is intended by the parties to be all encompassing and to act as a full and total release of any claim, except for those claims that cannot be released by private agreement, whether specifically enumerated herein or not, that PLAINTIFFS have or might have had, that exist or ever have existed as of this Agreement.

4. **Affirmations.** PLAINTIFFS affirm that they have not filed, caused to be filed, or presently are a party to any claim, complaint, or action against MERITAGE in any forum or form, except for the matter of *Anthony Kirby and Rick Leech, Junior, on behalf of themselves and others similarly situated v. IMMOOS FIRE PROTECTION, INC., et al.*, Case No.: 07AS00032, currently pending in California Superior Court, County of Sacramento.

5. **Non-Disparagement.** PLAINTIFFS agree not to defame, disparage or demean Meritage Homes of California, Inc., in any manner whatsoever.

6. **Confidentiality.** PLAINTIFFS agree not to disclose any information regarding the existence or substance of this Settlement Agreement and General Release, except to a spouse, tax advisor, and/or an attorney with whom they choose to consult regarding their consideration of this Settlement Agreement and General Release, or otherwise as required by law.

7. **Governing Law, Interpretation, and Attorneys' Fees.** This Settlement Agreement and General Release shall be governed and conformed in accordance with the laws of the State of California without regard to its conflict of laws provision. In the event that any party breaches any provision of this Settlement Agreement and General Release, the Parties affirm that they may institute an action to specifically enforce any term or terms of this Settlement Agreement and General Release. The non-breaching party shall be entitled to recover attorneys' fees and costs from the breaching party, if the non-breaching party is the prevailing party in any enforcement action. Should any provision of this Settlement Agreement and General Release be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, excluding the general release language, such provision shall immediately become null and void, leaving the remainder of this Settlement Agreement and General Release in full force and effect.

8. **Nonadmission of Wrongdoing.** The parties agree that neither this Settlement Agreement and General Release nor the furnishing of the consideration for this Release shall be deemed or construed at anytime for any purpose as an admission by MERITAGE of any employment relationship with the PLAINTIFFS, or of any liability or unlawful conduct of any kind.

9. **Amendment.** This Settlement Agreement and General Release may not be modified, altered or changed except upon express written consent of both parties wherein specific reference is made to this Settlement Agreement and General Release.

10. **Successors and Assigns.** This Agreement shall be binding upon the parties hereto and upon their heirs, administrators, representatives, executors, divisions, parents, subsidiaries, parents' subsidiaries, affiliates, partners, limited partners, successors and assigns, and shall inure to the benefit of said parties and each of them and to their heirs, administrators, representatives, executors, divisions, parents, subsidiaries, parents' subsidiaries, affiliates, partners, limited partners, successors and assigns. PLAINTIFFS expressly warrant that they have not transferred to any person or entity any rights or causes of action, or claims released by this Agreement.

11. **Selective Enforcement.** The Parties agree that the failure of any party to enforce or exercise any right, condition, term or provision of this Agreement shall not be construed as or deemed to be a waiver or relinquishment thereof, and the same shall continue in full force and effect.

12. **Copy of Agreement Valid.** The Parties agree that executed copies of this Agreement shall be valid and binding, in the event the original executed counterparts to the Agreement are missing.

13. **Entire Agreement.** This Settlement Agreement and General Release sets forth the entire agreement between the parties hereto, and fully supersedes any prior agreements or understandings between the parties. PLAINTIFFS acknowledge that they have not relied on any representations, promises, or agreements of any kind made to him in connection with his decision to accept this Settlement Agreement and General Release, except for those set forth in this Settlement Agreement and General Release.

14. **Enforcement of Agreement.** In the event a dispute arises over the interpretation, application or enforcement of this Agreement, the prevailing Party shall be entitled to an award of reasonable attorneys' fees and costs in addition to any other relief the prevailing party is entitled to. The Court shall have continuing jurisdiction over this matter to enforce this settlement pursuant to California Code of Civil Procedure Section 664.6.

HAVING ELECTED TO EXECUTE THIS AGREEMENT AND GENERAL RELEASE, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH "1" ABOVE, PLAINTIFFS FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTER INTO THIS AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS THEY HAVE OR MIGHT HAVE AGAINST MERITAGE.

IN WITNESS WHEREOF, the parties hereto knowingly and voluntarily executed this Settlement Agreement and General Release as of the date(s) set forth below:

Anthony Kirby



Rick Leech, Jr.

Date: _____

Date: 1/12/09

MERITAGE HOMES OF CALIFORNIA, INC.

By: _____

Name:

Title:

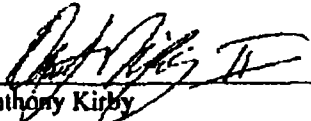
Date: _____

Firmwide 87674643 | 058892 1002

RECEIVED
JAN 14 2009

BY: _____

IN WITNESS WHEREOF, the parties hereto knowingly and voluntarily executed this Settlement Agreement and General Release as of the date(s) set forth below:



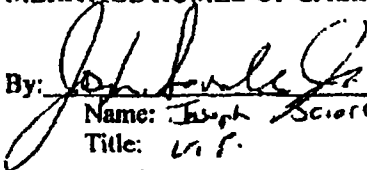
Anthony Kirby

Rick Leech, Jr.

Date: 1/8/09

Date: _____

MERITAGE HOMES OF CALIFORNIA, INC.

By: 

Name: Joseph Sciortulla, Jr.
Title: v.p.

Date: 1/22/09

Firmwide: 47674643.1 058892.1002

RECEIVED
JAN 09 2009

BY: _____

EXHIBIT B

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between HILBERS, INCORPORATED ("HILBERS"), on the one hand, and ANTHONY KIRBY and RICK LEECH on the other. Plaintiffs are collectively referenced as "Plaintiffs." Defendant HILBERS and Plaintiffs may be referred to individually as a "Party" and jointly as the "Parties."

I. FACTUAL RECITALS

1.1 This Agreement is entered into with reference to the following facts:

(a) A dispute has arisen between the above-named Parties in relation to their respective rights and obligations arising out of the contract between Defendant HILBERS and Defendant IMMOOS FIRE PROTECTION, Plaintiffs' employer, for construction labor services provided by Plaintiffs. Each Party agrees that this settlement is a compromise of disputed claims between the Parties.

(b) Plaintiffs have filed an action in the Superior Court of the State of California, County of Sacramento, Case Number 07AS00032 against Defendants alleging, *inter alia*, that Defendant HILBERS failed to comply with California Labor Code section 2810 ("the Action"), which takes as unlawful predicate acts violations of various provisions of the California Labor Code (the "Underlying Action") by Defendant IMMOOS' FIRE PROTECTION.

(c) The Parties to this Agreement desire finally to compromise and settle the Action, though not the Underlying Action, against Defendant IMMOOS FIRE PROTECTION.

(d) The Parties acknowledge that this Settlement Agreement shall not be construed as an admission of any liability whatsoever by any Party, or by any officers, directors, agents, servants or employees of Defendant HILBERS, or any of them. The Parties are entering

into this Agreement for the sole purpose of avoiding the vexation, uncertainties, and expense of litigation.

1.2 It is now the desire and intention of the Parties to settle and resolve all disputes, differences and claims which Plaintiffs may have against Defendant HILBERS. Pursuant to and in accordance with that desire and in consideration of the promises and releases contained in this Agreement, the Parties agree as follows:

2. OBLIGATIONS OF DEFENDANT

Within forty-five business days of the execution of this Agreement, Defendant HILBERS will send by overnight mail to Law Offices of Elyn Moscovitz Trust Account a check in the amount of \$4,000 to be distributed by Law Offices of Elyn Moscovitz and followed by 1099s as such: (1) Kirby-\$2,000.00 and (2) Leech-\$2,000.00

3 OBLIGATIONS OF PLAINTIFFS

3.1 Dismissal of the Action. Plaintiffs shall execute and file with the Court a Request for Dismissal with Prejudice of the Action ("Dismissal") within five (5) business days of receipt of the aforementioned \$4,000.00 check. Plaintiffs will take any and all necessary steps to obtain the Court's approval of the Request for Dismissal.

