

SUPREME COURT COPY

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JAN 18 2011

Frederick K. Ohlrich Clerk

Case Number S185827

Deputy

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

Anthony Kirby, et al.,
Plaintiffs and Appellants

vs.

Immoos Fire Protection, Inc.,
Defendant and Respondent

Appeal from a Decision of the Third Appellate District,
Case Number C062306

**APPELLANTS' MOTION FOR JUDICIAL NOTICE;
DECLARATION OF ELLYN MOSCOWITZ;
PROPOSED ORDER**

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Attorneys for Plaintiffs and Appellants
ANTHONY KIRBY AND RICK LEECH, JR.

Case Number S185827

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Attorneys for Plaintiffs and Appellants
ANTHONY KIRBY AND RICK LEECH, JR.

TO RESPONDENT AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs and Appellants Anthony Kirby and Rick Leech, Jr. ("Appellants") hereby move this Supreme Court to take judicial notice of the attached documents, including news and legal industry articles and legislative history.

This motion is made on the grounds that (1) Evidence Code section 452 authorizes the Court to take judicial notice of these materials; and (2) these materials are relevant to the issues in Appellants' Opening Brief on the Merits.

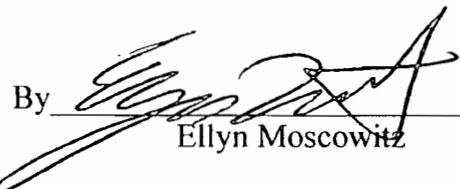
This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, and such other matters as may properly come before the Court.

Dated: January 17, 2011

Respectfully submitted,

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

**LAW OFFICES OF
SCOT D. BERNSTEIN, P.C.**
Scot Bernstein

By 
Ellyn Moscovitz

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

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Evidence Code sections 452 and 459 and California Rule of Court 8.252, Appellants Anthony Kirby and Rick Leech, Jr. (“Appellants”) hereby move the Supreme Court to take judicial notice of the following materials:

- 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) 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 (“Venable LLP Employer Alert”);
- Exhibit B: *Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit*, BARKER OLMSTED & BARNIER, APLC LEGAL UPDATE (Aug. 2010) <http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php> (“Barker LLP Legal Update”);
- Exhibit C: Posting of Robin E. Weideman, *Attorneys’ Fees Properly Awarded to Prevailing Employer in Wage Case* (Aug. 3, 2010) <http://www.callaborlaw.com/archives/283216-print.html>;
- Exhibit D: Kathy Robertson, *Employees Ordered to Pay Attorney’s Fees*, SACTO. BUS. JOURNAL (Jul. 29, 2010) <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* (Aug. 10, 2010)
<http://www.wzllp.com/blog/?post=16>;
- Exhibit F: Posting of Robert Nudleman, *Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees* (Jul. 28, 2010) <http://blog.griegolaw.com/2010/07/28/prevailing-employer-in-mealrest-break-suit-entitled-to-attorneys-fees/>;
- 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)
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* (Jul.27, 2010)
<http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html>;
- Exhibit I: *Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant* (Aug. 10, 2010)
<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;

- Exhibit J: Plaintiffs' Notice of Lodgment in Support of Plaintiff's Appeal, Kirby, et al. v. Immoos Fire Protection, Inc., Sacramento Superior Court, Case No. 07AS00032;
- Exhibit K: Enrolled Bill Report (Sept. 19, 1991) on Sen. Bill No. 955 (1991-1992 Reg. Sess.);
- Exhibit L: Assembly Ways and Means Committee, Republican Analysis (May 22, 1991) on Sen. Bill No. 2139 (1991-1992 Reg. Sess.);
- Exhibit M: Senate Rules Committee, Office of Senate Floor Analyses (May 14, 1986) on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986;
- Exhibit N: Senate Rules Committee, Office of Senate Floor Analyses (August 14, 1986) on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986;
- Exhibit O: Bill Analysis, DIR on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986;
- Exhibit P: Assembly Third Reading on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986;

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

ARGUMENT

I. THIS COURT SHOULD JUDICIALLY NOTICE EXHIBITS A-I, NEWS AND LEGAL INDUSTRY ARTICLES REGARDING THE RESPONSE FROM EMPLOYERS AND THEIR LAWYERS TO THE OPINION

Appellants request that this Court take judicial notice of exhibits A through 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. They are relevant because they demonstrate that employers consider the Opinion to be a positive development for employers, providing new precedent for an award of attorney's fees and litigation advantages in actions brought by non-exempt hourly wage earners alleging violations of California's meal and rest period requirements. (See Cal. Labor Code § 226.7.)

For example, one newsletter states that as a "practical" matter, meal and rest period claimants do not generate sufficient income or have the financial assets to pay a fee award, but the threats of "black marks on credit" and "judgment liens on property" against these claimants would still be useful for employers:

Practical tips: Although [the Opinion] is good news for employers, as a practical matter, employers cannot count on collecting 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.

(Barker LLP Legal Update, Ex. B, p. 2 (emphasis added).)

Similarly, another newsletter states employers may now "credibly threaten to obtain sizable judgment[s]" against meal and rest claimants:

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 claims 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.

(Venable LLP Employer Alert, Ex. A, p. 1 (emphasis added).)

Exhibits C, E, and F are blogs written by employers' attorneys after the Court of Appeal's decision and are also relevant to show this employer response. Exhibit D is an article in a business journal, regarding the same precedential developments in actions for meal periods. Finally, exhibits H and I are blogs written by practitioners in the attorney's fees and wage and hour fields, regarding the general impact of the Court of Appeal's decision in their field of expertise.

Judicial notice of exhibits A through I is appropriate and may be considered by this Court for persuasive value. (See *Seelig v. Infinity Broadcasting Corp., et al.* (2002) 97 Cal.App.4th 798, 808, fn. 5 (granting request for judicial notice based on broad "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 (finding judicial notice of the reported content in news articles appropriate).)

