Case Number S185827

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ANTHONY KIRBY et al.

Plaintiffs and Appellants,

vs.

IMMOOS FIRE PROTECTION, INC.,

Defendant and Respondent,

Petition for Review of a Decision of the Court of Appeal

Third Appellate District Case Number C062306

RESPONDENT'S REQUEST FOR JUDICIAL NOTICE

Robert L. Rediger, Esq. (CA State Bar No. 109392)
Laura C. McHugh, Esq. (CA State Bar No. 180930)
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IMMOOS FIRE PROTECTION, INC.

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IMMOOS FIRE PROTECTION, INC.

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INTRODUCTION

Pursuant to Evidence Code section 459, and California Rules of Court 8.252 and 8.520, Respondent IMMOOS FIRE PROTECTION, INC. (hereinafter "Respondent") moves this Court to take judicial notice of the court filings listed below. Said documents are relevant to the determination of whether the underlying petition for review satisfies California Rule of Court 8.520 as they establish 1) that Respondent did request an attorneys' fee award in its answer prayer; and 2) Appellants did not timely raise issues at the Court of Appeal which they now seek review from the Supreme Court.

Exhibit A was presented to the trial court as it was Respondent's Answer to the underlying complaint. It was not presented to the Court of Appeal as the question of whether Respondent requested an attorneys' fees award within its answer prayer was not timely raised to the Court of Appeal. It does no relate to proceedings occurring after the judgment that is the subject of the appeal.

Exhibit B was not presented to the trial court, but was presented to the Court of Appeal, as it was Petitioners' opening brief to the Court of Appeal. It does relate to proceedings occurring after the judgment that is the subject of the appeal.

Exhibits A and B are true and correct copies of the documents which were filed with the trial court and Court of Appeal, respectively.

The documents are described and indicated, under penalty of perjury, to be true and correct copies of the originals in the declaration of Respondent's counsel, Jimmie E. Johnson, included herein. Respondent requests this Court take judicial notice of the following documents:

Exhibit A: Defendant Immoos Fire Protection, Inc's Answer to First Amended Complaint for Unfair Business Practices, Violations of Labor Code, Injunction, and Attorney's Fees (Sacramento Superior Court, Case No. 07AS00032).

Exhibit B: Appellant's Opening Brief (Third District Court of Appeal, Case No. C062306).

This motion is based upon the instant motion, the memorandum or points and authorities, and the declaration of Respondent's counsel, Jimmie E. Johnson, included herein.

DATED: September 15, 2010

REDIGER, McHUGH & OWENSBY, LLP

By _____
JIMMIE E. JOHNSON
Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION FOR JUDICIAL NOTICE

Evidence Code section 459 provides reviewing courts the same power to take judicial notice of documents as trial courts under Evidence Code sections 450 *et seq.* (Evid. Code, § 459.) In turn, Evidence Code section 452, subdivision (d) (hereinafter "Section 452(d)") provides that a court may take judicial notice of "[r]ecords of [] any court of this state...." Pursuant to Section 452(d), a reviewing court may take judicial notice of those documents in the reviewing court's case file, as well as those documents filed in the case in the lower courts. (*Saltares v. Kristovich* (1970) 6 Cal.App.3d 504, 511.)

California Rule of Court 8.520 requires that any request for judicial notice to the Supreme Court comply with the requirements set forth in California Rule of Court 8.252, subdivision (a) (hereinafter "Rule 8.252(a)"). (Cal. R. Court, § 8.520, subd. (g).) In turn, Rule 8.252(a) requires that any judicially–noticed document be relevant to the appeal – or in this case, the petition for review. (Cal. Rules of Court, rule 8.252, subd. (a)(2)(A).) To this end, Petitioners claim in their underlying petition for review that Respondent failed to request an award of attorneys' fees within its Answer. Exhibit A, Respondent's Answer to the underlying complaint, evidences that Respondent did in fact request an attorneys' fees award. In addition, Petitioners have presented questions for review to this Court

which they did not timely make to the Court of Appeal below. Exhibit B, Petitioners' opening brief to the Court of Appeal evidences that Petitioners did not timely make these arguments.

Therefore, whereas the court filings subject to the instant motion for judicial notice are relevant to the underlying petition for review, and whereas this Court is empowered to take judicial notice of such court filings, this Court should take judicial notice of said documents.

DATED: September 15, 2010

Respectfully submitted,

REDIGER, McHUGH & OWENSBY, LLP

By _____
JIMMIE E. JOHNSON
Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

DECLARATION OF JIMMIE E. JOHNSON IN SUPPORT OF RESPONDENT'S MOTION FOR JUDICIAL NOTICE

I, JIMMIE E. JOHNSON, declare:

1. I am an attorney admitted to practice in the state of California, and am one of the attorneys of record representing the Respondent, IMMOOS FIRE PROTECTION, INC., in this petition for review.

2. I make this declaration in support of the instant motion for judicial notice.

3. The following documents are true and correct copies of the original documents filed in their respective courts in the underlying matter:

Exhibit A: Defendant Immoos Fire Protection, Inc's Answer to First Amended Complaint for Unfair Business Practices, Violations of Labor Code, Injunction, and Attorney's Fees (Sacramento Superior Court, Case No. 07AS00032).

Exhibit B: Appellant's Opening Brief (Third District Court of Appeal, Case No. C062306).

I declare under penalty of perjury that the foregoing is true and correct and that I could competently testify thereto if called upon to do so.

Executed this 15th day of September 2010, at Sacramento, California.

JIMMIE E. JOHNSON

EXHIBIT A

Robert L. Rediger, Esq. (Bar No. 109392)
REDIGER, McHUGH & HUBBERT, LLP
555 Capitol Mall, Suite 1240
Sacramento, California 95814
Telephone: (916) 442-0033
Facsimile: (916) 498-1246

Attorneys for Defendant,
IMMOOS FIRE PROTECTION, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

ANTHONY KIRBY and RICK LEECH, JR., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

IMMOOS FIRE PROTECTION, INC. and DOES 1 to 750, inclusive,

Defendants.

CASE NO. 07AS00032

DEFENDANT IMMOOS FIRE PROTECTION, INC.'S ANSWER TO FIRST AMENDED COMPLAINT FOR UNFAIR BUSINESS PRACTICES, VIOLATIONS OF LABOR CODE, INJUNCTION, AND ATTORNEY'S FEES

The Defendant, IMMOOS FIRE PROTECTION, INC., answers the unverified First Amended Complaint dated August 29, 2007, and containing seven (7) causes of action on file herein as follows:

In accordance with Code of Civil Procedure section 431.30(d), the Defendant denies generally each and all of the allegations contained in the Complaint and each purported cause of action therein and without limiting the generality of the foregoing, denies that the Plaintiffs have been damaged in the amount of money therein alleged, or in any amount, or at all, by reason of any act or omission of the Defendant.

///

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses to the separate causes of action set forth in the First Amended Complaint, the Defendant alleges as follows:

AFFIRMATIVE DEFENSES TO THE FIRST CAUSE OF ACTION
(California Business and Professions Code § 17200)

1. One or more of the Plaintiffs may have failed to mitigate the damages he or she alleges to have suffered as a result of any acts of the Defendant and/or if one or more of the Plaintiffs sustained any damage as a result of any conduct alleged in the Complaint, the Defendant is entitled to an offset to the extent he or she received income and/or benefits from other sources.

2. The Workers' Compensation Act, California Labor Code section 3200, *et seq.*, may provide the exclusive remedy for some or all of the Plaintiffs' claimed injuries.

3. One or more of the Plaintiffs may have failed to exhaust notice and administrative procedures, including but not limited to those required by Labor Code section 2699.3.

4. The Defendant engaged in the just and proper exercise of management discretion in dealing with the Plaintiffs.

5. The allegations of this cause of action constitute a misjoinder of parties to the extent the Plaintiffs seek to proceed against unnamed defendants in their individual or personal capacities.

6. The Plaintiffs have failed to allege facts sufficient to state a claim for injunctive relief and/or one or more of the Plaintiffs have an adequate remedy at law.

7. The Plaintiffs may not proceed as representatives of a class because they are unable to satisfy the requirements for class certification, including those set forth in California Code of Civil Procedure section 382.

8. One or more of the Plaintiffs may have engaged in misconduct which, if known to the Defendant, would have resulted in the termination of his or her employment.

9. The Plaintiffs' claims for equitable relief are barred by the doctrines of unclean hands, waiver, estoppel, laches, consent, mootness and/or release.