3.2 No Additional Claims. Plaintiffs agree, warrant and covenant that none of them will file or seek any additional claims for compensation or any monetary payment of any kind against Defendant HILBERS where that claim arises out of the California Labor Code or any other local state or federal law covered by Complaint # 07AS00032 during the statutory period.

3.3 Agencies and Courts to Honor Agreement. Plaintiffs hereby request all administrative agencies and courts to honor the release of claims under this Agreement.

3.4 Warranties. Plaintiffs warrant and represent that there are no liens or claims of liens or assignments, in law or equity or otherwise, of or against the claims or causes of action

released herein, and further that each of them is fully entitled to enter into and perform this Agreement.

3.5 No Other Representations or Statements. In making this Agreement, Plaintiffs and Interested Party are not relying on, and have not relied on, any representation or statements made by Defendant HILBERS or its attorneys with respect to the facts involved in the Action. Plaintiffs fully understand and warrant that if any fact on which they relied in executing this Agreement is found hereafter to be other than or different from the facts now believed by them, or any of them, to be true, Plaintiffs expressly accept and assume the risk of such possible difference in fact and acknowledges that this Agreement shall be and shall remain effective notwithstanding any such difference in fact.

4. ATTORNEYS' FEES AND COSTS

Plaintiffs hereby waive the right to recover attorney fees and costs so far incurred in The Action against HILBERS, but not the Underlying Action, Complaint # 07AS00032

5. GENERAL RELEASE

5.1 Claims Released. Except with respect to the obligations created by or arising out of this Agreement, and to the fullest extent permitted by law, the Plaintiffs do hereby for themselves and their beneficiaries, heirs, legal successors and assigns, release and absolutely and forever discharge Defendant HILBERS, and its owners, directors, officers, employees, agents, successors, assigns, related companies, attorneys, and insurers, and any of them, from any and all claims, demands, damages, debts, liabilities, attorneys' fees, accounts, reckonings, obligations, costs, expenses, liens, actions and causes of action arising out of Complaint # 07AS00032, which each Plaintiff now has, owns or holds or any time heretofore ever had, owned or held against Defendant HILBERS through the effective date of this Agreement under federal, state, and local law, (all of which are collectively referred to in this Agreement as the "Released Matters").

Released Matters shall include, but are not be limited to, any action under federal, state or local law, regulation or executive order, including, but not limited to, actions under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1966, as amended; the California Fair Employment and Housing Act (which includes claims for age; race, color, ancestry, national origin, disability, medical condition, marital status, religious creed, pregnancy, sexual orientation, sex discrimination and harassment, retaliation); the Fair Labor Standards Act, as amended; the Employee Retirement Income Security Act of 1974, as amended; and the California Labor Code arising out of Complaint # 07AS00032.

5.2 Full and Final Accord and Satisfaction and General Release. It is the intention of the Parties in executing this Agreement and in receiving the consideration called for by this Agreement, that this Agreement shall be effective as a full and final accord and satisfaction and general release of and from all Released Matters.

5.3 General Release and Waiver of Unknown Claims. In furtherance of the intentions set forth herein, Plaintiffs and Interested Party acknowledge that they are familiar with Section 1542 of the Civil Code of the State of California which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs and Interested Party waive and relinquish any right or benefit which they or any of them has or may have under Section 1542 of the Civil Code of the State of California or any similar provision of the statutory or non-statutory law of any other jurisdiction, to the full extent that each Plaintiff and Interested Party may lawfully waive all such rights and benefits pertaining to the subject matter of this Agreement. In connection with such waiver and relinquishment, Plaintiffs acknowledge that each of them is aware that they may hereafter discover claims or

facts in addition or different from those which they now know or believe to exist with respect to the subject matter of this Agreement, but that it is their intention hereby fully, finally and forever to settle and release all of the Released Matters, known or unknown, suspected or unsuspected, which now exist or heretofore have existed against Defendant HILBERS, its owners, directors, officers, employees, agents, successors, assigns, related companies, attorneys, except as otherwise expressly provided in this Agreement. In furtherance of this intention, the release herein given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claim or fact.

6. GENERAL and CONFIDENTIALITY

6.1 Representation by Counsel. The Parties acknowledge that they have been represented by legal counsel of their own choice throughout all of the negotiations which preceded the execution of this Agreement and that they have executed this Agreement with the consent and on the advice of legal counsel. The Parties further acknowledge that they and their counsel have had an adequate opportunity to make whatever investigation or inquiry they deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution of this Agreement and the delivery and acceptance of the consideration set forth in this Agreement. The Parties have carefully read this Agreement, have been advised of its meaning and consequences by their respective attorneys, and sign the same of their own free will.

6.2 Agreement Governed by California Law. This Agreement and any other documents referred to in this Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of California applicable to instruments, persons and transactions which have legal contacts and relationships solely within the State of California.

6.3 Language of Agreement. Counsel for each of the Parties has read and approved the language of this Agreement. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any of the Parties.

6.4 Enforcement of Agreement. In the event a dispute arises over the interpretation, application or enforcement of this Agreement, the prevailing Party shall be entitled to an award of reasonable attorneys' fees and costs in addition to any other relief the prevailing party is entitled to. The Court shall have continuing jurisdiction over this matter to enforce this settlement pursuant to California Code of Civil Procedure Section 664.6.

6.5 Execution of Documents. Each Party agrees to take all steps necessary, and to execute whatever documents may be necessary, to complete and consummate this Agreement.

6.6 Authority. Each Party and its respective counsel represents to the other Party that it has the authority to execute this Agreement and to release the claims, demands and causes of action which are purported to be released herein.

6.7 Titles and Captions. The titles of various articles and sections of this Agreement are used for convenience of reference only, and are not intended to and shall not in any way enlarge or diminish the rights or obligations of the Parties or affect the meaning or construction of the Agreement.

6.8 Severability. This Agreement would not have been agreed upon but for the inclusion of each and every one of its covenants, provisions, terms and clauses. If any covenant, provision, term or clause in this Agreement is declared void, invalid or unenforceable, the entire Agreement shall be voidable at the option of either Party by giving written notice to the other Party.

6.9 Sole Agreement. This Agreement contains the entire agreement between the Parties hereto and constitutes the complete, final and exclusive embodiment of their agreement

with respect to the subject matter hereof. The terms of this Agreement are contractual and not a mere recital. This Agreement is executed without reliance upon any promise, warranty or representation by any Party or any representative of any Party other than those expressly contained herein.

6.10 Amendments. This Agreement may not be altered or amended except by an instrument in writing executed by all of the Parties to this Agreement.

6.11 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same document.

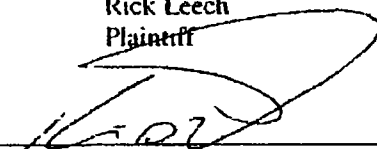
Dated: _____

Anthony Kirby
Plaintiff

Dated: _____

Rick Leech
Plaintiff

Dated: NOV 4 2008



HILBERS, INCORPORATED

Approved as to form: _____

LAW OFFICE OF STEVEN A. LAMON

Dated: Nov. 10, 2008

By: 

STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: _____

By: _____
ELLYN MOSCOWITZ
Attorneys for Plaintiffs

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6.10 Amendments. This Agreement may not be altered or amended except by an instrument in writing executed by all of the Parties to this Agreement.