These exhibits are important in understanding the impact that the Court of Appeal's decision has had, and will have, in litigation brought by meal and rest period claimants against their employers.

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

Appellants request that this Court take judicial notice of Exhibit J. This exhibit should be judicially noticed under Evidence Code section 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 because it demonstrates that Appellants entered in settlement agreements with general contractors Meritage Homes of California, Inc., Hilbers Inc., DR Horton, and Shea Homes Inc. (the "General Contractor Defendants"). Exhibit J contains the fully executed 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.) Because Respondent and Defendant Immoos ("Immoos" or "Respondent") raised a misleading assertion about the non-existence of these agreements in its Answer to Petition for Review ("Answer"), judicial notice of Exhibit J is appropriate and may be considered by this Court to show that these agreements actually were executed by Appellants and General Contractor Defendants between November 2008 and January 2009. Exhibit J also demonstrates that Appellants obtained the settlement monies owed and Immoos had actual notice of the existence of these settlement agreements.

III. THIS COURT SHOULD JUDICIALLY NOTICE EXHIBIT K-P, THE LEGISLATIVE HISTORY OF LABOR CODE SECTIONS 218.5. AND 1194.

Appellants request that this Court take judicial notice of exhibits K through P. These exhibits should be judicially noticed under Evidence Code section 452 (c).

Exhibits K through P provide the legislative history of Labor Code sections 218.5 and 1194. (Cal. Labor Code §§ 218.5, 1194.) Specifically, exhibits K through P consist of documents from the histories of Senate Bill 955 of 1991, Assembly Bill 2139 of 1991, and Senate Bill 2570 of 1986. Judicial notice may be taken under Evidence Code section 452(c) of “[o]fficial acts of the legislative, executive and judicial departments of the United States, or any state of the United States.” (*Post v. Prati* (1979) 90 Cal.App.3d 626, 634; *Delany v. Baker* (1999) 20 Cal.4th 23, 30.)

The appeal at bar concerns the interpretation of Labor Code sections 218.5 and 1194, and exhibits K through P are relevant to demonstrate the intent of the Legislature with regard to those statutes. (Cal. Labor Codes §§ 218.5, 1194.) The Court’s primary objective when construing or interpreting statutes is determining the legislative intent of the enactment. “In the construction of a statute the intention of the Legislature...is to be pursued, if possible.” (Code Civ. Proc. § 1859.) The “touchstone of statutory interpretation” is the “probable intent of the Legislature.” (*California Teacher’s Assn. v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 632.) Therefore, the legislative history contained in exhibits K through P is relevant and should aid the Court in its interpretation of the statutes at issue in this appeal.

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CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court take judicial notice of exhibits A through P.

Dated: January 18, 2011

Respectfully submitted,

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

**LAW OFFICES OF
SCOT D. BERNSTEIN, P.C.**
Scot Bernstein

By 

Ellyn Moscowitz

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

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 Appellants Anthony Kirby and Rick Leech, Jr. 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 Motion 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)
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) <http://www.barkeroilmsted.com/news/legal-updates/newsletter0185.php>.
5. Attached as Exhibit C is a true and correct copy of Robin E. Weideman, *Attorneys' Fees Properly Awarded to Prevailing Employer in Wage Case* (Aug. 3, 2010) <http://www.callaborlaw.com/archives/283216-print.html>.

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)
<http://sacramento.bizjournals.com/sacramento/stories/2010/07/26/daily66.html>.

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

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

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)
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>.

11. Attached as Exhibit I is a true and correct copy of Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant (Aug. 10, 2010) 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.

12. Attached as Exhibit J is a true and correct copy of Plaintiffs' Notice of Lodgment in Support of Plaintiff's Appeal, *Kirby, et al. v. Immoos Fire Protection, Inc.*, Sacramento Superior Court, Case No. 07AS00032.

13. Attached as Exhibit K is a true and correct copy of Enrolled Bill Report (Sept. 19, 1991) on Sen. Bill No. 955 (1991-1992 Reg. Sess.). I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 1.

14. Attached as Exhibit L is a true and correct copy of Assembly Ways and Means Committee, Republican Analysis (May 22, 1991) on Sen. Bill No. 2139 (1991-1992 Reg. Sess.). I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 1.

15. Attached as Exhibit M is a true and correct copy of Senate Rules Committee, Office of Senate Floor Analyses (May 14, 1986) on Sen. Bill

No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986. I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 2.

16. Attached as Exhibit N is a true and correct copy of Senate Rules Committee, Office of Senate Floor Analyses (August 14, 1986) on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986. I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 2.

17. Attached as Exhibit O is a true and correct copy of Bill Analysis, DIR on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986. I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 2.

18. Attached as Exhibit P is a true and correct copy of Assembly Third Reading on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986. I obtained this document from Maria A. Sanders of Legislative Intent Service, Inc. A true and correct copy of Maria A. Sanders' declaration regarding this document is attached hereto as Exhibit 2.

19. Attached as Exhibit 1 is a declaration of Maria A. Sanders of Legislative Intent Service, Inc. supporting Exhibits K and L, documents regarding of Senate Bill 955 of 1991 and Assembly Bill 2139 of 1991.

20. Attached as Exhibit 2 is a declaration of Maria A. Sanders of Legislative Intent Service, Inc. supporting Exhibits M-P, documents regarding Senate Bill 2570.

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 January 18, 2011.