10. Some or all of the time for which one or more of the Plaintiffs claim compensation is not work time for which compensation was due.

11. One or more of the Plaintiffs lack standing to bring this action.

12. The Plaintiffs have failed to state facts sufficient to constitute a cause of action alleging a violation of the California Business and Professions Code section 17200.

AFFIRMATIVE DEFENSES TO THE SECOND CAUSE OF ACTION
(California Labor Code sections 201, 203 and 204 – Payment of Wages)

13. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11 as affirmative defenses to the Second Cause of Action.

14. The Plaintiffs' claims for waiting time penalties and/or other penalties are barred because the Defendant did not willfully fail to pay one or more of the Plaintiffs any wages.

15. The Plaintiffs have failed to state facts sufficient to state cause of action alleging the unlawful payment of wages under the California Labor Code sections 201, 203 and/or 204.

AFFIRMATIVE DEFENSES TO THE THIRD CAUSE OF ACTION
(California Labor Code sections 204.3 and 510 and IWC Wage Order 16-2001 – Overtime Pay)

16. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11, and 14, as affirmative defenses to the Third Cause of Action.

17. The Plaintiffs have failed to state facts sufficient to constitute a cause of action for unpaid overtime under the California Labor Code sections 204.3 and 510 and/or the Industrial Welfare Commission Wage Order 16-2001.

AFFIRMATIVE DEFENSES TO THE FOURTH CAUSE OF ACTION
(California Labor Code section 223 – Secret Payment of Lower Wages)

18. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11, and 14, as affirmative defenses to the Fourth Cause of Action.

19. The Plaintiffs have failed to state facts sufficient to constitute a cause of action alleging a violation under California Labor Code section 223 for the secret payment of lower wages.

AFFIRMATIVE DEFENSES TO THE FIFTH CAUSE OF ACTION
(California Labor Code section 226 – Itemized Wage Statements)

20. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11, and 14, as affirmative defenses to the Fifth Cause of Action.

21. The Plaintiffs have failed to state facts sufficient to constitute a cause of action alleging a violation under California Labor Code section 226 for inaccurate itemized wage statements.

AFFIRMATIVE DEFENSES TO THE SIXTH CAUSE OF ACTION
(IWC Wage Order 16-2001 – Meal and Rest Periods)

22. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11, and 14, as affirmative defenses to the Sixth Cause of Action.

23. The Plaintiffs have failed to state facts sufficient to constitute a cause of action alleging unlawful failure to provide meal and rest periods under IWC Wage Order 16-2001.

AFFIRMATIVE DEFENSES TO THE SEVENTH CAUSE OF ACTION
(Labor Code Section 2810- Against Does 1-750)

24. The Defendant hereby incorporates by reference and realleges the affirmative defenses numbered 1 through 11, and 14, as affirmative defenses to the Seventh Cause of Action to the extent the Plaintiffs incorporate all of the allegations of their of their First Amended Complaint herein.

WHEREFORE, the Defendant prays for judgment as follows:

1. The Plaintiffs take nothing by their action;

2. The Complaint be dismissed in its entirety;

3. The Defendant be awarded their reasonable fees and costs;

4. The Defendant be awarded interest on all sums as provided by law;

5. For such other and further relief as the court may deem just and proper.

DATED: September 13, 2007.

REDIGER, McHUGH & HUBBERT, LLP

By _____
ROBERT L. REDIGER
Attorney for Defendant,
IMMOOS FIRE PROTECTION, INC.

PROOF OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On September 13, 2007, I served the within **DEFENDANT IMMOOS FIRE PROTECTION, INC.'S ANSWER TO FIRST AMENDED COMPLAINT FOR UNFAIR BUSINESS PRACTICES, VIOLATIONS OF LABOR CODE, INJUNCTION, AND ATTORNEY'S FEES** in *Anthony Kirby, et al. v. Immoos Fire Protection, Inc., et al.*; Sacramento County Superior Court Case No. 07AS00032 by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Kathy Roberts, Esq.
LAW OFFICES OF ELLYN MOSCOWITZ
8400 Enterprise Way, Suite 201
Oakland, CA 94621

XXXX **and placing the same with postage thereon fully prepaid in the designated area for outgoing mail. I am readily familiar with Rediger, McHugh & Hubbert, LLP's practice of collecting and processing correspondence whereby the mail is sealed, given the appropriate postage and placed in a designated mail collective area. Each day's mail is collected and deposited with the United States Postal Service after the close of each day's business.**

_____ by placing a true copy thereof in a Federal Express envelope/box for overnight delivery in the receptacle located at 555 Capitol Mall, Sacramento, California 95814; Airbill No. _____.

_____ Facsimile No. _____

_____ Certified Mail No. _____

_____ By personal service at address above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of September 2007, at Sacramento, California.

LORRAINE L. RENFROE

EXHIBIT B

Case No. C062306

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Anthony Kirby et al.,

Plaintiffs and Appellants,

vs.

Immoos Fire Protection System,

Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT FOR SACRAMENTO COUNTY

HONORABLE LOREN E. MCMASTER, JUDGE

CASE NO. 07AS00032

APPELLANT'S OPENING BRIEF

LAW OFFICES OF ELLYN MOSCOWITZ
ELLYN MOSCOWITZ (SBN 129287)
ENRIQUE GALLARDO (SBN 191670)
1629 TELEGRAPH AVE, 4TH FLOOR
OAKLAND, CA 94612
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ATTORNEYS FOR PLAINTIFFS AND APPELLANTS
ANTHONY KIRBY AND RICK LEACH, JR.

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TABLE OF AUTHORITIES

Cases

Other Authorities

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C062306
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Ellyn Moscowitz, SBN 129287 — Law Offices of Ellyn Moscowitz 1629 Telegraph Avenue, 4th Floor Oakland, CA 94612 TELEPHONE NO.: 510-899-6240 FAX NO. (Optional): 510-899-6245 E-MAIL ADDRESS (Optional): emoscowitz@moscowitzlaw.com ATTORNEY FOR (Name): Appellant/Plaintiffs Anthony Kirby et al.	Superior Court Case Number: 07AS00032
APPELLANT/PETITIONER: Anthony Kirby, et al. RESPONDENT/REAL PARTY IN INTEREST: Immoos Fire Protection System	FOR COURT USE ONLY

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Appellant/Plaintiffs Anthony Kirby, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (Explain):
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 3, 2009

Ellyn Moscowitz
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

Case No. C062306

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Anthony Kirby et al.,

Plaintiffs and Appellants,

vs.

Immoos Fire Protection System,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

INTRODUCTION

Plaintiffs Anthony Kirby and Rick Leech, Jr. (collectively "Plaintiffs") appeal the order of the trial court awarding Defendant Immoos Fire Protection System ("Immoos") attorney's fees and costs for defending the First, Sixth and Seventh Causes of Action of the lawsuit before the trial court, and awarding Immoos its attorney's fees for bringing the motion for attorney's fees. As will be demonstrated below, Immoos cannot receive attorney's fees for defending any of the causes of action, as all of the causes of action were governed by statutes that do not allow for a defendant or an employer to collect attorney's fees.

As demonstrated below, most of the claims in Plaintiffs' lawsuit sought recovery of unpaid statutorily-mandated wages or overtime compensation. California's clearly stated public policy is to encourage employees to enforce such claims for unpaid statutorily-mandated wages and overtime. The Legislature implemented this public policy by applying unilateral fee-shifting provisions to these claims through Labor Code section 1194, so that only employees, not employers, may receive attorney's fees and costs of suit.

Additionally, all of the rest of Plaintiffs' claims – seeking recovery of something other than unpaid wages – are themselves subject to unilateral fee-shifting provisions that do not allow for defendants or employers to recover attorney's fees. These include claims against unlawful and unfair business practices in violation of the unfair competition law ("UCL" – Business and Professions Code § 17200 *et seq.*), claims based on the failure to provide accurate itemized wage statements (Labor Code section 226) and claims against other defendants under Labor Code section 2810. California also has clear public policy preventing defendants or employers from recovering attorney's fees for defending claims based on these statutes.

Therefore, an award of attorney's fees to Immoos for defending any of Plaintiffs' claims contravenes the express public policy of California. Such an award would chill the ability of plaintiff employees from enforcing statutes that the Legislature established with unilateral fee-shifting provisions. Such an award effectively punishes workers who only seek their unpaid statutorily-mandated wages and other statutory rights. More importantly, an award of attorney's fees to Immoos is in direct conflict with the unilateral fee-shifting provisions in the statutes.