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Dated: 11/17/08


Anthony Kirby
Plaintiff

RECEIVED
NOV 18 2008

BY: _____

Dated: _____

Rick Leech
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form: _____

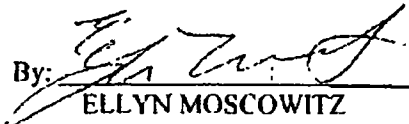
LAW OFFICE OF STEVEN A. LAMON

Dated: _____

By: _____
STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-15-08

By: 

ELLYN MOSCOWITZ
Attorneys for Plaintiffs

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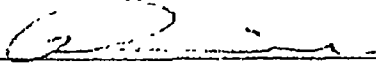
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6.11 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same document.

Dated: _____

Anthony Kirby
Plaintiff

Dated: 11/17/08


Rick Lecch
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form: _____

LAW OFFICE OF STEVEN A. LAMON

Dated: _____

By: _____
STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-15-08

By: 
ELLYN MOSCOWITZ
Attorneys for Plaintiff

RECEIVED
NOV 17 2008

EXHIBIT C

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between DR HORTON, INC. ("DR HORTON"), on the one hand, and ANTHONY KIRBY and RICK LEECH on the other. Plaintiffs are collectively referenced as "Plaintiffs." Defendant DR HORTON and Plaintiffs may be referred to individually as a "Party" and jointly as the "Parties."

1. FACTUAL RECITALS

1.1 This Agreement is entered into with reference to the following facts:

(a) A dispute has arisen between the above-named Parties in relation to their respective rights and obligations arising out of the contract between Defendant DR HORTON and Defendant IMMOOS FIRE PROTECTION, Plaintiffs' employer, for construction labor services provided by Plaintiffs. Each Party agrees that this settlement is a compromise of disputed claims between the Parties.

(b) Plaintiffs have filed an action in the Superior Court of the State of California, County of Sacramento, Case Number 07AS00032 against Defendants alleging, *inter alia*, that Defendant DR HORTON failed to comply with California Labor Code section 2810 ("the Action"), which takes as unlawful predicate acts violations of various provisions of the California Labor Code (the "Underlying Action") by Defendant IMMOOS FIRE PROTECTION.

(c) The Parties to this Agreement desire finally to compromise and settle the Action, though not the Underlying Action, against Defendant IMMOOS FIRE PROTECTION.

(d) The Parties acknowledge that this Settlement Agreement shall not be construed as an admission of any liability whatsoever by any Party, or by any officers, directors, agents, servants or employees of Defendant DR HORTON, or any of them. The Parties are

entering into this Agreement for the sole purpose of avoiding the vexation, uncertainties, and expense of litigation.

1.2 It is now the desire and intention of the Parties to settle and resolve all disputes, differences and claims which Plaintiffs may have against Defendant DR HORTON. Pursuant to and in accordance with that desire and in consideration of the promises and releases contained in this Agreement, the Parties agree as follows:

2. OBLIGATIONS OF DEFENDANT

Within five business days of the execution of this Agreement, Defendant DR HORTON will send by overnight mail to Law Offices of Ellyn Moscovitz Trust Account a check in the amount of \$500 to be distributed by Law Offices of Ellyn Moscovitz and followed by 1099s as such: (1) Kirby-\$250.00 and (2) Leech-\$250.00.

3. OBLIGATIONS OF PLAINTIFFS

3.1 Dismissal of the Action. Plaintiffs shall execute and file with the Court a Request for Dismissal with Prejudice of the Action ("Dismissal") within five (5) business days of receipt of the aforementioned \$500.00 check. Plaintiffs will take any and all necessary steps to obtain the Court's approval of the Request for Dismissal.

3.2 No Additional Claims. Plaintiffs agree, warrant and covenant that none of them will file or seek any additional claims for compensation or any monetary payment of any kind against Defendant DR HORTON where that claim arises out of the California Labor Code or any other local state or federal law covered by Complaint # 07AS00032.

3.3 Agencies and Courts to Honor Agreement. Plaintiffs hereby request all administrative agencies and courts to honor the release of claims under this Agreement.

3.4 Warranties. Plaintiffs warrant and represent that there are no liens or claims of liens or assignments, in law or equity or otherwise, of or against the claims or causes of action

released herein; and further that each of them is fully entitled to enter into and perform this Agreement.

3.5 No Other Representations or Statements. In making this Agreement, Plaintiffs and Interested Party are not relying on, and have not relied on, any representation or statements made by Defendant DR HORTON or its attorneys with respect to the facts involved in the Action. Plaintiffs fully understand and warrant that if any fact on which they relied in executing this Agreement is found hereafter to be other than or different from the facts now believed by them, or any of them, to be true, Plaintiffs expressly accept and assume the risk of such possible difference in fact and acknowledges that this Agreement shall be and shall remain effective notwithstanding any such difference in fact.

4. ATTORNEYS' FEES AND COSTS

Plaintiffs hereby waive the right to recover attorney fees and costs so far incurred in The Action against DR HORTON, but not the Underlying Action, Complaint # 07AS00032.

5. GENERAL RELEASE

5.1 Claims Released. Except with respect to the obligations created by or arising out of this Agreement, and to the fullest extent permitted by law, the Plaintiffs do hereby for themselves and their beneficiaries, heirs, legal successors and assigns, release and absolutely and forever discharge Defendant DR HORTON, and its owners, directors, officers, employees, agents, successors, assigns, related companies, attorneys, and insurers, and any of them, from any and all claims, demands, damages, debts, liabilities, attorneys' fees, accounts, reckonings, obligations, costs, expenses, liens, actions and causes of action arising out of Complaint # 07AS00032, which each Plaintiff now has, owns or holds or any time heretofore ever had, owned or held against Defendant DR HORTON through the effective date of this Agreement under federal, state, and local law, (all of which are collectively referred to in this Agreement as the

"Released Matters"). Released Matters shall include, but are not be limited to, any action under federal, state or local law, regulation or executive order, including, but not limited to, actions under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1966, as amended; the California Fair Employment and Housing Act (which includes claims for age, race, color, ancestry, national origin, disability, medical condition, marital status, religious creed, pregnancy, sexual orientation, sex discrimination and harassment,-retaliation); the Fair Labor Standards Act, as amended; the Employee Retirement Income Security Act of 1974, as amended; and the California Labor Code arising out of Complaint # 07AS00032.

5.2 Full and Final Accord and Satisfaction and General Release. It is the intention of the Parties in executing this Agreement and in receiving the consideration called for by this Agreement, that this Agreement shall be effective as a full and final accord and satisfaction and general release of and from all Released Matters.

5.3 General Release and Waiver of Unknown Claims. In furtherance of the intentions set forth herein, Plaintiffs and Interested Party acknowledge that they are familiar with Section 1542 of the Civil Code of the State of California which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs and Interested Party waive and relinquish any right or benefit which they or any of them has or may have under Section 1542 of the Civil Code of the State of California or any similar provision of the statutory or non-statutory law of any other jurisdiction, to the full extent that each Plaintiff and Interested Party may lawfully waive all such rights and benefits pertaining to the subject matter of this Agreement. In connection with such waiver and relinquishment, Plaintiffs acknowledge that each of them is aware that they may hereafter discover claims or

facts in addition or different from those which they now know or believe to exist with respect to the subject matter of this Agreement, but that it is their intention hereby fully, finally and forever to settle and release all of the Released Matters, known or unknown, suspected or unsuspected, which now exist or heretofore have existed against Defendant DR HORTON, its owners, directors, officers, employees, agents, successors, assigns, related companies, attorneys, except as otherwise expressly provided in this Agreement. In furtherance of this intention, the release herein given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claim or fact.