Ellyn Moscovitz

[PROPOSED ORDER]

Good cause appearing, therefore,

IT IS HEREBY ORDERED that the Supreme Court will 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) 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) <http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php>
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- Exhibit D: Kathy Robertson, *Employees Ordered to Pay Attorney's Fees*, SACTO. BUS. JOURNAL (Jul. 29, 2010) <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 (Aug. 10, 2010)

<http://www.wzllp.com/blog/?post=16>

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

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)

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* (Jul.27, 2010)

<http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html>

Exhibit I: *Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant* (Aug. 10, 2010)

http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm

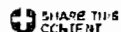
_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29

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- Exhibit P: Assembly Third Reading on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), as amend Aug 12, 1986.

DATED: _____

The Honorable Chief Justice or
Associate Justice of the
California Supreme Court

EXHIBIT A



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

Daniel B. Chammas

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Christin J. Kim

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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

An 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).

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

(Continued from page 3)

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 was in order to determine exactly how much fees should be awarded to the

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 listed the total regular hours worked by the employee, which equaled the total number of hours worked.

For employees who worked 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.

(Continued on page 5)



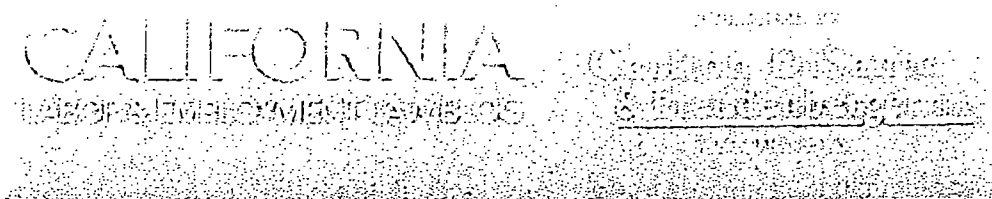
employer. The employer could not recover its expenses for the time the attorneys spent defending the minimum wage and overtime claims. The attorneys would have to account for the time spent defending the unpaid wage and rest period claim.

Practical Tips:

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

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.

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. Lumsos 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.sacramento-business-journal.com/employees-ordered-to-pay-attorneys-fees/>

Printed: 07/29/10 10:00 AM

BUSINESS JOURNAL

Thursday, July 29, 2010

Employees ordered to pay attorney's fees

Sacramento Business Journal - by [Ellyn Moscovitz](#) at 11:00 AM

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. Inmoss 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 Inmoss 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. Inmoss 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 Moscovitz, 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



On a Minute's Notice

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

**Mediate with Steven
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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-
3300 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

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Wage and Hour Law and
Litigation, published by
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EXHIBIT J

ORIGINAL

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FILED
ENDORSED
JUL - 1 2009
By N WALLACE
Deputy Clerk

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,

13 vs.

14 IMMOOS FIRE PROTECTION, INC., SHEA
15 HOMES INC., HILBERS, INC., MERITAGE
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

20
21
22
23
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
28 1. A true and correct copy of Settlement Agreement and General Release between

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

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

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

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

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

Dated: July 1, 2009

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.


By: 
Ellyn Moscovitz
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.

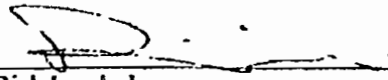
13. Entire Agreement. This Settlement Agreement and General Release sets forth the entire agreement between the parties hereto, and fully supersedes any prior agreements or understandings between the parties. PLAINTIFFS acknowledge that they have not relied on any representations, promises, or agreements 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 Lecch, Jr.

Date: _____

Date: 1/12/09

MERITAGE HOMES OF CALIFORNIA, INC.

By: _____

Name:
Title:

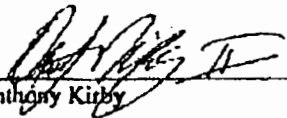
Date: _____

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:



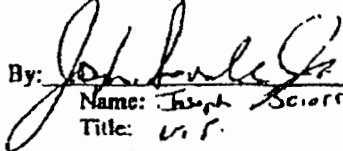
Anthony Kirby

Rick Leech, Jr.

Date: 1/8/09

Date: _____

MERITAGE HOMES OF CALIFORNIA, INC.

By: 

Name: Joseph Sciorro, Jr.
Title: V.P.

Date: 1/22/09

Pinwida:17674647.1 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."

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 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 Ellyn Moscovitz Trust Account a check in the amount of \$4,000 to be distributed by Law Offices of Ellyn 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

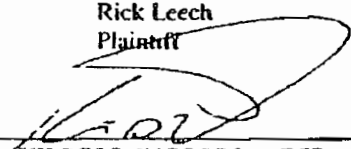
with respect to the subject matter hereof. The terms of this Agreement are contractual and not a mere recital. This Agreement is executed without reliance upon any promise, warranty or representation by any Party or any representative of any Party other than those expressly contained herein.

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:

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

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.

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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: 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

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.

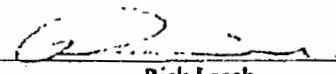
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6.11 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same document.

Dated: _____

Anthony Kirby
Plaintiff

Dated: 11/17/08


Rick Leech
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form: _____

LAW OFFICE OF STEVEN A. LAMON

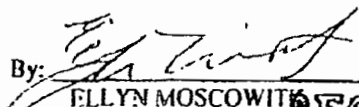
Dated: _____

By: _____

STEVEN A LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-15-08

By: 

ELLYN MOSCOWITZ
Attorneys for Plaintiff

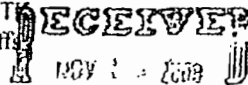


EXHIBIT C

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

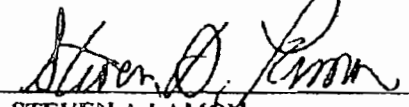
Dated: NOV 4 2008


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

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: 11/17/08


Anthony Kirby
Plaintiff

RECEIVED

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: 11-13-08

By: 

ELLYN MOSCOWITZ
Attorneys for Plaintiffs



COPY

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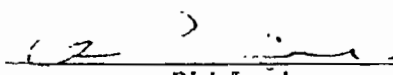
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Dated: _____

Anthony Kirby
Plaintiff

Dated: 11/17/08


Rick Leech
Plaintiff

Dated: _____

HILBERS, INCORPORATED

Approved as to form: _____

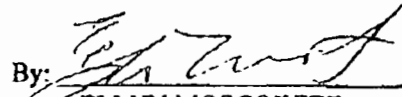
LAW OFFICE OF STEVEN A. LAMON

Dated: _____

By: _____
STEVEN A. LAMON
Attorneys for Defendants

LAW OFFICES OF ELLYN MOSCOWITZ

Dated: 11-17-08

By: 
ELLYN MOSCOWITZ
Attorneys for Plaintiff

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. MOOS 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 Released 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 Elynn Moscovitz" (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.