Additionally, as will be demonstrated below, Immoos was not a party to the Seventh Cause of Action and therefore cannot receive attorney's fees for defending that cause of action.

Finally, Immoos cannot recover attorney's fees or costs for any action where fees and costs are recoverable under Labor Code section 1194.

Therefore, this court should reverse the trial court's order granting Immoos any attorney's fees or costs. This court should find that Immoos may not receive any attorney's fees or costs.

STATEMENT OF FACTS

Plaintiffs Anthony Kirby and Rick Leech, Jr. (collectively "Plaintiffs") were employees of Defendant Immoos Fire Protection System ("Immoos"). Plaintiffs sued Immoos for unlawful and unfair business practices in violation of the unfair competition law ("UCL" – Business and Professions Code § 17200 *et seq.*) and for violations of various provisions of wage and hour law contained in the California Labor Code and California Industrial Welfare Commission Order No. 16-2001 ("Wage Order 16"). (*See* 1 JA 1-36).

In a separate cause of action, Plaintiffs sued Doe Defendants (the Complaint was later amended to identify defendants Shea Homes, Inc., Hilbers, Inc., Meritage Homes of California, Inc., and D.R. Horton, Inc. – Sacramento (collectively "2810 Defendants") for violations of Labor Code § 2810. (*See* 1 JA 14-15, 1 JA 29-31, 1 JA 35-42)

Plaintiffs settled their claims with the 2810 Defendants, who were the entities that contracted with Defendant Immoos for labor services, thus obtaining the relief sought in the complaint. (*See* 1 JA 43-50, 1 JA 54-55.) Since Plaintiffs obtained the relief they were seeking, Plaintiffs dismissed the complaint with prejudice. (See 1 JA 62-63, 3 JA 394.)

A. The Trial Court Awards Immoos Attorney's Fees.

Immoos moved for their attorney's fees. (*See* 3 JA 418.) The trial court found that Immoos was the prevailing party. (*See* 3 JA 418.) Pursuant to Labor Code section 218.5 (*see* 3 JA 419), the trial court awarded Immoos thirty percent of its attorney's fees. (*See* 3 JA 420.) The trial court also awarded Immoos 100% of the fees on the moving papers, reply and hearing on its attorney's fees motion. (*See id.*) The trial court awarded thirty percent of Immoos' attorney's fees based on an apportionment where it found that Immoos was entitled to recover attorney's fees only for its defense of the 1st, 6th and 7th causes of action. (*See id.*)

The trial court found that Immoos could not recover attorney's fees for the 2nd, 3rd and 4th causes of action, as all of these claims involved the failure to pay wages or the correct overtime, such that Labor Code section 1194 provided for an award of attorney's fees only to an employee. (*See* 3 JA 419.) The trial court found that Immoos could not recover attorney's fees for the 5th cause of action because it was based on Labor Code section 226, which contained a one-way fee shifting provision which precluded an employer from collecting attorney's fees. (*See id.*)

Thus, the trial court awarded Immoos $49,846.05 in attorney's fees (including $4,426.50 for preparing the attorney's fees motion and 30% of its total attorney's fees (*see* 2 JA 78)) and $5,355.13 in costs. (*See* 3 JA 425.) This appeal followed. (*See* 3 JA 415.)

LEGAL ARGUMENT

THE TRIAL COURT'S ORDER AWARDING IMMOOS ATTORNEY'S FEES MUST BE REVERSED AS NONE OF THE

CLAIMS AGAINST IMMOOS ALLOW FOR A DEFENDANT TO COLLECT ATTORNEY'S FEES.

There is no basis for an award of fees to Immoos, as all of the plaintiffs' claims against Immoos were based on statutes, or involved claims, that do not allow for an employer or a defendant to collect attorney's fees. As a general rule, a party can recover attorney's fees only when fees are provided for by statute or by agreement of the parties. (*See Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 294 [67 Cal.Rptr.2d 621].) The trial court awarded Immoos attorney's fees for its defense of the First, Sixth, and Seventh Causes of Action pursuant to Labor Code section 218.5 (*See* 3 JA 418-419, 421.) Labor Code section 218.5 provides that:

> In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable 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.

Although section 218.5 provides a basis by which a defendant could be awarded fees in an action involving wages or fringe benefits, Plaintiffs will demonstrate below that each of their claims was governed by a statute that supersedes section 218.5 and does not allow for a defendant or employer to recover attorney's fees. Thus, Immoos is not entitled to any attorney's fees.

The interpretation of attorney's fees statutes and their application to the circumstances of a case are questions of law, subject to independent review on appeal. (*See Californians for Population Stabilization v. Hewlett-Packard Co. supra*, 58 Cal.App.4th at 294.) Similarly, the choice of application of the appropriate Labor Code section to a particular circumstance governing an award of attorney's fees is a question of law.

(*See Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 [95 Cal.Rptr.2d 57].)

A. Immoos Cannot Recover Attorney's Fees for Defending the First Cause of Action because the Unfair Competition Law Does Not Provide for an Attorney's Fees Award to a Defendant.

The major purpose of California's Unfair Competition Law, Business and Professions Code section 17200 *et seq.* ("UCL"), is preservation of fair business competition. (*See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548].) Pursuant to this purpose, the relief for an action based on the UCL is limited to injunctive relief and restitution and the UCL does not provide for attorney's fees. (*See id.*) A prevailing plaintiff in an UCL claim may only recover fees as a private attorney general pursuant to Code of Civil Procedure section 1021.5, while there are no provisions for attorney's fees for a prevailing defendant. (*See Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1179 [121 Cal.Rptr.2d 79]). This fee-shifting provision is designed to advance the public policy of encouraging private enforcement of the UCL. (*See id.* at 1180.)

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1. A defendant may recover attorney's fees for defense of claims where plaintiffs sought recovery based outside of the UCL.

It is settled law that the UCL does not provide for attorneys fees for a defendant – the trial court appears to accept this by citing the *Walker* case for the proposition that a defendant cannot recover attorney's fees. (*See* 3

JA 420.) However, the trial court appears to base the award of attorney's fees for the First Cause of Action on the following rational:

> [T]he 1st cause of action also incorporated allegations of failure to provide rest periods (6th cause of action) and for the parallel allegations from the 7th cause of action, pursuant to Labor Code 2810.

(*See id.*)

It is true that a defendant can recover attorney fees if a plaintiff, as part of (or more appropriately, in addition to) a UCL cause of action, also seeks recovery under another statute or theory:

> A defendant, however, may recover attorney fees if the plaintiff alleged or prosecuted a non-unfair-competition-law *theory of recovery* permitting the prevailing party to recover attorney fees.

(*Walker*, 98 Cal.App.4th at 1179 (emphasis added)).

Plaintiffs cited *Walker* and argued that attorney's fees were unavailable for the First Cause of Action, as the theories of recovery alleged did not allow for attorney's fees for a defendant. (*See* 3 JA 365.) Plaintiffs did allege violations of several laws as *predicate* actions to prove a UCL violation. However, as demonstrated below, plaintiffs never sought any recovery based on these predicate violations in the First Cause of Action; Plaintiffs sought recovery only under the UCL.

2. Plaintiffs sought recovery based only on the UCL in the First Cause of Action; therefore, Immoos is not entitled to attorney's fees for defending this cause of action.

The UCL prohibits *unlawful* business practices. Therefore, violations of various statutes are often alleged as the basis of proving the predicate "unlawful" business practices. Here, as part of the First Cause of

Action and predicate to proving a UCL claim, Plaintiffs alleged that Immoos committed unlawful acts by violating a number of statutes, including California Industrial Welfare Commission Wage Order No. 16-2001 (rest periods) and Labor Code section 2810. (*See* 1 JA 8, 23-24.) These violations are described as the "unlawful predicate acts" to prove a violation of the UCL. (*See* 1 JA 8, 24.) However, all remedies are sought pursuant to the UCL. (*See* 1 JA 9, 24-25.) No remedies were sought in the First Cause of Action pursuant to Wage Order No. 16-2001 or Labor Code section 2810. (*See id.*)

Plaintiffs did seek "wages unlawfully withheld" and "unpaid wages, unpaid overtime" in the First Cause of Action, but the prayer for relief is clear that the unpaid wages are sought in the form of restitution under the UCL. (*See* 1 JA 9, 24-25.) No other statute or basis of recovery besides the UCL is mentioned in the prayer for relief for the First Cause of Action. (*See* 1 JA 9, 24-25.)