6. GENERAL and CONFIDENTIALITY

6.1 Representation by Counsel. The Parties acknowledge that they have been represented by legal counsel of their own choice throughout all of the negotiations which preceded the execution of this Agreement and that they have executed this Agreement with the consent and on the advice of legal counsel. The Parties further acknowledge that they and their counsel have had an adequate opportunity to make whatever investigation or inquiry they deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution of this Agreement and the delivery and acceptance of the consideration set forth in this Agreement. The Parties have carefully read this Agreement, have been advised of its meaning and consequences by their respective attorneys, and sign the same of their own free will.

6.2 Agreement Governed by California Law. This Agreement and any other documents referred to in this Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of California applicable to instruments, persons and transactions which have legal contacts and relationships solely within the State of California.

6.3 Language of Agreement. Counsel for each of the Parties has read and approved the language of this Agreement. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any of the Parties.

6.4 Enforcement of Agreement. In the event a dispute arises over the interpretation, application or enforcement of this Agreement, the prevailing Party shall be entitled to an award of reasonable attorneys' fees and costs in addition to any other relief the prevailing party is entitled to. The Court shall have continuing jurisdiction over this matter to enforce this settlement pursuant to California Code of Civil Procedure Section 664.6.

6.5 Execution of Documents. Each Party agrees to take all steps necessary, and to execute whatever documents may be necessary, to complete and consummate this Agreement.

6.6 Authority. Each Party and its respective counsel represents to the other Party that it has the authority to execute this Agreement and to release the claims, demands and causes of action which are purported to be released herein.

6.7 Titles and Captions. The titles of various articles and sections of this Agreement are used for convenience of reference only, and are not intended to and shall not in any way enlarge or diminish the rights or obligations of the Parties or affect the meaning or construction of the Agreement.

6.8 Severability. This Agreement would not have been agreed upon but for the inclusion of each and every one of its covenants, provisions, terms and clauses. If any covenant, provision, term or clause in this Agreement is declared void, invalid or unenforceable, the entire Agreement shall be voidable at the option of either Party by giving written notice to the other Party.

6.9 Sole Agreement. This Agreement contains the entire agreement between the Parties hereto and constitutes the complete, final and exclusive embodiment of their agreement

with respect to the subject matter hereof. The terms of this Agreement are contractual and not a mere recital. This Agreement is executed without reliance upon any promise, warranty or representation by any Party or any representative of any Party other than those expressly contained herein.

6.10 Amendments. This Agreement may not be altered or amended except by an instrument in writing executed by all of the Parties to this Agreement.

6.11 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same document.

Dated: _____

Anthony Kirby
Plaintiff

Dated: _____

Rick Leech
Plaintiff

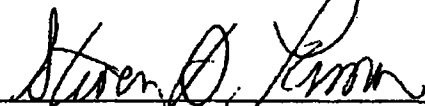
Dated: NOV 4 2008


HILBERS, INCORPORATED

Approved as to form:

Dated: Nov 10, 2008

LAW OFFICE OF STEVEN A. LAMON

By: 
STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: _____

By: _____
ELLYN MOSCOWITZ
Attorneys for Plaintiffs

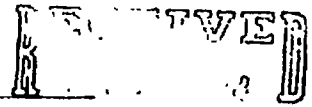
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Dated: 11/17/08

Anthony Kirby
Anthony Kirby
Plaintiff



BY:.....

Dated: _____

Rick Leech
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form:

LAW OFFICE OF STEVEN A. LAMON

Dated: _____

By: _____
STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-15-08

By: *Ellyn Moscowitz*
ELLYN MOSCOWITZ
Attorneys for Plaintiffs

COPY

COPY

with respect to the subject matter hereof. The terms of this Agreement are contractual and not a mere recital. This Agreement is executed without reliance upon any promise, warranty or representation by any Party or any representative of any Party other than those expressly contained herein.

6.10 Amendments. This Agreement may not be altered or amended except by an instrument in writing executed by all of the Parties to this Agreement.

6.11 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same document.

Dated: _____

Anthony Kirby
Plaintiff

Dated: 11/17/08

[Signature]
Rick Leech
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form:

LAW OFFICE OF STEVEN A. LAMON

Dated: _____

By: _____
STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-13-08

By: [Signature]
ELLYN MOSCOWITZ
Attorneys for Plaintiffs

RECEIVED

EXHIBIT D

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and among Rick Leech ("Plaintiff"), on behalf of himself and his agents, attorneys, heirs, executors, assigns and any other person or entity acting with him or on his behalf (collectively, "Plaintiff"), on the one hand, and Shea Homes, Inc., on behalf of itself and its present and former agents, officers, employees, directors, trustees, subsidiaries, family of companies, affiliated divisions and companies, parent companies, predecessors, successors and assigns (collectively, "Defendant"), on the other hand. This Agreement is made pursuant to the following terms and conditions.

1. Pending and Future Legal or Administrative Actions - Covenant Not to Sue.

1.1 Plaintiff represents he does not have currently pending any legal actions or administrative proceedings against Defendant, other than the case presently pending in the Sacramento County Superior Court entitled Anthony Kirby and Rick Leech, et al., v. IMOOS Fire Protection, et al., Case No. 07AS00032 ("the Action").

1.2 Except for settlement of the Action, Plaintiff shall not assist, participate or be represented in, nor institute, submit or file, or permit to be instituted, submitted or filed on his behalf, against Defendant, any lawsuit, charge, claim, complaint or other proceeding with any administrative agency, court or other forum under any federal, state or local laws or regulations including, but not limited to, the Family Medical Leave Act; the Employee Retirement Income Security Act of 1974; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967; 42 U.S.C. § 1981; the Older Workers Benefits Protection Act; the Equal Pay Act of 1963; the Americans with Disabilities Act; the Rehabilitation Act; the Consolidated Omnibus Budget Reconciliation Act of 1985; the Sarbanes-Oxley Act; the California Fair Employment and Housing Act; the California Family Rights Act; the California Business and Professions Code; the California Private Attorneys General Act; the California Labor Code; the California Wage Orders; or any other federal, state or local insurance, human rights, civil rights, wage-hour, pension, or labor laws, rules and/or regulations, public policy, common law, contract or tort laws, or any claim of retaliation under such laws, or any claim arising under common law, including, but not limited to causes of action for class actions; collective actions; representative actions; wrongful termination; harassment of any sort; discrimination or retaliation on the basis of sex, age, disability, medical condition, race, religion; sexual orientation; national origin or any other protected basis; whistle-blower liability; invasion of privacy; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; fraudulent misrepresentation; negligent misrepresentation; fraud; negligence; conspiracy to commit any act mentioned herein; breach of contract (whether express or implied, oral or written); breach of the implied covenant of good faith and fair dealing; promissory estoppel; interference with business advantage; defamation; slander; interference with prospective economic advantage; interference with contractual relationship; violation of any national, state or local statute, law, or ordinance; failure to pay any wages due, secret payment of lower wages, meal periods, rest breaks, unpaid vacation, overtime, expenses, travel time, travel expenses, wage statements, pay stubs, methods of payment, and any other monies owed; and Plaintiff shall not, from any source or proceeding, seek or accept any award or settlement therefrom arising out of his work for Defendant. In the event Plaintiff institutes or is a party to any such action, his claims shall be dismissed, with prejudice and with an award of attorneys' fees and costs to Defendant incurred as a result of such action, immediately upon presentation of this Agreement.