11/17/2008 05:45

L/O ELLYN MOSCOWITZ

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Page 03/07

11/14/2008 09:33 7874 /547

SOLAR FAX

PAGE 02/02

2-6000 3:40PM JACOBSON LEVIN

NO. 3302 P. 10/10

16.3. Each party has entered into this Agreement freely and voluntarily and has made an investigation of the facts pertaining to the attainment, 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 the respective party.

HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH "B" 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: 10/13, 2008


Rick Leach

Dated: _____, 2008

SHBA HOMES, INC.

By: 
By its authorized agent or officer
Layne Marseau Assistant Secretary

Dated: _____, 2008

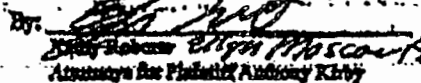
SHBA HOMES, INC.

By: 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: 
Ellen Moskowitz
Attorney for Plaintiff Anthony Kirby

Dated: 12/23, 2008

JACKSON LEWIS LLP


By: 
Chry U. Palmer
Attorney for Defendant Shba 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 Lecch, 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 Released 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 Elyn Moscovitz" (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.

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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:

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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.

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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 null 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 Elynn Moskowitz
Attorneys for Plaintiff Anthony Kirby

Dated: 12-23, 2008

JACKSON LEWIS LLP

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

RECEIVED
11/13/2008

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 Moscovitz 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.

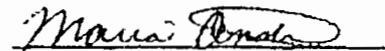

Maria Anderson

EXHIBIT K

ENROLLED BILL REPORT

	BILL NUMBER SB 955
DEPARTMENT, BOARD OR COMMISSION INDUSTRIAL RELATIONS	AUTHOR Torres

BILL SUMMARY

This bill would permit both the Labor Commissioner and private parties to recover liquidated damages, interest and attorneys fees in civil actions for failure to pay minimum wages.

BILL ANALYSIS

Existing law permits the Department of Industrial Relations or the Division of Labor Standards Enforcement, with the consent of the employee or employees affected, to commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation owed to an employee and entitles the Department or Division to recover the costs of the suit.

This bill would instead permit the Department or Division, with or without the consent of the employee or employees affected, to commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation, including interest thereon, owed to any employee and would provide that the Department or Division shall be awarded reasonable attorney's fees and costs of the suit.

Existing law provides that, notwithstanding any agreement to work for lesser wages, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of the minimum wage or overtime compensation, together with the costs of the suit.

VOTE:

ASSEMBLY _____

SENATE 39-0

RECOMMENDATION

SIGN

VETO

DEFER TO _____

DIVISION CHIEF

Roberta Mendonca
RM/UL

DATE

9/19/91

DEPARTMENT DIRECTOR

Ryder W. Culy

DATE

9/19/91

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This bill would additionally entitle any employee seeking to recover the unpaid balance of the full amount of the minimum wage or overtime compensation in a civil action pursuant to the above provisions to recover interest thereon and reasonable attorneys fees.

This bill would provide that in any action to recover wages because of the payment of a wage less than the minimum wage fixed by order of the Industrial Welfare Commission, an employee shall also be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon, but would provide that these provisions shall not be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.

If the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable ground for believing that the act or omission giving rise to the action was not a violation of specified provisions relating to minimum wage or an order of the Industrial Welfare Commission, it would permit the court to refuse to award liquidated damages or award any amount of liquidated damages not to exceed an amount equal to the wages unlawfully paid and interest thereon.

LEGISLATIVE HISTORY

This bill is sponsored by California Rural Legal Assistance and is intended to address the concerns outlined in the Governor's veto message on AB 2139 (Lee, 1991), regarding the inappropriateness of imposing liquidated damages as a penalty in all situations where the minimum wages law has been violated, regardless of willfulness.

AB 2139 was supported by the California Labor Federation, California State Pipe Trades Council, California State Association of Electrical Worker and the Western States Council of Sheet Metal Workers Unions. Proponents believe that this bill and the provisions of AB 2139 are necessary to ensure that individuals who file civil actions to recover unpaid minimum wages and overtime compensation are able to recover interest on their awards. They also believe that the ability to bring a civil action to recover these monies should be available to the Department or the Division without the need to obtain consent of the affected employees, as these are minimum labor standards which adversely impact law-abiding employers who do comply with the requirements of state law and who are placed at a competitive disadvantage of those employers who fail to adhere to the standards. Finally, they believe that the provision for liquidated damages should serve as a deterrent to those employers who fail to pay minimum wages or overtime compensation, thus assisting the state's enforcement efforts in this area.

In its recommendation to the Governor on AB 2139, DIR expressed concerns that the bill created new penalties which were inconsistent with the existing statutory penalty scheme in that it created damages in strict liability (liquidated damages) which may be greater than the waiting time penalties which might or might not be assessed for willful failure to pay wages on

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termination under Section 203 of the Labor Code. For example, a misclassification of a non-exempt employee as an exempt employee would potentially create significant overtime liability, but might result in no award of Section 203 penalties because the misclassification was not willful. Even so, under AB 2139, liquidated damages doubling the award to the employee (potentially larger than the waiting time penalties for willful violations), would have been automatically awarded to the employee.