In any case, claims for "wages unlawfully withheld," "unpaid wages" and "unpaid overtime" also do not allow for recovery of attorney fees by a defendant, as these claims for statutorily-mandated wages are subject to Labor Code section 1194, which allows only for an employee to collect attorney's fees, as will be shown in Sections I.C.1., I.C.2 below.

The trial court cited claims based on the failure to provide rest breaks and on Labor Code section 2810 as being "incorporated" into the First Cause of Action. (*See* 3 JA 420.) However, Plaintiffs included these claims in separate Causes of Action (the Sixth and Seventh Causes of Action) with their own prayers for relief. (*See* 1 JA 13-15, 29-31.) It would be redundant and illogical for Plaintiffs to seek recovery for missed rest breaks and for violations of Labor Code section 2810 in the First Cause of Action, when the recovery for these claims is clearly sought in the Sixth and Seventh Causes of Action. Plaintiffs did not seek recovery for missed

rest breaks or for violations of Labor Code section 2810 in the First Cause of Action under any theory of recovery except that of the UCL

In any case, Plaintiffs will demonstrate that Labor Code section 2810 is also subject to a unilateral fee-shifting provision that does not allow employers or defendant to collect attorney fees. (*See* Sections I.B.1, I.B.2 below.) Plaintiffs will also demonstrate that unpaid premium pay required for missed rest breaks constitute unpaid statutorily-mandated wages governed by Labor Code section 1194, which does not allow for recovery of attorney fees by defendants and employers. (*See* Sections I.C, I.C.1, I.C.2 below.)

The First Cause of Action is not an "action brought for the nonpayment of wages, fringe benefits, or health or welfare or pension fund contributions." (*See* Labor Code section 218.5.) Attorney fees cannot be awarded under section 218.5 for defense of the First Cause of Action. Rather, the First Cause of Action is an action seeking to remedy unfair competition, and seeking restitution as the *only* remedy for the unfair competition.

This situation is similar to that considered in *Californians for Population Stabilization v. Hewlett-Packard Co, supra*, 58 Cal.App.4th at 295, where the court properly found that a plaintiff could not recover fees pursuant to section 218.5, as the plaintiff did allege Labor Code violations predicate to proving unlawful business practices, but the court found plaintiff did not bring an action for the nonpayment of wages, but brought an unfair competition claim and sought only recovery under the UCL. Immoos cannot recover fees for the First Cause of Action, as Plaintiffs only sought recovery under the UCL, which does not allow for attorneys fees to defendants.

B. Immoos Cannot Recover Costs or Attorney's Fees for the Seventh Cause of Action because Immoos Was Not a Party to this Cause of Action.

A defendant cannot recover costs or attorney's fees for defending a claim if it is not a party to the claim. The trial court awarded costs and attorney's fees to Immoos based on Labor Code section 218.5 (*See* 3 JA 418), which calls for attorney's fees to be awarded to any prevailing *party* in an action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. However, as Plaintiffs argued to the trial court, Immoos could not receive attorney's fees as it "was not the prevailing party for the Seventh Cause of Action because it was never a party to that claim." (*See* 3 JA 363.) Immoos therefore cannot be awarded fees under section 218.5 for defending this cause of action, as it was not a prevailing party to the cause of action.

Plaintiffs did not name Immoos as a defendant to the Seventh Cause of Action in any of their Complaints. Both the Class Action Complaint for Unfair Business Practices, Violations of Labor Code, Injunction and Attorneys' Fees ("Complaint") and the First Amended Complaint for Unfair Business Practices, Violations of Labor Code, Injunction and Attorneys' Fees (FAC) clearly state in the heading to the Seventh Cause of Action (alleging violation of Labor Code section 2810) that the Seventh Cause of Action was against Does 1-750 *only*. (*See* 1 JA 14, 29 (emphasis added).) The complaints allege that Does 1-750 violated Labor Code section 2810(a) by contracting *with* Immoos for labor or services because they knew or should have known that the contract did not provide for funds sufficient to comply with labor laws. (*See* 3 JA 14-15, 30-31.) At no point in the Seventh Cause of Action did the complaints name Immoos as a

defendant to the Seventh Cause of Action. (*See* 3 JA 14-15, 29-31.) Plaintiffs never communicated to the trial court in any other filing that Immoos was a party to the Seventh Cause of Action.

If Immoos believed that it had vital interests at stake in the Seventh Cause of Action, such that it wanted to expend attorney's fees in defending these interests, it should have attempted to intervene in this cause of action. Immoos did not seek to intervene. As Immoos was not even a party to the Seventh Cause of Action, it cannot be a "prevailing party" under section 218.5 and cannot recover attorney's fees for this Cause of Action.

1. Even if Immoos were a party to the Seventh Cause of Action, it could not recover attorney's fees because the claim was based on a statute containing a unilateral fee-shifting provision.

Immoos was not a party to the Seventh Cause of Action and Plaintiffs do not contend otherwise. However, even if Immoos were a party, it could not recover attorney's fees for defense of the Seventh Cause of Action, as Labor Code section 2810, upon which the cause of action was based, only provides for recovery of attorney fees by an aggrieved employee.

Labor Code section 2810(g) provides that an *employee aggrieved* by a violation of section 2810(a) may file an action for damages or statutorily designated penalties and upon prevailing, may recover costs and attorney's fees. This section of the Labor Code does not provide for recovery by any other party. In the Seventh Cause of Action, Plaintiffs sought only statutory penalties and attorneys' fees pursuant to this section of the Labor Code. (*See* 3 JA 15-16, 31.) There is no other basis on which Immoos, if it

were a party to this claim, could base recovery of fees, except by claiming recovery pursuant to section 218.5.

2. When one statute allows for fees for a prevailing defendant, but the action is also governed by a statute which contains a unilateral fee-shifting provision, fees for defense of that action are precluded.

The court in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 [95 Cal.Rptr.2d 57] considered whether Labor Code section 218.5 or Labor Code section 1194 controlled the awarding of attorneys fees in a case involving unpaid overtime. (*See id.* at pp. 1426-47.) Section 1194(a) provides that:

> Notwithstanding any agreement to work for a lesser wage, 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 this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit

The *Earley* court reasoned that the only reasonable interpretation that would avoid nullification of section 1194 would be to bar employers from relying on section 218.5 to recover fees for minimum wages or overtime, which were the more specific subject matters of section 1194. (*See Earley*, 26 Cal.App.4th at 1429-30). The *Earley* court found that the unilateral fee-shifting provisions of section 1194 should apply as they constituted "a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." (*See id.* at 1429-30). The court also pointed out that section 1194 was enacted after section 218.5, so that as the latter enacted and more specific

statute, section 1194 would supersede section 218.5 as a matter of statutory construction. (*See id* at 1430, n.9).

Therefore, even if Immoos were a party to the Seventh Cause of Action, it could not receive attorneys fees as the claims under Labor Code section 2810 are subject to a unilateral fee shifting provision. (*See* Labor Code section 2810(g). Unilateral fee-shifting provisions – like the one found in Labor Code section 2810 – allowing a prevailing plaintiff employee to recover fees but not a prevailing defendant employer, are deliberately created by legislators to encourage more effective enforcement of important public policies. (*See Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 504 [14 Cal.Rptr.3d 467].) The public policy implicit in unilateral fee-shifting provisions is to encourage injured parties to broadly and effectively enforce the statutes "in situations where they otherwise would not find it economical to sue." (*Id.* quoting *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal. App.3d 318, 325 [223 Cal. Rptr. 766].)

Section 2810 and its unilateral fee-shifting provision codify the public policy of encouraging aggrieved employees to seek redress against entities that enter into contracts for labor services who know, or should know, that that the contract does not contain funds sufficient to allow the contractor to comply with all applicable local, state or federal laws or regulations governing the labor or services. (*See* Labor Code section 2810(a).) This is a more specific purpose than the "general provisions of section 218.5" governing wage claims. (*See Earley, supra*, 79 Cal.App.4th at 1428). Section 2810, enacted in 2003 (*see* Stats 2003 ch 908 § 1(SB 179)), as the latter-enacted statute, would also supersede section 218.5, which was last amended in 2000 (*see* Stats 2000 ch 876 § 4 (AB 2509)), as a matter of statutory construction. (*See Earley*, 79 Cal.App.4th at 1430, n.9.)