2. Release of all Claims.

2.1 Except for settlement of the Action and any settlement payments due to Plaintiff under that settlement, it is understood and agreed by and between the parties to this Agreement that in consideration for the promises contained herein, Plaintiff hereby completely releases and forever discharges Defendant and its present or former officers, agents, employees, directors, trustees, subsidiaries, affiliated divisions and companies (including but not limited to Shea Homes Limited Partnership), parent companies, predecessors, successors and assigns ("Released Parties") from all causes of action, claims, judgments, obligations, damages or liabilities of whatever kind and character, including, but not limited to, those arising under the Family Medical Leave Act; the Employee Retirement Income Security Act of 1974; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967; 42 U.S.C. § 1981; the Older Workers Benefits Protection Act; the Equal Pay Act of 1963; the Consolidated Omnibus Budget Reconciliation Act of 1985; the Americans with Disabilities Act; the Rehabilitation Act; the Sarbanes-Oxley Act; the California Fair Employment and Housing Act; the California Family Rights Act; the California Business and Professions Code; the California Private Attorneys General Act; the California Labor Code; the California Wage Orders; or any other federal, state or local insurance, human rights, civil rights, wage-hour, pension, or labor laws, rules and/or regulations, public policy, contract or tort laws, or any claim of retaliation under such laws, or any claim arising under common law, including, but not limited to causes of action for class actions; collective actions; representative actions; wrongful termination; harassment of any sort; discrimination or retaliation on the basis of sex, age, disability, race, religion, sexual orientation, national origin or any other protected basis; whistleblower liability; invasion of privacy; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; fraudulent misrepresentation; negligent misrepresentation; fraud; negligence; conspiracy to commit any act mentioned herein; breach of contract (whether express or implied, oral or written); breach of the implied covenant of good faith and fair dealing; promissory estoppel; interference with business advantage; defamation; slander; interference with prospective economic advantage; interference with contractual relationship; violation of any national, state or local statute, law, or ordinance; failure to pay any wages due, secret payment of lower wages, meal periods, rest breaks, unpaid vacation, overtime, expenses, travel time, travel expenses, wage statements, pay stubs, methods of payment, and Plaintiff agrees that he will not, from any source or proceeding, seek or accept any award or settlement therefrom. In the event Plaintiff institutes or is a party to any such action, his claims shall be dismissed, with prejudice and with an award of attorneys' fees and costs to the Release Parties incurred as a result of such action, immediately upon presentation of this Agreement.

2.2 Plaintiff represents and warrants that Plaintiff has not assigned or subrogated any claim or any claim released herein, or authorized any other person or entity to assert such a claim or claims on Plaintiff's behalf.

2.3 Plaintiff further agrees to waive any claim for damages occurring at any time after the date of this Agreement because of any alleged continuing effect of any alleged unlawful or other wrongful acts or omissions involving Defendant, its respective employees or agents, which occurred on or before the date of this Agreement. Plaintiff further agrees to waive any right

Plaintiff may have to sue for injunctive relief against the alleged continuing effects of any alleged unlawful or other wrongful acts or omissions occurring prior to the date of this Agreement.

2.4 Plaintiff further agrees to waive any right he may have in any legal proceeding commencing after the date of this Agreement, including without limitation, arbitration, mediation, state or federal administrative proceeding and/or state or federal trial, to admit any evidence of any kind relating to the alleged unlawful or other wrongful acts or omissions involving Defendant, its respective employees or agents, which occurred on or before the date of this Agreement.

3. Settlement Sum.

3.1 Pursuant to the other terms and conditions contained in this Agreement, Defendant agrees to pay Plaintiff the gross sum of TWO HUNDRED FIFTY DOLLARS AND ZERO CENTS (\$250.00) (the "SETTLEMENT SUM") as payment for the alleged statutory penalties under California Labor Code section 2810, upon which an IRS Form 1099 shall issue to Plaintiff. The SETTLEMENT SUM shall be issued to Plaintiff in trust to "The Law Offices of Ellyn Moscowitz" (Taxpayer Identification No. 870737901), and mailed to the office of Plaintiff's counsel within ten (10) business days from the date Plaintiff delivers the executed Agreement, and an executed IRS Form W-9, to Defendant's counsel. Plaintiff's counsel agrees to provide Defendant an executed IRS Form W-9 upon Plaintiff's execution of this Agreement.

3.2 It is understood that payment of the above SETTLEMENT SUM is made to compromise and release Plaintiff's claims and other damages alleged against Defendant, including all attorneys' fees and costs, except for settlement of the Action. Plaintiff agrees to hold Defendant harmless for, and to repay Defendant the full amount of, any such taxes, interest and penalties Defendant is required to pay on Plaintiff's behalf as a result of Defendant's payment of the SETTLEMENT SUM. Plaintiff agrees neither Defendant nor its attorneys have provided him or his counsel any tax advice. In the event Defendant is notified or requested by the Internal Revenue Service or by any State taxing authority to pay any withholding tax or other employee or employer taxes and interest or penalties on all or any part of the amounts paid to Plaintiff as a result of Defendant's payment of the SETTLEMENT SUM, Defendant shall so notify Plaintiff herein prior to any such payment and in no event later than ten (10) business days from Defendant's receipt of such notice or request so as to afford Plaintiff a reasonable opportunity to appear and argue or move against such payment.

3.3 Plaintiff agrees Defendant has no obligation to pay him any amount other than the SETTLEMENT SUM, and any payment to which Plaintiff is entitled as a Class Member under the terms of the Class Actions settlement of this action, inclusive of all attorneys' fees and costs, and Plaintiff is responsible for paying any liens asserted against the SETTLEMENT SUM.

4. **Agreement Not To Assist Others In Commencing Or Prosecuting Any Action Against Defendants.**

Except for settlement of the Action, Plaintiff agrees and understands that, except as may be required by subpoena, court order, or other force of law, he shall not in any way assist any individual or entity in commencing or prosecuting any action or proceeding, including but not limited to any administrative agency claims, charges or complaints or any lawsuit against Defendant, or in any way participate or cooperate in any such action or proceeding, including any trial, pretrial preparation, pre-litigation fact-gathering, or administrative agency proceeding connected with any and all matters. Absent legal compulsion, this Agreement bars Plaintiff from testifying, providing documents or information, advising, counseling or providing any other form of assistance to any person or entity who wishes to make or who is making any claim against Defendant or any of its respective owners, shareholders, officers, directors, agents or employees. This Paragraph 4 does not preclude Plaintiff from cooperating with any local, state or federal government investigation.

5. **Denial of Liability.**

5.1 The parties acknowledge that each has denied and continues to deny any and all liability to each other for any claims relating to Plaintiff's hiring by, employment with or cessation of employment with Defendant.

5.2 Each party expressly recognizes that the making of this Agreement does not in any way constitute an admission or concession of wrongdoing on the part of the other party.

6. **Plaintiff's Waiver of California Civil Code Section 1542.**

6.1 Plaintiff understands and expressly agrees that this Agreement extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past or present, which Plaintiff has or may have against Defendant and the Released Parties, and all rights under Section 1542 of the California Civil Code are hereby expressly waived. Such Section reads as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

6.2 Plaintiff agrees that he has read this Agreement, including the waiver of California Civil Code section 1542, and that Plaintiff has consulted counsel about the Agreement and specifically about the waiver of section 1542, and that Plaintiff understands the Agreement and the section 1542 waiver, and so freely and knowingly enters into this Agreement. Plaintiff acknowledges that he may hereafter discover facts different from or in addition to those Plaintiff knows or now believes to be true with respect to the matters released or described in this Agreement, and Plaintiff agrees that the releases and agreements contained herein shall be and

will remain effective in all respects notwithstanding any later discovery of any such different or additional facts. Plaintiff hereby assumes any and all risk of any mistake in connection with the true facts involved in the matters, disputes, or controversies described herein or with regard to any facts which are now unknown to Plaintiff relating thereto.

7. Waiver of Future Employment.

7.1 Plaintiff agrees not to apply for employment with any Defendant and waives any right Plaintiff may have to apply for employment or to be reinstated at any time henceforth with Defendant. Plaintiff's waiver of future employment extends only to Defendant and the Released Parties, and does not prevent Plaintiff from being employed by un-released companies who contract with Defendant in the future.