DIR pointed out that it would be appropriate to sign legislation which restricted the liquidated damages provisions of the bill to a failure to pay minimum wages which, almost by definition, is willful. SB 955 addresses these concerns.

FISCAL IMPACT

Minor absorbable costs to the Department of Industrial Relations. The minor savings to the Division of Labor Standards Enforcement obtained by the deterrent function of the liquidated damages provision of the bill would be offset by the slight increase in caseload anticipated by the ability to bring a civil action without the consent of the affected employee(s).

RECOMMENDATION

Sign. This bill corrects problems outlined by the Governor in vetoing AB 2139 (Lee, 1991) as it relates to liquidated damages. As enrolled, this bill could assist DIR's Division of Labor Standards Enforcement in enforcing minimum wages for employees.

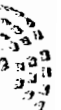


EXHIBIT L

*Out
B Roll Call*

AB 2139 (Lee)
5/22/91

ASSEMBLY WAYS AND MEANS COMMITTEE
REPUBLICAN ANALYSIS

AB 2139 (Lee) -- CIVIL ACTIONS TO RECOVER UNPAID WAGES

Version: Original
Recommendation: None

Vice Chairman: Bill Baker
Vote: Majority

Summary: Permits the Department of Industrial Relations (DIR) (or its Division of Labor Standards Enforcement - DLSE) to bring civil suit to recover unpaid minimum wages or unpaid overtime compensation owed to an employee -- without the consent of the employee as is now required by law. Also, the bill would permit an employee, or the DIR/DLSE to recover interest on the unpaid wages, as well as an award of liquidated damages (to the employee) of an amount equal to the unpaid minimum and overtime wages, including reasonable attorney's fees and costs of suit. Fiscal effect: Minor absorbable General Fund costs according to DIR.

Supported by: State Federation of Labor/AFL-CIO. Opposed by: None on file. Governor's position: Unknown (DIR neutral).

Comments: Civil actions are now allowed, but there is no provision for recovery of interest on the award. The department is not now able to act on behalf of damaged employees, nor able to assist law-abiding employers whose competitive situation may be adversely impacted because they choose to adhere to state law. Provisions for liquidated damages are seen as a deterrent. Department officials say they believe the bill would, indeed, act as a deterrent, and aid in the state's minimum wage and overtime enforcement program.

While some may question the advisability of a minimum wage, it is the law, and so are requirements for premium pay for overtime beyond 40 hours a week and 8 hours a day, in most non-professional and non-supervisory occupations.

Assembly Republican Committee vote

Labor -- 5/1/91

(7-1) Noes: McClintock

Abs.: Kelley, Leslie

Consultants: Jim Bald/Ellen Moratti

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AF-5
AB2139

EXHIBIT M

THIRD READING

<p>SENATE RULES COMMITTEE</p> <p>Office of Senate Floor Analyses 1100 J Street, Suite 305 445-6614</p>	Bill No.	SB 2570
	Author:	Lockyer (D)
	Amended:	5/14/86
	Vote Required:	Majority

Committee Votes:

Senate Floor Vote:

COMMITTEE: JUDICIARY		
BILL NO.:	SB 2570	
DATE OF HEARING:	5-16-86	
SENATORS:	AYE	NO
Donnell		
Kenna	✓	
Marks	✓	
Patris	✓	
Prepley	✓	
Richardson	✓	
Roberti	✓	
Torres	✓	
Watson	✓	
Davis (VC)	✓	
Lockyer (CH)	✓	
TOTAL:	10	0

Assembly Floor Vote:

SUBJECT: Attorney's fees

SOURCE: California Teamsters - Public Affairs Council

DIGEST: This bill would require courts to award attorney fees to a prevailing party in any action involving employment benefits (salary, pension fund, health benefits, etc.), or enforcement of an arbitrator's award as specified. The bill specifies that it does not apply to public employment. (See Analysis for details.)

ANALYSIS: Existing law permits the district attorney of any county to bring civil actions to enforce the payment of wages, and permits any wage claimant to sue directly for any wages or benefits which are due.

This bill would require the court to award reasonable attorney's fees and costs to the prevailing party in any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. The bill states it does not apply to public employment.

Existing law also provides that when a party to a collective bargaining agreement appeals the decision of an arbitrator regarding disputes concerning the collective bargaining agreement, the court shall award attorney's fees to the prevailing appellee unless the appellant has raised substantial issues involving complex or significant questions of law.

This bill would expand the award of attorney's fees as outlined above to cover court actions to compel compliance with the decision or award of an arbitrator or grievance panel.

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Purpose of Bill

The purpose of this bill is to provide that the burden of paying attorney's fees should in all fairness rest on the unsuccessful litigant in actions for nonpayment of wages and actions to compel compliance with the decision or award of an arbitrator or grievance panel.

FISCAL EFFECT: Appropriation: No Fiscal Committee: No Local: No

SUPPORT: (Verified 5/14/86)

California Teamsters - Public Affairs Council (source)

ARGUMENTS IN SUPPORT: The California Teamsters Union (source), argue that actions for nonpayment of wages usually involve relatively small amounts of money, since such suits arise from a situation in which the employee is terminated or quits because of lack of payment. Due to the fact recoveries are often small, the expense of hiring an attorney to file and pursue a lawsuit often exceeds the value of the claim, with the employee forced to make the economical decision not to enforce his or her rights.

Conversely, employers will be protected from frivolous lawsuits for nonpayment of wages since the employee will be required to pay the employer's legal fees when the employer is the prevailing party.

The source utilizes the same rationale to justify awarding attorney's fees to the prevailing party in a court action to compel compliance with the decision of an arbitrator or a grievance panel regarding disputes concerning a collective bargaining agreement, unless the other party has raised substantial issues involving complex or significant questions of law.