Even if Immoos was a party to the Seventh Cause of Action, it could not recover attorney's fees for defending this claim, as the unilateral fee-shifting provision of section 2810 precludes any party besides an "aggrieved employee" from receiving attorney's fees. Plaintiffs made this exact argument to the trial court, citing the *Earley* case and contending that section 2810 mirrored section 1194. (*See* 3 JA 364.)

C. Immoos Cannot Recover Attorney's Fees for the Sixth Cause of Action, because this Cause of Action Sought Recovery of Unpaid Statutorily-Mandated Wages.

In the Sixth Cause of Action, Plaintiffs alleged that, because they were not provided with their second rest period, they "are owed an additional one hour of wages per day per missed rest period per [IWC] Wage Order 16." (*See* 1 JA 13, 29; *see also* IWC Wage Order 16, sec. 11(D), Cal. Code Regs., tit. 8, § 11160, subds. 11(D).) This is the *only* recovery that Plaintiffs sought in the Sixth Cause of Action – one hour of wages per day in which a rest period was missed. (*See* 3 JA 13, 29) Plaintiffs did not seek recovery of missed rest breaks or a remedy for missed rest breaks – they sought recovery of unpaid wages. These wages are mandated by statute. Immoos cannot recover attorney's fees for this cause of action, as Labor Code section 1194 precludes recovery of attorney's fees by an employer for claims for unpaid wages that are mandated by statute.

The hour of wages owed to Plaintiffs for a missed rest period constitutes a wage. Recently, the California Supreme Court held that an employer has an affirmative obligation to pay an employee an additional hour of wages immediately upon failing to provide the employee a rest period – no further action is required by the employee for this obligation to

arise. (*See Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094, 1108 [56 Cal.Rptr.3d 880].) The one hour of wages owed to an employee for each day with a missed meal break "is akin to an employee's immediate entitlement to payment of wages or for overtime." (*Id.*) As the *Murphy* court ruled, the hour of wages is premium pay, similar to the time-and-a-half and double-time premium pay provided for overtime work (*see* Labor Code section 510(a)), the four hours of wages provided to employees for reporting time even if they perform no work (*see* Cal Code Regs., tit. 8, § 11070(5)), or the one hour of wages provided to an employee for working a split shift. (*See* Cal Code Regs., tit. 8, § 11070(4)(C); *see also Murphy v. Kenneth Cole, supra*, 40 Cal.4th at 1112-1113.)

Therefore, if an employer fails to immediately pay an employee an hour of wages for each day with a missed rest break, the employee has an immediate claim for one hour of unpaid wages, akin to any other claim for unpaid wages or for unpaid overtime. In the present case, Plaintiffs claims in the Sixth Cause of Action are for unpaid statutorily-mandated wages – akin to Plaintiffs' claims for unpaid statutorily-mandated wages under Labor Code sections 201, 203 and 204 alleged in the Second Cause of Action.[1] Such a claim for unpaid statutorily-mandated wages is properly governed by Labor Code section 1194.

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[1] Dicta from another case provides further evidence that the failure to provide the premium pay required for missed rest breaks constitutes "unpaid wages" and that claims for such unpaid wages are properly governed by section 1194. The court in *Brewer v. Premier Golf Properties, LP* considered the failure to provide meal and rest breaks in violation of section 226.7 in deciding that punitive damages were unavailable for such claims. However, the court, citing *Murphy v. Kenneth Cole*, noted that if an employer failed to provide the premium pay required by section 226.7 for missed breaks, "the additional penalties applicable for 'pay stub' violations or other defaults *in the payment of wages due* (such as the 'waiting time' penalties under section 203) are arguably triggered." (*Brewer v. Premier Golf Properties, LP* (2008) 168 Cal.App.4th 1243, 1254 n.9 [86 Cal.Rptr.3d

In the *Murphy v. Kenneth Cole* case, the California Supreme Court analyzed an employee's claims alleging missed meal and rest breaks and – in order to determine the correct statute of limitations – whether the additional hour of wages for missed breaks required by California Labor Code section 226.7 constituted a wage or a penalty. (*See Murphy v. Kenneth Cole, supra*, 40 Cal.4th at 1102.) The Court analyzed the provisions awarding an additional hours wages contained in section 226.7 interchangeably with the parallel provisions contained in IWC wage orders. (*See id.* at 1107-08.) The Court noted that:

> [i]n discussing the amended version of section 226.7, which ultimately was signed into law, the Senate Rules Committee explained that the changes were intended to track the existing provisions of the IWC wage orders regarding meal and rest periods. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Bill. No. 2509, as amended Aug. 25, 2000, p. 4)

(*Id.* at 1107-08.) Therefore, IWC wage order provisions concerning rest breaks, including those in IWC Wage Order 16, upon which Plaintiffs made their claims, may be considered interchangeably with the parallel provisions of section 226.7. (*See* Labor Code section 226.7; *see also* IWC Wage Order 16, sec. 11(D), Cal. Code Regs., tit. 8, § 11160, subds. 11(D)). The *Murphy* court's holdings regarding meal and rest breaks apply fully to rest breaks under IWC Wage Order 16.

The Supreme Court in *Murphy* ruled on the laws governing rest breaks that had significantly changed in 2000 with the addition of provisions for one hour of premium pay for each day with a missed break.

225] (emphasis added).) Thus, the *Brewer* court considered the failure to provide the premium pay required for missed breaks as akin to any other claim for unpaid wages, such that additional penalties resulting from unpaid wages arise.

(*See id.* at 1108). This provision establishing one hour of wages as premium pay for missed breaks was added to the IWC wage orders in 2000 (*see id.* at 1106) and codified in Labor Code section 226.7 by AB 2509, which was chaptered in 2000. (*See id.* at 1108). AB 2509 was silent on the issue of whether unpaid premium pay required for missed breaks should be governed by section 1194. Plaintiffs are not aware of any courts' consideration of section 1194's applicability to unpaid wages required for missed breaks since the *Murphy* court ruled that such pay was properly considered wages and premium pay. However, based on the *Murphy* court's ruling and reasoning, section 1194 must apply to such unpaid statutorily-mandated premium pay.

Plaintiffs contended this issue with the trial court, arguing that the claims in the Sixth Cause of Action were for unpaid wages mandated by statute and citing the *Murphy* and *Earley* cases. (*See* 3 JA 361.)

1. Labor Code section 1194 precludes recovery by employers for claims involving unpaid statutorily-mandated wages.

As demonstrated above, Immoos had an immediate obligation to pay employees an hour of wages for each day Immoos failed to provide a rest period. Plaintiffs alleged that they were owed these unpaid wages and sought recovery of these unpaid wages. (*See* 3 JA 13, 29.) A claim by an employee seeking recovery for unpaid statutorily-mandated wages is governed by Labor Code section 1194. (*See Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324 [37 Cal.Rptr.3d 460].)

In *Armenta*, a company did not pay its employees for travel time and time spent loading equipment and supplies. (*See id.* at 320.) Noting that California's labor statutes reflect a strong public policy in favor of full payment of wages, the *Armenta* court rejected a model of averaging all

hours worked in a work week, used under the Federal Labor Standards Act, whereby unpaid hours could still average out to be above the minimum wage (and thus not governed by section 1194). (*See id.* at 324.) Rather, the court held that the minimum wage standard affixes to all wages for all hours earned by employees for which they were not paid – therefore any wages that were unpaid were less than the minimum wage and thus governed by section 1194. (*See id.*) In the present case, in the Sixth Cause of Action, Plaintiffs allege that they were not paid the premium pay of one hour's wages owed to them for each day with missed rest periods. The hour of wages owed to Plaintiffs is unpaid, the same as if Plaintiffs had performed off-clock work that was unpaid, as in the *Armenta* case. The *Armenta* court's ruling provides further evidence demonstrating that claims for unpaid premium pay required for missed rest breaks are properly governed by Labor Code section 1194.

2. The premium pay required for missed rest breaks addresses the most basic demands of an employee's health and welfare and is mandated by statute; claims for unpaid premium pay are properly governed by Labor Code section 1194.