7.2 Plaintiff agrees that if Plaintiff knowingly or unknowingly applies for a position with Defendant, and is offered or accepts a position, the offer may be withdrawn, or Plaintiff may be terminated immediately, without notice or cause. Plaintiff further agrees that, in the event of such an offer and withdrawal, or hiring and termination as described in this Paragraph 7.1, Plaintiff waives any right to seek legal or administrative redress of any kind for events relating to the withdrawal of the offer, or termination of employment, as described in this Paragraph 7.1.

8. Non-Disparagement.

Plaintiff agrees that he shall not make any negative statement, written or oral, or engage in any negative communication about Defendant or Defendant's representatives or employees relating to Plaintiff's employment with Defendant, Plaintiff's cessation of employment at Defendant, or the alleged damages resulting from this cessation of employment.

9. Representation of Pending Actions.

Plaintiff and his attorneys expressly warrant that, to the best of their knowledge, information, and belief, other than Plaintiff himself and plaintiff Rick Leech, they know of no other persons who have expressed an intent to file a lawsuit against Defendant.

10. Severability.

If any provision of this Agreement is declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, that provision will immediately become null and void, leaving the remainder of this Agreement in full force and effect.

11. Construction.

The normal rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action on this Agreement. This Agreement is entered into in the State of California and shall be construed and interpreted in accordance with its laws.

12. Breach of Agreement.

12.1 Any party to this Agreement may bring an action at law for its breach in the Solano County Superior Court of the State of California. Unless otherwise ordered by the Court, only the provisions of the Agreement alleged to have been breached shall be disclosed.

12.2 In any action at law permitted in Paragraph 12.1, the prevailing party, as determined by the Court, shall be entitled to have his or its costs and reasonable attorneys' fees paid by the losing party.

13. Integration.

This Agreement represents the complete understanding between the parties. No other promises or agreements shall be binding or shall modify this Agreement unless signed by the parties hereto.

14. Execution.

This Agreement may be signed in counterparts and on separate signature pages. These separate signature pages will become part of the integrated Agreement. Where convenient for the parties to do so, the signed signature pages may be facsimile transmissions, email or PDF.

15. Dismissal with Prejudice.

Within five (5) calendar days from the date the SETTLEMENT SUM is mailed to Plaintiff's counsel as provided herein, Plaintiff agrees to file with the Court a request for dismissal with prejudice of Defendant as to all claims and all causes of action alleged in the Action; the request for dismissal will only dismiss Defendant from the Action, and will not dismiss the entire Action. Plaintiff agrees to take all other steps necessary to effectuate the dismissal of Defendant from the Action with prejudice.

16. Mutual Representations, Covenants, and Warranties.

Each of the parties to this Agreement represents, warrants, and agrees as follows:

16.1 Each party has received independent legal advice from his or its attorney with respect to the advisability of reaching a settlement, the advisability of executing this Agreement, and the ramifications of the meaning of California Civil Code Section 1542.

16.2 No party (nor any officer, agent, employee, representative, or attorney of or for any party) has made any statement or representation to any other party regarding any fact relied upon in entering into this Agreement, and no party has relied upon any statement, representation or promise of any other party (or of any officer, agent, employee, representative, or attorney for the other party) in executing this Agreement or in making the settlement provided for herein, except as expressly stated in this Agreement.

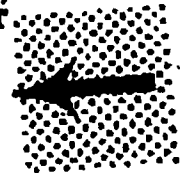
16.3 Each party has entered into this Agreement freely and voluntarily and has made an investigation of the facts pertaining to the settlement, this Agreement and all of the matters relating thereto.

16.4 Each party or responsible officer or agent thereof has read this Agreement and understands the contents hereof. Each of the persons executing this Agreement on behalf of the respective parties is empowered to do so and thereby binds this respective party.

HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH "9" ABOVE, PLAINTIFF FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST DEFENDANT.

Dated: 11/13, 2008

[Signature]
Rick Leach



Dated: _____, 2008

SHHA HOMES, INC.

By: *[Signature]*
By its authorized agent or officer
Layne Marceau Assistant Secretary

Dated: _____, 2008

SHHA HOMES, INC.

By: *[Signature]*
Matthew J. Henry
By its authorized agent or officer
Assistant Secretary

APPROVED AS TO FORM:

Dated: 11/16, 2008

LAW OFFICES OF ELLYN MOSCOWITZ

By: *[Signature]*
Ellyn Moscovitz
Attorney for Plaintiff Anthony Kirby

Dated: 12/23, 2008

JACKSON LEWIN LLP

By: *[Signature]*
Clay G. Palmer
Attorney for Defendant Shea Homes, Inc.

EXHIBIT E

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and among Anthony Kirby ("Plaintiff"), on behalf of himself and his agents, attorneys, heirs, executors, assigns and any other person or entity acting with him or on his behalf (collectively, "Plaintiff"), on the one hand, and Shea Homes, Inc., on behalf of itself and its present and former agents, officers, employees, directors, trustees, subsidiaries, family of companies, affiliated divisions and companies, parent companies, predecessors, successors and assigns (collectively, "Defendant"), on the other hand. This Agreement is made pursuant to the following terms and conditions.

1. Pending and Future Legal or Administrative Actions - Covenant Not to Sue.

1.1 Plaintiff represents he does not have currently pending any legal actions or administrative proceedings against Defendant, other than the case presently pending in the Sacramento County Superior Court entitled Anthony Kirby and Rick Leech, et al., v. IMMOOS Fire Protection, et al., Case No. 07AS00032 ("the Action").

1.2 Except for settlement of the Action, Plaintiff shall not assist, participate or be represented in, nor institute, submit or file, or permit to be instituted, submitted or filed on his behalf, against Defendant, any lawsuit, charge, claim, complaint or other proceeding with any administrative agency, court or other forum under any federal, state or local laws or regulations including, but not limited to, the Family Medical Leave Act; the Employee Retirement Income Security Act of 1974; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967; 42 U.S.C. § 1981; the Older Workers Benefits Protection Act; the Equal Pay Act of 1963; the Americans with Disabilities Act; the Rehabilitation Act; the Consolidated Omnibus Budget Reconciliation Act of 1985; the Sarbanes-Oxley Act; the California Fair Employment and Housing Act; the California Family Rights Act; the California Business and Professions Code; the California Private Attorneys General Act; the California Labor Code; the California Wage Orders; or any other federal, state or local insurance, human rights, civil rights, wage-hour, pension, or labor laws, rules and/or regulations, public policy, common law, contract or tort laws, or any claim of retaliation under such laws, or any claim arising under common law, including, but not limited to causes of action for class actions; collective actions; representative actions; wrongful termination; harassment of any sort; discrimination or retaliation on the basis of sex, age, disability, medical condition, race, religion, sexual orientation, national origin or any other protected basis; whistle-blower liability; invasion of privacy; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; fraudulent misrepresentation; negligent misrepresentation; fraud; negligence; conspiracy to commit any act mentioned herein; breach of contract (whether express or implied, oral or written); breach of the implied covenant of good faith and fair dealing; promissory estoppel; interference with business advantage; defamation; slander; interference with prospective economic advantage; interference with contractual relationship; violation of any national, state or local statute, law, or ordinance; failure to pay any wages due, secret payment of lower wages, meal periods, rest breaks, unpaid vacation, overtime, expenses, travel time, travel expenses, wage statements, pay stubs, methods of payment, and any other monies owed; and Plaintiff shall not, from any source or proceeding, seek or accept any award or settlement therefrom arising out of his work for Defendant. In the event Plaintiff institutes or is a party to any such action, his claims shall be dismissed, with prejudice and with an award of attorneys' fees and costs to Defendant incurred as a result of such action, immediately upon presentation of this Agreement.