VW/tb 5/14/86 Senate Floor Analyses

EXHIBIT N

UNFINISHED BUSINESS

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1100 J Street, Suite 305 445-6614	Bill No.	SB 2570
	Author:	Lockyer (D)
	Amended:	8/14/86
	Vote Required:	Majority

Committee Votes:

Senate Floor Vote: P. 5893, 5/22/86

COMMITTEE: JUDICIARY		
BILL NO.:	SB 2570	
DATE OF HEARING:	5-6-86	
SENATORS:	AYE	NO
Doolittle		
Keene	✓	
Marks	✓	
Petris	✓	
Presley	✓	
Richardson	✓	
Roberti	✓	
Torres	✓	
Watson	✓	
Davis (VC)	✓	
Lockyer (Ch)	✓	
TOTAL:	10	0

Senate Bill 2570—An act to amend Section 1128 of, and to add Section 218.5 to, the Labor Code, relating to attorney's fees.
 Bill read third time.

Roll Call

The roll was called and the bill was passed by the following vote:
AYES (30)—Senators Alquist, Ayala, Bergeson, Beverly, Carpenter, Craven, Deddeh, Dills, Doolittle, Ellis, Leroy Greene, Hart, Keene, Lockyer, Marks, Mello, Morgan, Nielsen, Petris, Presley, Robbins, Roberti, Rosenthal, Royce, Russell, Seymour, Stiera, Torres, Vuich, and Watson.
NOES (0)—None.
 Bill ordered transmitted to the Assembly.

Assembly Floor Vote: 60-11, P. 8970, 8/14/86

SUBJECT: Attorney's fees

SOURCE: California Teamsters - Public Affairs Council

DIGEST: This bill would require courts to award attorney fees to a prevailing party in any action involving employment benefits (salary, pension fund, health benefits, etc.), or enforcement of an arbitrator's award as specified. The bill specifies that it does not apply to public employment, mechanics liens or actions brought by the Labor Commissioner. (See Analysis for details.)

Assembly Amendments exempt actions brought by the Labor Commissioner or involving mechanics liens.

ANALYSIS: Existing law permits the district attorney of any county to bring civil actions to enforce the payment of wages, and permits any wage claimant to sue directly for any wages or benefits which are due.

This bill would require the court to award reasonable attorney's fees and costs to the prevailing party in any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. The bill states it does not apply to public employment, mechanics liens or actions brought by the Labor Commissioner.

Existing law also provides that when a party to a collective bargaining agreement appeals the decision of an arbitrator regarding disputes concerning the collective bargaining agreement, the court shall award attorney's fees to the prevailing appellee unless the appellant has raised substantial issues involving complex or significant questions of law.

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This bill would expand the award of attorney's fees as outlined above to cover court actions to compel compliance with the decision or award of an arbitrator or grievance panel.

Purpose of Bill

The purpose of this bill is to provide that the burden of paying attorney's fees should in all fairness rest on the unsuccessful litigant in actions for nonpayment of wages and actions to compel compliance with the decision or award of an arbitrator or grievance panel.

FISCAL EFFECT: Appropriation: No Fiscal Committee: No Local: No

SUPPORT: (Verified 8/14/86)

California Teamsters - Public Affairs Council (source)

ARGUMENTS IN SUPPORT: The California Teamsters Union (source), argue that actions for nonpayment of wages usually involve relatively small amounts of money, since such suits arise from a situation in which the employee is terminated or quits because of lack of payment. Due to the fact recoveries are often small, the expense of hiring an attorney to file and pursue a lawsuit often exceeds the value of the claim, with the employee forced to make the economical decision not to enforce his or her rights.

Conversely, employers will be protected from frivolous lawsuits for nonpayment of wages since the employee will be required to pay the employer's legal fees when the employer is the prevailing party.

The source utilizes the same rationale to justify awarding attorney's fees to the prevailing party in a court action to compel compliance with the decision of an arbitrator or a grievance panel regarding disputes concerning a collective bargaining agreement, unless the other party has raised substantial issues involving complex or significant questions of law.

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ASSEMBLY FLOOR VOTE:

SENATE BILL NO. 2570 (Lockyer) - An act to amend Section 1123 of, and to add Section 218.5 to, the Labor Code, relating to attorney's fees.

Bill read third time, and presented by Assembly Member Harris.

ASSEMBLY JOURNAL

Bill passed by the following vote:

AYES—60

Agrios	Davis	Jones	Papan
Areias	Eaves	Katz	Peace
Bader	Elder	Kelley	Polanco
Bane	Farr	Killea	Robinson
Bates	Filante	Klehs	Rogers
Bradley	Floyd	La Follette	Roos
Bronzan	Grisham	Lancaster	Sher
Calderon	Hannigan	Leonard	Stirling
Campbell	Harris	Margolin	Tanner
Chacon	Hauser	McAlister	Tucker
Clute	Herger	McClintock	Vicencia
Condit	Hill	Mojonnier	Waters, Maxine
Connelly	Hughes	Molina	Wright
Cortese	Isenberg	Moore	Wyman
Costa	Johnston	O'Connell	Mr. Speaker

NOES—11

Allen	Felando	Frizzelle	Seastrand
Baker	Ferguson	Konnyu	Sebastiani
Brown, Dennis	Frazer	Mounjoy	

Bill ordered transmitted to the Senate.

VW/tb 8/15/86 Senate Floor Analyses

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EXHIBIT O

BILL ANALYSIS A 1-100

To Gov 3/18/86

DEPARTMENT Industrial Relations	AUTHOR Lockyer	BILL NUMBER SB 2570
SPONSORED BY Teamsters Union	RELATED BILLS Original	DATE LAST AMENDED 2/21/86

BILL SUMMARY

This bill requires the courts to award attorney's fees to the prevailing party in an action to collect wages, fringe benefits, health and welfare or pension fund contributions.