The unilateral fee-shifting provision of Labor Code section 1194 is deliberately designed by legislators to encourage employees to more effectively enforce important public policies regarding the payment of statutorily-mandated wages. (*See Earley v. Superior Court, supra*, 79 Cal.App.4th at 1430-31 (quoting *Covenant Mutual Ins. Co. v. Young, supra*, 179 Cal.App.3d at 325); *see also* Sec. I.B.2 above.) Section 1194 is designed to encourage enforcement of fundamental, statutorily-based protections of the most basic demands of employees' health and welfare. (*See Earley v. Superior Court, supra*, 79 Cal.App.4th at 1430.) The

premium pay required for missed breaks also constitutes a fundamental statutorily-based protection of workers and is governed by section 1194.

In ruling that section 1194 exclusively governed attorney's fees awards regarding claims for overtime compensation, the *Earley* court relied on the fundamental, statutory basis for overtime compensation:

> An employee's right to [straight-time] wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.

(*Earley, supra*, 79 Cal.App.4th at 1430.) The *Earley* court analyzed and relied on the fundamental protections provided to workers by the statutorily imposed requirements for overtime compensation. (*See id.*) The court also noted that "[s]ection 218.5 would still be available for an action brought to recover non-payment of *contractually agreed-upon or bargained-for* 'wages, fringe benefits, or health and welfare or pension fund contributions'" (*Id.* (quoting section 218.5) (footnote omitted, emphasis added).)

The *Earley* court therefore established that wages which provided fundamental, statutorily-mandated worker protections should be governed by the more specific provisions of section 1194, while section 218.5 was available for claims based on contractually-based wages and fringe benefits.

3. Just as statutorily-mandated prevailing wages fit the definition of a minimum wage, the statutorily-mandated premium pay required for missed rest breaks also is a required, minimum wage governed by Labor Code section 1194.

If a wage is statutorily mandated, it is a required, minimum wage. The court in *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765[125 Cal.Rptr.2d 804] ruled that because public works prevailing wage laws are mandated by statute and serve important public policy goals, section 1194 governs claims based on prevailing wage laws. (*See id.* at 778-79 (citing *Earley, supra*, 79 Cal.App.4th at 1430.) The *Road Sprinkler Fitters* court held that prevailing wage laws were minimum wage laws. (*See id.* at 778 (citations omitted). One of the cases the *Road Sprinkler Fitters* court cited was *People v. Hwang* (1994) 25 Cal.App.4th 1168. In *People v. Hwang*, the court found that because prevailing wage laws were mandatory and applied consistently to "all workers employed on public works" without any discretionary determinations by the contracting public entity, prevailing wage laws established a minimum wage that could not be pre-empted by federal law. (*See id.* at 1182.) Thus, prevailing wages are "minimum wages" governed by section 1194.

The premium pay required for missed rest breaks, just like prevailing wages, is designed to provide a fundamental worker protection and is mandated by statute – thus it is a minimum wage and should be governed by section 1194:

> [M]eal period provisions address some of 'the most basic demands of an employee's health and welfare.' . . . Moreover, the text of the wage order and the statutory provisions . . . make clear that the right

to meal periods is a generally applicable labor standard that is not subject to waiver by agreement.

(*Franco v. Athens Disposal Company, Inc.* (2009) 171 Cal.App.4th 1277, 1294 [90 Cal.Rptr.3d 539] (citation omitted) (holding that provisions regarding meal *and* rest periods under Labor code section 226.7 and IWC wage orders, and the provisions requiring one hour's wages for missed breaks, constitute unwaivable statutory rights).) Just as with the prevailing wages in *Road Sprinkler Fitters*, the premium pay required for missed rest breaks is mandated by statute and cannot be waived by agreement. The pay is applied consistently to all workers without any discretionary determinations by the employer, just as with the prevailing wages in *People v. Hwang*. This demonstrates that the premium pay required for missed rest breaks constitutes a fundamental worker protection. The premium pay for missed rest breaks is a statutorily mandated, minimum wage. Therefore, claims for these unpaid wages are properly governed by section 1194.

The rulings of the courts in *Murphy*, *Armenta, Earley, and Road Sprinkler Fitters* considering different (but interconnected) issues, all point to the same conclusion: that the statutorily-mandated premium pay required for missed meal breaks constitutes a fundamental worker protection and a minimum wage and claims for this unpaid premium pay are properly governed by section 1194, not section 218.5. Application of section 1194 to the premium pay required for missed rest breaks is also consistent with the California Supreme Court's long-established holding that statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees. (*See Murphy v. Kenneth Cole, supra*, 40 Cal.4th at 1110 (citations omitted).)

Plaintiffs' claims in the Sixth Cause of Action cannot be governed by section 218.5. Plaintiffs' claims in the Sixth Cause of Action were not for "nonpayment of contractually agreed-upon or bargained-for 'wages,

fringe benefits, or health and welfare or pension fund contributions.'" (*See* Earley v. Superior Court, supra 79 Cal.App.4th at 1430 (quoting section 218.5).) The premium pay Plaintiffs sought is not a bargained-for wage or fringe benefits that may be governed by section 218.5. The premium pay required for missed rest breaks is an immediately-payable minimum wage mandated by statute, and must be governed section 1194.

D. Immoos Cannot Recover Attorney's Fees for the Sixth Cause of Action Because the Work Performed in Defense of this Claim Overlapped with Work Performed in Defense of Claims that Are Subject to One-Way Fee Shifting Provisions.

As demonstrated in section I.B.2 above, unilateral fee-shifting provisions are deliberately designed by legislators to encourage employees to more effectively enforce important public policies. (*See Earley v. Superior Court, supra*, 79 Cal.App.4th at 1430-31 (quoting *Covenant Mutual Ins. Co. v. Young, supra*, 179 Cal.App.3d at 325).) However, attorney's work defending claims subject to these unilateral fee-shifting provisions will often overlap with work defending claims that are not subject to unilateral fee-shifting provisions. When this occurs, the public policy considerations of the unilateral fee-shifting provisions will override a general litigation cost entitlement, so that attorney's fees should not be awarded where they otherwise are appropriate. (*See Carver v. Chevron U.S.A., Inc., supra*, 119 Cal.App.4th at 505.)

Attorney fees for claims that overlap with claims that contain unilateral fee-shifting provisions may not be awarded, as the award of fees for these claims – where it would otherwise be appropriate – would frustrate the Legislature's intent to encourage the important public policies advanced by the unilateral fee-shifting provision. (*See id.* at 504-505.)

The claims contained in Plaintiffs' Sixth Cause of Action are governed by section 1194, which contains a unilateral fee-shifting provision. However, even if the claims in the Sixth Cause of Action were not subject to a unilateral fee-shifting provision, attorney's fees defending these claims would overlap with the rest of the claims in the lawsuit, all of which are subject to unilateral fee-shifting provisions, as will be demonstrated below. An award of fees in this situation is untenable, as it would defeat the Legislature's intent to encourage plaintiff or employee enforcement of important public policies in a number of areas.

1. All of the claims in Plaintiffs' lawsuit are subject to unilateral fee shifting provisions designed to advance plaintiff or employee enforcement of important public policy considerations.

In the First Cause of Action, Plaintiffs alleged violations of the Unfair Competition Law (UCL), Business and Professions Code section 17200 *et seq.* (*See* Section I.A.2 above; *see also* 1 JA 7-9, 23-25.) Plaintiffs have already demonstrated above that the UCL contains a unilateral fee-shifting provision, where only plaintiffs may recover attorney's fees. (*See* Section I.A.1 above). This fee-shifting provision is designed to advance the public policy of encouraging private enforcement of the UCL. (*See Walker v. Countrywide Home Loans, Inc, supra*, 98 Cal.App.4th at 1180.)

In the Second Cause of Action, Plaintiff alleged that Immoos failed to pay Plaintiffs all wages owed, in violation of Labor Code sections 201, 203 and 204. (*See* 1 JA 9-10, 25-26.) Plaintiffs have demonstrated above that claims for unpaid statutorily-mandated wages are properly governed by Labor Code section 1194, which contains a unilateral fee-shifting

provision. (*See* Section I.C.2 above; *see also Armenta, supra*, 135 Cal.App.4th at 324.)

In the Third Cause of Action, Plaintiffs alleged Immoos failed to pay Plaintiffs overtime compensation in violation of Labor Code sections 510 and 1194 and IWC Wage Order 16. (*See* 1 JA 10-11, 26-27.) As Plaintiffs demonstrated above, claims for unpaid overtime compensation are governed by section 1194. (*See* Section I.B.2. above; *see also Earley, supra*, 79 Cal.App.4th at 1430.)