2. Release of all Claims.

2.1 Except for settlement of the Action and any settlement payments due to Plaintiff under that settlement, it is understood and agreed by and between the parties to this Agreement that in consideration for the promises contained herein, Plaintiff hereby completely releases and forever discharges Defendant and its present or former officers, agents, employees, directors, trustees, subsidiaries, affiliated divisions and companies (including but not limited to Shea Homes Limited Partnership), parent companies, predecessors, successors and assigns ("Released Parties") from all causes of action, claims, judgments, obligations, damages or liabilities of whatever kind and character, including, but not limited to, those arising under the Family Medical Leave Act; the Employee Retirement Income Security Act of 1974; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967; 42 U.S.C. § 1981; the Older Workers Benefits Protection Act; the Equal Pay Act of 1963; the Consolidated Omnibus Budget Reconciliation Act of 1985; the Americans with Disabilities Act; the Rehabilitation Act; the Sarbanes-Oxley Act; the California Fair Employment and Housing Act; the California Family Rights Act; the California Business and Professions Code; the California Private Attorneys General Act; the California Labor Code; the California Wage Orders; or any other federal, state or local insurance, human rights, civil rights, wage-hour, pension, or labor laws, rules and/or regulations, public policy, contract or tort laws, or any claim of retaliation under such laws, or any claim arising under common law, including, but not limited to causes of action for class actions; collective actions; representative actions; wrongful termination; harassment of any sort; discrimination or retaliation on the basis of sex, age, disability, race, religion, sexual orientation, national origin or any other protected basis; whistleblower liability; invasion of privacy; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; fraudulent misrepresentation; negligent misrepresentation; fraud; negligence; conspiracy to commit any act mentioned herein; breach of contract (whether express or implied, oral or written); breach of the implied covenant of good faith and fair dealing; promissory estoppel; interference with business advantage; defamation; slander; interference with prospective economic advantage; interference with contractual relationship; violation of any national, state or local statute, law, or ordinance; failure to pay any wages due, secret payment of lower wages, meal periods, rest breaks, unpaid vacation, overtime, expenses, travel time, travel expenses, wage statements, pay stubs, methods of payment, and Plaintiff agrees that he will not, from any source or proceeding, seek or accept any award or settlement therefrom. In the event Plaintiff institutes or is a party to any such action, his claims shall be dismissed, with prejudice and with an award of attorneys' fees and costs to the Release Parties incurred as a result of such action, immediately upon presentation of this Agreement.

2.2 Plaintiff represents and warrants that Plaintiff has not assigned or subrogated any claim or any claim released herein, or authorized any other person or entity to assert such a claim or claims on Plaintiff's behalf.

2.3 Plaintiff further agrees to waive any claim for damages occurring at any time after the date of this Agreement because of any alleged continuing effect of any alleged unlawful or other wrongful acts or omissions involving Defendant, its respective employees or agents, which occurred on or before the date of this Agreement. Plaintiff further agrees to waive any right

Plaintiff may have to sue for injunctive relief against the alleged continuing effects of any alleged unlawful or other wrongful acts or omissions occurring prior to the date of this Agreement.

2.4 Plaintiff further agrees to waive any right he may have in any legal proceeding commencing after the date of this Agreement, including without limitation, arbitration, mediation, state or federal administrative proceeding and/or state or federal trial, to admit any evidence of any kind relating to the alleged unlawful or other wrongful acts or omissions involving Defendant, its respective employees or agents, which occurred on or before the date of this Agreement.

3. Settlement Sum.

3.1 Pursuant to the other terms and conditions contained in this Agreement, Defendant agrees to pay Plaintiff the gross sum of TWO HUNDRED FIFTY DOLLARS AND ZERO CENTS (\$250.00) (the "SETTLEMENT SUM") as payment for the alleged statutory penalties under California Labor Code section 2810, upon which an IRS Form 1099 shall issue to Plaintiff. The SETTLEMENT SUM shall be issued to Plaintiff in trust to "The Law Offices of Ellyn Moscowitz" (Taxpayer Identification No. 870737901), and mailed to the office of Plaintiff's counsel within ten (10) business days from the date Plaintiff delivers the executed Agreement, and an executed IRS Form W-9, to Defendant's counsel. Plaintiff's counsel agrees to provide Defendant an executed IRS Form W-9 upon Plaintiff's execution of this Agreement.

3.2 It is understood that payment of the above SETTLEMENT SUM is made to compromise and release Plaintiff's claims and other damages alleged against Defendant, including all attorneys' fees and costs, except for settlement of the Action. Plaintiff agrees to hold Defendant harmless for, and to repay Defendant the full amount of, any such taxes, interest and penalties Defendant is required to pay on Plaintiff's behalf as a result of Defendant's payment of the SETTLEMENT SUM. Plaintiff agrees neither Defendant nor its attorneys have provided him or his counsel any tax advice. In the event Defendant is notified or requested by the Internal Revenue Service or by any State taxing authority to pay any withholding tax or other employee or employer taxes and interest or penalties on all or any part of the amounts paid to Plaintiff as a result of Defendant's payment of the SETTLEMENT SUM, Defendant shall so notify Plaintiff herein prior to any such payment and in no event later than ten (10) business days from Defendant's receipt of such notice or request so as to afford Plaintiff a reasonable opportunity to appear and argue or move against such payment.

3.3 Plaintiff agrees Defendant has no obligation to pay him any amount other than the SETTLEMENT SUM, and any payment to which Plaintiff is entitled as a Class Member under the terms of the Class Actions settlement of this action, inclusive of all attorneys' fees and costs, and Plaintiff is responsible for paying any liens asserted against the SETTLEMENT SUM.

4. **Agreement Not To Assist Others In Commencing Or Prosecuting Any Action Against Defendants.**

Except for settlement of the Action, Plaintiff agrees and understands that, except as may be required by subpoena, court order, or other force of law, he shall not in any way assist any individual or entity in commencing or prosecuting any action or proceeding, including but not limited to any administrative agency claims, charges or complaints or any lawsuit against Defendant, or in any way participate or cooperate in any such action or proceeding, including any trial, pretrial preparation, pre-litigation fact-gathering, or administrative agency proceeding connected with any and all matters. Absent legal compulsion, this Agreement bars Plaintiff from testifying, providing documents or information, advising, counseling or providing any other form of assistance to any person or entity who wishes to make or who is making any claim against Defendant or any of its respective owners, shareholders, officers, directors, agents or employees. This Paragraph 4 does not preclude Plaintiff from cooperating with any local, state or federal government investigation.

5. **Denial of Liability.**

5.1 The parties acknowledge that each has denied and continues to deny any and all liability to each other for any claims relating to Plaintiff's hiring by, employment with or cessation of employment with Defendant.

5.2 Each party expressly recognizes that the making of this Agreement does not in any way constitute an admission or concession of wrongdoing on the part of the other party.

6. **Plaintiff's Waiver of California Civil Code Section 1542.**

6.1 Plaintiff understands and expressly agrees that this Agreement extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past or present, which Plaintiff has or may have against Defendant and the Released Parties, and all rights under Section 1542 of the California Civil Code are hereby expressly waived. Such Section reads as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

6.2 Plaintiff agrees that he has read this Agreement, including the waiver of California Civil Code section 1542, and that Plaintiff has consulted counsel about the Agreement and specifically about the waiver of section 1542, and that Plaintiff understands the Agreement and the section 1542 waiver, and so freely and knowingly enters into this Agreement. Plaintiff acknowledges that he may hereafter discover facts different from or in addition to those Plaintiff knows or now believes to be true with respect to the matters released or described in this Agreement, and Plaintiff agrees that the releases and agreements contained herein shall be and

will remain effective in all respects notwithstanding any later discovery of any such different or additional facts. Plaintiff hereby assumes any and all risk of any mistake in connection with the true facts involved in the matters, disputes, or controversies described herein or with regard to any facts which are now unknown to Plaintiff relating thereto.