This bill also requires the court to award attorney's fees to the party prevailing in an action to enforce an arbitrator's award regarding a collective bargaining agreement unless substantial issues involving complex or significant questions of law are at issue.

BILL ANALYSIS

The portion of the bill that would require the courts to award attorney's fees to the prevailing party in any suit brought for wages, fringe benefits, and health and welfare and pension fund contributions is of concern to this Division.

The portion of the bill that refers to arbitration is not within the Division's scope of responsibility.

The Division filed 352 suits in 1985 for wages and is successful in most suits; only those claims that are determined to be valid and enforceable after an investigation or a hearing are accepted by the legal staff. The bill, as drafted, would result in the courts awarding far more attorney's fees to the Division than the Division would be required to pay on those few cases that are unsuccessful.

After discussion with the author's consultant and sponsor, it has been determined that it was not the intent to include governmental agencies, as the purpose of the bill is to award attorney fees only in private suits. The author intends to amend the bill accordingly.

FISCAL

The Division wins 85% of its suits. If the average attorney fee was \$500, approximately \$150,000 would be generated.

(continued)

Preparer's Initials: AJR

Portion of bill to be deleted for

PI-WH

STATE-MANDATED LOCAL PROGRAM		Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	\$ _____
OFFICIAL POSITION: Neutral <input checked="" type="checkbox"/>			GOVERNOR'S OFFICE USE	
Division Chief	Date	LIS - 12		
<i>Joseph H. Carby</i>	3/13/86			
DEPARTMENT DIRECTOR	DATE	<input type="checkbox"/> Position noted <input type="checkbox"/> Position approved <input checked="" type="checkbox"/> Position disapproved		
<i>James Moore</i>	3/4/86	871 _____		

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LEGISLATIVE HISTORY

The Teamsters Union is sponsoring the bill to cover the cost of obtaining wages and benefits from recalcitrant or slow paying employers. It is not intended to cover governmental agencies, including the Labor Commissioner.

RECOMMENDED POSITION

Neutral. If amended to exclude public agencies, the bill will no longer be within the scope of the Division's responsibility.

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EXHIBIT P

ASSEMBLY THIRD READING

SB 2570 (Lockyer) - As Amended: August 12, 1986

SENATE VOTE: 30-0

ASSEMBLY ACTIONS:

COMMITTEE	<u>L. & E.</u>	VOTE	<u>12-0</u>	COMMITTEE	<u>JUD.</u>	VOTE	<u>10-0</u>
	(Recommend Consent Calendar)						

Ayes:

Ayes:

Nays:

Nays:

DIGEST

Existing law:

- 1) Requires the Labor Commissioner to accept claims for the non-payment of wages and fringe benefits and to enforce statutes relating to failure to pay wages and benefits. The commissioner may hear claims and order payment on the basis of evidence presented. If the commissioner's decision is appealed, the claim is heard de novo in the municipal or superior court. If the appeal is unsuccessful, the party who filed the appeal must pay the other party's court costs and attorney's fees.
- 2) Provides that where a party to a collective bargaining agreement prevails in an action to compel arbitration of a dispute, the court shall award the party costs and attorney's fees unless the other party has raised complex or significant questions of law or of fact. Additionally, the court must award costs and attorney's fees to a prevailing appellee in an appeal of the decision of an arbitrator of a collective bargaining dispute unless the appellant raises complex or significant questions of law.

This bill requires the award of reasonable attorney's fees and costs to the prevailing party in any action for the nonpayment of wages, fringe benefits, or health, welfare, and pension fund contributions unless the action was brought by the commissioner. Attorney's fees and costs would be specifically excluded for unpaid wage actions involving a contractor's license bond or action to enforce a mechanics lien. The bill also requires the court to award attorney's fees to the prevailing party in an action to compel compliance with the decision of an arbitrator or grievance panel in a collective bargaining dispute.

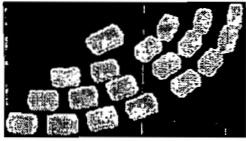
FISCAL EFFECT

None

Britton McFetridge
 445-2657
 8/14/86:ale

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EXHIBIT 1



LEGISLATIVE INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

DECLARATION OF MARIA A. SANDERS

I, Maria A. Sanders, declare:

I am an attorney licensed to practice in California, State Bar No. 092900, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Senate Bill 955 of 1991. Senate Bill 955 was approved by the Legislature and was enacted as Chapter 825 of the Statutes of 1991.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Senate Bill 955 of 1991. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

EXHIBIT A- SENATE BILL 955 OF 1991:

1. All versions of Senate Bill 955 (Torres-1991);
 2. Procedural history of Senate Bill 955 from the 1991-92
Senate Final History;
 3. Analysis of Senate Bill 955 prepared for the Senate
Committee on Industrial Relations;
 4. Material from the legislative bill file of the Senate
Committee on Industrial Relations on Senate Bill 955;
 5. Material from the legislative bill file of the Senate
Committee on Appropriations on Senate Bill 955;
 - a. Previously obtained material;
 - b. Up-to-date collection of material;
- +

6. Third Reading analysis of Senate Bill 955 prepared by the Office of Senate Floor Analyses;
7. Material from the legislative bill file of the Office of Senate Floor Analyses on Senate Bill 955;
 - a. Previously obtained material;
 - + b. Up-to-date collection of material;
8. Analysis of Senate Bill 955 prepared for the Assembly Committee on Labor and Employment;
9. Material from the legislative bill file of the Assembly Committee on Labor and Employment on Senate Bill 955;
 - a. Previously obtained material;
 - + b. Up-to-date collection of material;
10. Analysis of Senate Bill 955 prepared for the Assembly Committee on Ways and Means;
11. Material from the legislative bill file of the Assembly Committee on Ways and Means on Senate Bill 955;
12. Two Third Reading analysis of Senate Bill 955 prepared by the Assembly Committee on Labor and Employment;
13. Material from the legislative bill file of the Assembly Republican Caucus on Senate Bill 955;
 - a. Previously obtained material;
 - + b. Up-to-date collection of material;
14. Unfinished Business analysis of Senate Bill 955 prepared by the Office of Senate Floor Analyses;
15. Post-enrollment documents regarding Senate Bill 955.