In the Fourth Cause of Action, Plaintiffs allege Immoos secretly paid them a wage lower than that required by statute, regulations, or contract, in violation of Labor Code section 223. (*See* 3 JA 11-12, 27-28.) Plaintiffs alleged that Immoos secretly paid a lower wage by "the failure to pay for all work performed, cash pay, banking of hours, and failure to pay any overtime." (*See* 3 JA 12, 28.) Secret payment of a lower wage, the failure to pay for all work performed, cash pay of a lower wage and banking of hours without subsequent payment are all claims for unpaid statutorily-mandated wages, which are governed by section 1194. (*See* Section I.C.2 above; *See also Armenta, supra*, 135 Cal.App.4th at 324).

The unilateral fee-shifting provision of Labor Code section 1194 was designed by the Legislature to encourage employee enforcement of the public policy purposes of section 1194. (*See Earley, supra*, 79 Cal.App.4th at 1430.)

In the Fifth Cause of Action, Plaintiffs allege that Immoos failed to provide Plaintiffs with accurate itemized wage statements, in violation of Labor Code section 226. (*See* 1 JA 12-13, 28-29.) Labor Code section 226(e) contains a provision limiting attorney's fees to employees. Such a unilateral fee-shifting provision was deliberately designed by the Legislature to encourage employees to more effectively enforce the

statute's important public policies. (*See* Section I.B.2. above; *see also Carver v. Chevron U.S.A., Inc, supra,* 119 Cal.App.4th at 504.)

In the Seventh Cause of Action, Plaintiffs allege that the 2810 Defendants entered into contracts with Immoos and knew or should have known that there were insufficient funds to comply with all applicable laws, in violation of Labor Code section 2810.[2] (*See* 1 JA 14, 30.) Plaintiffs have demonstrated that section 2810 contains a unilateral fee-shifting provision, which is designed to encourage more effective employee enforcement of its public policy purposes. (*See* Section I.B.1, I.B.2 above.)

Thus, every one of Plaintiffs' claims in their lawsuit was subject to a unilateral fee-shifting provision which restricted attorney's fees to plaintiffs or employees. Even if the claims for unpaid premium pay contained in the Sixth Cause of Action were not subject to section 1194, these claims overlap with the rest of the claims in the lawsuit, all of which are subject to unilateral fee-shifting provisions. An award of fees for Immoos' defense of the Sixth Cause of Action would frustrate the legislative intent of encouraging employee or plaintiff enforcement of the UCL, section 1194, section 226 and section 2810.

2. The trial court did not rule on whether claims overlapped; there is considerable overlap in all of the claims.

Consideration of whether claims in a lawsuit overlap is best determined within a trial court's discretion, similar to a trial court's discretion to apportion fees among different claims in a lawsuit. (*See*

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[2] Immoos was not a party to the Seventh Cause of Action. However, if the Appellate Court follows the trial courts finding that Immoos was eligible for attorney's fees for defending the Seventh Cause of Action, then the Appellate Court should consider the unilateral fee-shifting provisions of section 2810.

Carver v. Chevron U.S.A., Inc, supra, 119 Cal.App.4th at 505-506.) Plaintiffs contended this issue, pointing out to the court in its opposition to Immoos' motion for attorney's fees that "defendants are prohibited from collecting attorney fees where the time spent defending claims [is] subject to both a bilateral and unilateral (i.e., one-way) fee shifting scheme." (*See* JA at 7:24-26, citing *Wood v. Santa Monica Escrow Company* (2007) 151 Cal.App.4th 1186, 1190-91 [60 Cal.Rptr.3d 597] and *Carver v. Chevron, U.S.A., Inc., supra*, 119 Cal.App.4th at 505; *see also* JA at 3:13-17) However, the trial court never ruled on the issue of whether the various claims in the lawsuit overlapped with claims subject to unilateral fee-shifting provisions. In none of the trial court's rulings on the issue of attorneys fees – in neither the May 26, 2009 Minute Order, nor the trial court's oral statements at the May 26, 2009 hearing regarding attorney's fees (*see* Reporter's Transcript on Appeal 1:19-20, 3:7, 6:21, 7:5, 7, 12-20, 26-28, 8:2-4, 10-12, 16-27, 9:5-6, 12, 10:26-11:11, 11:15, 12:24-25, 13:23, 14:28-15:3, 15:9-18, 21, 26, 16:7, 17:5, 7-8) nor the May 26, 2009 Minute Order (see 3 JA 408-410) nor the June 24, 2009 Minute Order (*see* 3 JA 411-414), nor the July 9, 2009 Order Granting Defendant Immoos Fire Protection Systems Co., Inc's Motion for Attorney's Fees (*see* 3 JA 417-421), nor in the August 3, 2009 Judgment (*see* 3 JA 425) – did the trial court consider or rule on the issue of whether the claims in the lawsuit overlapped.

The trial court did not rule on whether the claims in the Sixth Cause of Action overlapped with claims that are subject to unilateral fee-shifting provisions, which would invalidate any award of attorney's fees for the Sixth Cause of Action. There is likely a great deal of overlap in Defendants' attorney's fees among the various Causes of Action. For example, Immoos claims the largest amount of attorney's fees invoiced for January 5, 2009. (*See* 1 JA 70.) They are likely related to the Plaintiffs'

motion for class certification, where many of the work performed would involve all of the causes of action.

Plaintiffs have demonstrated that the claims in the Sixth Cause of Action are governed by section 1194. However, if this Courts finds that they are not governed by section 1194, the Court should invalidate any award of attorney's fees for these claims as they overlap with claims that are subject to unilateral fee-shifting provisions or remand to the trial court to determine if the claims in the Sixth Cause of Action overlap.

E. Immoos Cannot Recover Fees or Costs for Any Causes of Action in this Case, as Labor Code Section 218.5 States that It Is Not Applicable to any Action for Which Attorney's Fees Are Recoverable Under Section 1194.

Labor Code section 218.5 was amended in 2000, subsequent to the *Earley* decision to adding the following second paragraph: "This section does not apply to any action for which attorney's fees are recoverable under Section 1194." It is unclear from the statute if "action" refers to separate causes of action, or an entire "action" or proceeding as a whole. Resort to legislative history is appropriate when the language of the statute is susceptible to more than one reasonable construction. (*See Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29-30 [34 Cal.Rptr.3d 520] (citations omitted).) Thus, reference to legislative history is appropriate to determine what is meant by the term "action" in section 218.5. Legislative documents will demonstrate that "action" refers to an entire proceeding, such that if fees are recoverable under section 1194 for any causes of action in a proceeding, then section does not apply to the entire proceeding.

Several legislative documents demonstrate that the Legislature considered the word "action" to mean an entire court proceeding, with several causes of action. Many analyses of the bill, AB 2509, which amended section 218.5 to add its second paragraph, state that the bill:

> Clarif[ies] that Labor Code Section 1194, which provides for an award of attorney fees for an employee in *cases involving* failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorneys fees in other wage *cases*.

(*See* Assembly Committee on Labor and Employment analysis of AB 2509 as introduced [at p. 2, ¶8 and p. 5, ¶5(b)], attached as Exhibit B to Appellants' Motion to Take Judicial Notice of Documents Pursuant to Evidence Code Section 459 and Rule 8.252, California Rules of Court ("Motion for Judicial Notice") (emphasis added)).

Similar language in other legislative analyses of AB 2509 state that the bill clarifies that section 1194 "is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorney's fees in other wage *cases*." (*See* Senate Judiciary Committee analysis of AB 2509 as amended August 7, 2000 [at p. 2], attached as Exhibit C to the Motion for Judicial Notice (emphasis deleted and added).)

The legislative analyses' numerous statements that section 1194 applies in "cases" involving minimum wage and overtime, and that section 218.5 applies in other "cases" demonstrates that in adding the second paragraph of section 218.5, the Legislature was precluding the application of section 218.5 in any cases where fees were recoverable pursuant to section 1194. A "Case" generally refers to entire proceedings, including all its causes of action. Thus, where there is a case where fees are recoverable pursuant to section 1194 for at least one cause of action, section 218.5 cannot apply to the entire case and all its causes of action.

Numerous causes of action in this proceeding had fees that were recoverable pursuant to section 1194. For example, the Second Cause of Action and the Fourth Cause of Action, Plaintiffs alleged the failure to pay all swages owed. Such claims are governed by section 1194. (*See* Section I.C.2 above.) The Third Cause of Action contained overtime claims, which are explicitly governed by section 1194. Thus, as this case involved claims that were recoverable pursuant to section 1194, section 218.5 cannot apply to any of the causes of action in the case.