7. Waiver of Future Employment.

7.1 Plaintiff agrees not to apply for employment with Defendant and waives any right Plaintiff may have to apply for employment or to be reinstated at any time henceforth with Defendant. Plaintiff's waiver of future employment extends only to Defendant and the Released Parties, and does not prevent Plaintiff from being employed by un-released companies who contract with Defendant in the future.

7.2 Plaintiff agrees that if Plaintiff knowingly or unknowingly applies for a position with Defendant, and is offered or accepts a position, the offer may be withdrawn, or Plaintiff may be terminated immediately, without notice or cause. Plaintiff further agrees that, in the event of such an offer and withdrawal, or hiring and termination as described in this Paragraph 7.1, Plaintiff waives any right to seek legal or administrative redress of any kind for events relating to the withdrawal of the offer, or termination of employment, as described in this Paragraph 7.1.

8. Non-Disparagement.

Plaintiff agrees that he shall not make any negative statement, written or oral, or engage in any negative communication about Defendant or Defendant's representatives or employees relating to Plaintiff's employment with Defendant, Plaintiff's cessation of employment at Defendant, or the alleged damages resulting from this cessation of employment.

9. Representation of Pending Actions.

Plaintiff and his attorneys expressly warrant that, to the best of their knowledge, information, and belief, other than Plaintiff himself and plaintiff Rick Leech, they know of no other persons who have expressed an intent to file a lawsuit against Defendant.

10. Severability.

If any provision of this Agreement is declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, that provision will immediately become null and void, leaving the remainder of this Agreement in full force and effect.

11. Construction.

The normal rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action on this Agreement. This Agreement is entered into in the State of California and shall be construed and interpreted in accordance with its laws.

12. Breach of Agreement.

12.1 Any party to this Agreement may bring an action at law for its breach in the Sacramento County Superior Court of the State of California. Unless otherwise ordered by the Court, only the provisions of the Agreement alleged to have been breached shall be disclosed.

12.2 In any action at law permitted in Paragraph 12.1, the prevailing party, as determined by the Court, shall be entitled to have his or its costs and reasonable attorneys' fees paid by the losing party.

13. Integration.

This Agreement represents the complete understanding between the parties. No other promises or agreements shall be binding or shall modify this Agreement unless signed by the parties hereto.

14. Execution.

This Agreement may be signed in counterparts and on separate signature pages. These separate signature pages will become part of the integrated Agreement. Where convenient for the parties to do so, the signed signature pages may be facsimile transmissions, email or PDF.

15. Dismissal with Prejudice.

Within five (5) calendar days from the date the SETTLEMENT SUM is mailed to Plaintiff's counsel as provided herein, Plaintiff agrees to file with the Court a request for dismissal with prejudice of Defendant as to all claims and all causes of action alleged in the Action; the request for dismissal will only dismiss Defendant from the Action, and will not dismiss the entire Action. Plaintiff agrees to take all other steps necessary to effectuate the dismissal of Defendant from the Action with prejudice.

16. Mutual Representations, Covenants, and Warranties.

Each of the parties to this Agreement represents, warrants, and agrees as follows:

16.1 Each party has received independent legal advice from his or its attorney with respect to the advisability of reaching a settlement, the advisability of executing this Agreement, and the ramifications of the meaning of California Civil Code Section 1542.

16.2 No party (nor any officer, agent, employee, representative, or attorney of or for any party) has made any statement or representation to any other party regarding any fact relied upon in entering into this Agreement, and no party has relied upon any statement, representation or promise of any other party (or of any officer, agent, employee, representative, or attorney for the other party) in executing this Agreement or in making the settlement provided for herein, except as expressly stated in this Agreement.

16.4 Each party or responsible officer or agent thereof has read this Agreement and understands the contents hereof. Each of the persons executing this Agreement on behalf of the respective parties is empowered to do so and thereby binds this respective party.

16.5 This Agreement is expressly conditioned on the Court granting final approval of the class action Settlement. In the event the Court does not grant final approval of the class action Settlement, this Agreement is nul and void and of no effect whatsoever.

HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH "3" ABOVE, PLAINTIFF FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST DEFENDANT.

Dated: 11/07/08, 2008

[Signature]
Anthony Kirby

Dated: _____, 2008

SHEA HOMES, INC.

By: [Signature]
By its authorized agent or officer

Dated: 1-6, 2009

SHEA HOMES, INC.

By: [Signature]
By its authorized agent or officer

APPROVED AS TO FORM:

Dated: 12-23, 2008

LAW OFFICES OF ELLYN MOSCOWITZ

By: [Signature]
Kathy Roberts ELLYN MOSCOWITZ
Attorneys for Plaintiff Anthony Kirby

Dated: 12-23, 2008

JACKSON LEWIS LLP

By: [Signature]
Cary O. Palmer
Attorneys for Defendant
Shea Homes, Inc.

RECEIVED
NOV 13 2008

BY:

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California.

I am over the age of eighteen years and not a party to the within action; my business address is 1629

Telegraph Avenue, 4th Floor, Oakland, California 94612. On July 1, 2009, I served upon the following

parties in this action:

Robert Rediger
Laura McHugh
555 Capitol Mall, Suite 1240
Sacramento, CA 95814

Michelle B. Heverly
Littler Mendelson, P.C.
50 West Fernando Street, 15th Floor
San Jose, CA 95133

Cary Palmer
JACKSON LEWIS LLP
801 K Street, Suite 2300
Sacramento, CA 95814

Law Offices of Steven A. Lamon,
468 Century Park Drive, Suite A
Yuba City, CA 95991

Jim Anwyl
Anwyl, Scofield & Stepp, LLP
3043 Gold Canal Drive, Suite 100
Rancho Cordova, CA 95670

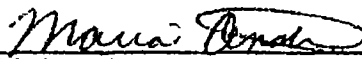
copies of the document(s) described as:

NOTICE OF LODGMENT IN SUPPORT OF PLAINTIFFS' APPEAL

BY MAIL I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California. I am readily familiar with the practice of Law Offices of Ellyn Moscowitz for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

BY PERSONAL SERVICE I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused the same to be delivered by hand to the offices of each addressee.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California, on July 1, 2009.



Maria Anderson

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1629 Telegraph Avenue, Fourth Floor, Oakland, California 95612. I am employed by the Law Offices of Ellyn Moscovitz, P.C.

On September 27, 2010, I served the within **AMENDED REQUEST FOR JUDICIAL NOTICE** in *Anthony Kirby et al. v. Immoos Fire Protection, Inc.*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] upon the following:

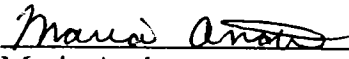
Robert Rediger, Esq. Laura C. McHugh, Esq. Jimmie E. Johnson, Esq. Rediger, McHugh & Owensby, LLP 555 Capitol Mall, Suite 1240 Sacramento, CA 95814	Honorable Loren E. McMaster Sacramento Superior Court 720 Ninth Street Sacramento, CA 95814
Appellate Coordinator Office of the Attorney General 300 S. Spring Street Los Angeles, CA 90013	California Court of Appeal Third Appellate District Court of Appeal 621 Capitol Mall, Tenth Floor Sacramento, CA 95814

XXXX: BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE. I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or diver authorized by the express carrier to receive documents.

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

XXXX: BY MESSENGER SERVICE. I served the documents by placing them in an envelope or package addressed to the persons at the addresses I listed above and providing them to a professional messenger service.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California on September 27, 2010.



Maria Anderson