EXHIBIT B- ASSEMBLY BILL 2139 OF 1991:

1. All versions of Assembly Bill 2139 (Lee-1991);
2. Procedural history of Assembly Bill 2139 from the 1991-92 Senate Final History;
3. Analysis of Assembly Bill 2139 prepared for the Assembly Committee on Labor and Employment;
4. Material from the legislative bill file of the Assembly Committee on Labor and Employment on Assembly Bill 2139;
5. Analysis of Assembly Bill 2139 prepared for the Assembly Committee on Ways and Means;
6. Material from the legislative bill file of the Assembly Committee on Ways and Means on Assembly Bill 2139;
7. Third Reading analysis of Assembly Bill 2139 prepared by the Assembly Committee on Labor and Employment;
8. Analysis of Assembly Bill 2139 prepared for the Senate Committee on Industrial Relations;
9. Third Reading analysis of Assembly Bill 2139 prepared by the Office of Senate Floor Analyses;

10. Material from the legislative bill file of the Office of Senate Floor Analyses on Assembly Bill 2139;
11. Governor's Veto Message on Assembly Bill 2139;
12. Post-enrollment documents regarding Assembly Bill 2139.

+ We have re-gathered these file materials and have noted this more recently accessed collection of documents as "up-to-date collection of material" in this declaration, which may duplicate documents previously gathered. It is not unusual for more materials to become publicly available after our initial research of legislation so our research protocols compel us to re-access a file to determine if additional documents are available.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 20th day of December, 2010 at Woodland, California.



MARIA A. SANDERS

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EXHIBIT 2



LEGISLATIVE INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

DECLARATION OF MARIA A. SANDERS

I, Maria A. Sanders, declare:

I am an attorney licensed to practice in California, State Bar No. 092900, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service undertook to locate and obtain all documents relevant to the enactment of Senate Bill 2570 of 1986. Senate Bill 2570 was approved by the Legislature and was enacted as Chapter 1211 of the Statutes of 1986.

The following list identifies all documents obtained by the staff of Legislative Intent Service on Senate Bill 2570 of 1986. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service. In compiling this collection, the staff of Legislative Intent Service operated under directions to locate and obtain all available material on the bill.

SENATE BILL 2570 OF 1986:

1. All versions of Senate Bill 2570 (Lockyer-1986);
2. Procedural history of Senate Bill 2570 from the 1985-86 Senate Final History;
3. Analysis of Senate Bill 2570 prepared for the Senate Committee on Judiciary;
4. Document from the legislative bill file of the Senate Committee on Judiciary on Senate Bill 2570;
5. Third Reading analysis of Senate Bill 2570 prepared by the Office of Senate Floor Analyses;
6. Material from the legislative bill file of the Office of Senate Floor Analyses on Senate Bill 2570;

7. Analysis of Senate Bill 2570 prepared for the Assembly Committee on Labor and Employment;
8. Material from the legislative bill file of the Assembly Committee on Labor and Employment on Senate Bill 2570;
 - a. Previously obtained material;
 - b. Up-to-date collection of material;
9. Two analyses of Senate Bill 2570 prepared for the Assembly Committee on Judiciary;
10. Material from the legislative bill file of the Assembly Committee on Judiciary on Senate Bill 2570;
11. Third Reading analysis of Senate Bill 2570 prepared by the Assembly Committee on Labor and Employment;
12. Material from the legislative bill file of the Assembly Republican Caucus on Senate Bill 2570;
13. Unfinished Business analysis of Senate Bill 2570 prepared by the Office of Senate Floor Analyses;
14. Legislative Counsel's Rule 26.5 analysis of Senate Bill 2570;
15. Material from the legislative bill file of Senator Bill Lockyer on Senate Bill 2570;
16. Post-enrollment documents regarding Senate Bill 2570;
17. Press Release #754 issued by the Office of the Governor on September 26, 1986 to announce that Senate Bill 2570 had been signed;
18. Material from the file of the Legislative Representative of the State Bar of California on Senate Bill 2570;
19. Excerpt regarding Senate Bill 2570 from the 1986 Summary Digest of Statutes Enacted and Resolutions Adopted prepared by Legislative Counsel.

We have re-gathered these file materials and have noted this more recently accessed collection of documents as "up-to-date collection of material" in this declaration, which may duplicate documents previously gathered. It is not unusual for more materials to become publicly available after our initial research of legislation so our research protocols compel us to re-access a file to determine if additional documents are available.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of December, 2010 at Woodland, California.



MARIA A. SANDERS

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 Moscowitz, P.C.

On January 18, 2011, I served the within Appellants' Motion to take Judicial Notice of Documents 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:

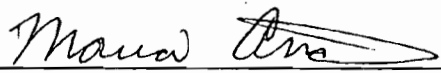
Robert Rediger, Esq. Laura C. McHugh, Esq. Jimmie E. Johnson, Esq. Rediger, McHugh & Owensby, LLP 555 Capitol Mall, Suite 1240 Sacramento, CA 95814	Honorable Loren E. McMaster Sacramento Superior Court 720 Ninth Street Sacramento, CA 95814
Appellate Coordinator Office of the Attorney General 300 S. Spring 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 January 18, 2011.



Maria Anderson