1. The Second, Third, Fourth and Sixth Causes of Action all had claims were costs and fees were recoverable pursuant to Labor Code section 1194 – costs cannot be recovered for these claims.

Even if this court does not accept the interpretation that section 218.5 cannot apply to an entire proceeding when it contains claims where fees are recoverable under section 1194, in the alternative, a number of causes of action in this proceeding consisted entirely of claims that are governed by section 1194, such that costs should not be recoverable for these causes of action.

As noted above, in the Second Cause of Action and the Fourth Cause of Action, Plaintiffs alleged the failure to pay all swages owed. Such claims are governed by section 1194. (*See* Section I.C.2 above.) The Third Cause of Action contained overtime claims, which are explicitly governed by section 1194. Plaintiffs have demonstrated that the Sixth Cause of Action is also governed by section 1194. (*See* Section 1.C. above.)

Section 1194 provides that in actions for minimum wage or overtime compensation, an *employee* may recover "the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest

thereon, reasonable attorney's fees, and *costs* of suit." (emphasis added). As demonstrated in Section I.B.2 above, actions governed by section 1194 preclude recovery of fees by anyone except a prevailing employee. This one-way fee-shifting should also be applicable to costs, as they are explicitly listed in section 1194. This interpretation of the statute was reinforced by the *Earley* court:

> Thus if an employee is unsuccessful in a suit for minimum wages or overtime, section 1194 does not permit a prevailing employer to recover fees or *costs*.)

(*Earley, supra*, 79 Cal.App.4th at 1429 (emphasis added) (citations omitted).)

Therefore, section 1194 precludes an award of costs, as well as attorney's fees, to a prevailing defendant. Plaintiffs argue above that the amendment to section 218.5 in 2000 establish that section 218.5 cannot apply to the entirety of a proceeding where some fees are recoverable pursuant to section 1194, so that no costs could be awarded.

However, in the alternative, if the Court does not accept this argument, the Court should not allow costs for causes of action fully governed by section 1194. Plaintiffs demonstrate above that the Second, Third, Fourth and Sixth Causes of Action are fully governed by section 1194. Additionally, Plaintiffs demonstrated above that Immoos was not a party to the Seventh Cause of Action. Therefore, Immoos could not receive cost for five of the seventh causes of action. However, the trial court awarded Immoos 100% of costs. Immoos costs should be reduced for the five out of seven causes of action where it cannot receive costs.

G. In Any Apportionment of Costs and Fees, Immoos' Defense of the Seventh Cause of Action, for Which It Cannot Receive Costs or Attorneys Fees, Should Be Considered; Immoos Cannot Deny that It Expended Attorney's Fees on this Cause of Action.

As demonstrated above, Immoos is not eligible for attorney's fees for any of the claims in the present lawsuit. However, should this court find that Immoos is eligible for costs and attorney's fees for either the First Cause of Action or the Sixth Cause of Action, any apportionment of costs and fees should take into account Immoos' defense of the Seventh Cause of Action. As demonstrated above, Immoos was not even a party to the Seventh Cause of Action and should not be eligible for costs or fees. (*See* Section I.B above.) However, Immoos sought recovery of attorney's fees for defending the Seventh Cause of Action. (*See* 2 JA 77 ("...Defendant is entitled to an award for the entirety of [the] Seventh Cause of Action.")) In its opposition to the motion for attorney's fees, Plaintiffs pointed out Immoos was not a party to the Seventh Cause of Action. (*See* 3 JA 363). However, Immoos continued to claim that it defended the Seventh Cause of Action in its reply to the Plaintiffs' opposition. (*See* 3 JA 395, 402.) Based on Immoos' arguments, the trial court found that Immoos should receive attorney's fees for defending the Seventh Cause of Action. (*See* 3 JA at 420.)

Under the well-recognized doctrine of judicial estoppel, Immoos cannot now deny its claims that it expended attorney's fees defending the Seventh Cause of Action. *Jackson v. County of Los Angeles* is the leading case clarifying the doctrine in California.

> Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same

> or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.

(*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 [70 Cal.Rptr.2d 96] (citation omitted).)

> In accordance with the purpose of judicial estoppel, we conclude that the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

(*Id. at* 183 (citations omitted).)

All of the prerequisites for judicial estoppel noted above apply in the present to prevent Immoos from denying its previous claim that it expended attorney's fees on the Seventh Cause of Action. In its motion for attorney's fees Immoos took the position that it expended attorney's fees defending the Seventh Cause of Action and this position was adopted by the trial court in awarding Immoos attorney's fees for this Cause of Action. The application of judicial estoppels is particularly appropriate in cases where a party relies on a position to seek attorney's fees. (*See International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1191-92 [101 Cal.Rptr.2d 532].)

Immoos continually claimed that it expended attorney's fees defending the Seventh Cause of Action, even after Plaintiffs argued that it was not eligible for attorney's fees because it was not a party to the cause of action. Immoos cannot deny its previous claims. Any apportionment of fees should recognize that Immoos expended fees on the Seventh Cause of

Action – for which it is ineligible for fees – and attribute an appropriate amount of fees for the cause of action.

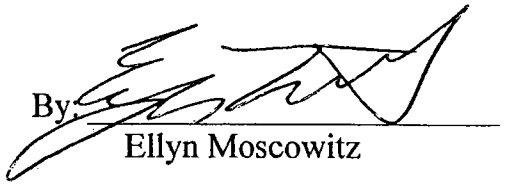
The apportionment of attorney's fees among various claims is best decided within the discretion of the trial court. (*See Carver v. Chevron U.S.A., Inc, supra,* 119 Cal.App.4th at 505-506.) If this Court finds that Immoos is eligible to receive attorney's fees for the First or Sixth Cause of Action, but not for the Seventh Cause of Action, it should remand to the trial court with the direction that when apportioning fees, fees should be attributed to the Seventh Cause of Action, even though Immoos was not a party to this claim.

CONCLUSION

For the foregoing reasons, this Court should find that Immoos was not eligible for any attorney's fees in this action, and reverse the trial court's order awarding Immoos attorney's fees for the First, Sixth and Seventh Causes of Action and for it fees on the motion for attorney's fees. (*See* JA at 4:21-24.) Immoos should not receive any attorney's fees.

Dated: November 3, 2009

Respectfully Submitted,
Law Office of Ellyn Moscowitz
Ellyn Moscowitz
Enrique Gallardo

By: 
Ellyn Moscowitz

Attorneys for Appellants

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 9,231 words as counted by the Microsoft Word Vista word processing program used to generate the brief.

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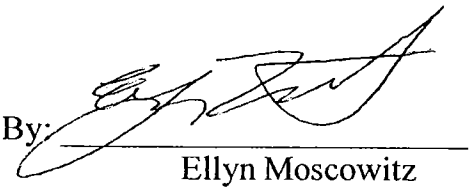
By: 

Ellyn Moscowitz

PROOF OF SERVICE

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, CA 94612. On November 3, 2009, I served upon the following parties in this action:

Robert Rediger Laura McHugh 555 Capitol Mall, Suite 1240 Sacramento, CA 95814
Honorable Loren E. McMaster Sacramento Superior Court 800 Ninth Street Sacramento, CA 95814
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013
California Court of Appeal Third Appellate District 621 Capitol Mall, 10th Floor Sacramento, CA 95814-4719

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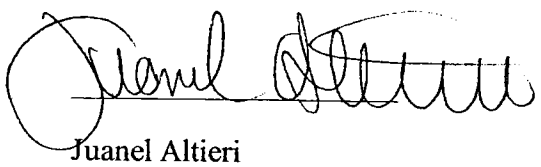
[X] (FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.

I hereby certify that the above document was printed on recycled paper. I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California, on November 3, 2009.



Juanel Altieri

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On September 15, 2010, I served the within **RESPONDENT'S REQUEST FOR JUDICIAL NOTICE** in *Anthony Kirby et al. v. Immoos Fire Protection, Inc*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Ellyn Moscowitz, Esq.
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XXXX by placing a true copy thereof in a Federal Express envelope/box for overnight delivery in the receptacle located at 555 Capitol Mall, Sacramento, California 95814.

Clerk
Third Appellate District Court of Appeal
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Sacramento, CA 95814

XXXX By personal service at address above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 15th day of September 2010, at Sacramento, California.

LORRAINE L. RENEROE