

**In the Matter of**  
**KURT E. FREITAG**  
**and**  
**Kurt E. Freitag dba Big Fish Partners I**  
**and**  
**Meritage Homeowners' Association**  
**fka**  
**Meritage at Little Creek Homeowners' Association, Inc.**  
**Case Nos. 77-06 & 65-06**  
**Final Order of Commissioner Dan Gardner**

**Issued July 9, 2007**

**SYNOPSIS**

Respondents are joint employers who employed Claimant and failed to pay him wages for all of the hours he worked in June 2005, in violation of ORS 652.140(2), and are jointly and severally liable for \$252 in unpaid wages to Claimant. Respondents' failure to pay the wages was willful and they are jointly and severally liable for penalty wages in the amount of \$1,920, pursuant to ORS 652.150. Additionally, Respondents violated Oregon child labor laws by employing minors in 2004 and 2005 without obtaining a validated employment certificate, pursuant to ORS 653.307 and OAR 839-021-0220(2); by employing minors without first verifying the age of the minors, pursuant to OAR 839-021-0185; by employing at least one minor to perform work hazardous to minors under 16 years old, in violation of OAR 839-021-0102(1)(ss); by employing at least one minor to perform work declared to be particularly hazardous or detrimental to the health or well being of minors 16 and 17 years old, in violation of OAR 839-021-0104; and by failing to post a validated employment certificate, pursuant to OAR 839-021-0220(3). As a result of the violations, Respondents were found jointly and severally liable for civil penalties in the amount of \$9,000. ORS 652.140(2); ORS 652.150; ORS 653.307; ORS 653.370; OAR 839-021-0220(2); OAR 839-021-0185; OAR 839-021-0102(1)(ss); OAR 839-021-0104; OAR 839-021-0220(3); OAR 839-021-0104; OAR 839-019-0010(2); OAR 839-019-0020; OAR 839-019-0025.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 10, 2006, in the U.S. Fish & Wildlife Conference Room, at 2127 SE Marine Science Drive, Newport, Oregon, and continued on February 21, 2007, in the Planning Department Conference Room, at 210 SW 2<sup>nd</sup> Street, Newport, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries (“BOLI” or “the Agency”). Ryan Anthony Doherty (“Claimant”) was present throughout the hearing and was not represented by counsel. Kurt E. Freitag (“Respondent Freitag”) was present individually and as authorized representative for Meritage Homeowners’ Association, formerly known as Meritage at Little Creek Homeowners’ Association, Inc. (“Respondent Meritage”).

In addition to Claimant, the Agency called as witnesses: Dan Christianson, Appraiser, Lincoln County Assessor’s Office (telephonic); Margaret Pargeter, BOLI Wage and Hour Division compliance specialist (telephonic); Karen Gernhart, BOLI Wage and Hour Division administrative specialist (telephonic); Kurt E. Freitag, Respondent; George Wespi, Project Manager, Joseph Hughes Construction Company; and Respondents’ former employees Kelly Johnson, Seth Mross, and Brandon Haro (telephonic).

Respondents called Respondent Freitag as their only witness.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-27 (wage claim hearing);
- b) Administrative exhibits CL-1 through CL-18 (child labor hearing);
- c) Agency exhibits A-1 through A-23 (filed with the Agency’s case summary in both cases), and A-24, A-25 (submitted at the wage claim hearing), and A-26 (submitted at the child labor hearing); and
- d) Respondent exhibits R-1 through R-9 (filed with Respondents’ case summary for the wage claim hearing), and R-10 (submitted at the wage claim hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following

Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

### **FINDINGS OF FACT – PROCEDURAL**

1) On October 26, 2005, Claimant filed a wage claim form stating “Meritage,” located at “881 NW Beach” in Newport, Oregon, had employed him from June 23 through June 29, 2005, and failed to pay him all wages that were due when he quit his employment.

2) On October 10, 2006, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) On March 16, 2006, the Agency issued an Order of Determination numbered 05-3331. In the Order of Determination, the Agency alleged Respondent Freitag had employed Claimant during the period June 23 through June 29, 2005, failed to pay Claimant for all hours worked in that period, and therefore was liable to Claimant for \$252 in unpaid wages, plus interest. The Agency also alleged Respondent Freitag’s failure to pay all of Claimant’s wages when due was willful and Freitag was liable to Claimant for \$1,920 as penalty wages, plus interest. The Order of Determination gave Respondent Freitag 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. Respondent Freitag timely filed a request for hearing and an answer stating, in pertinent part:

“As to Paragraph I, Respondent neither admits nor denies the claims therein.

“As to Paragraph II, Respondent denies that he is an employer or payer of wages to any person in the State of Oregon, specifically that he has never employed or retained the wage claimant, or any other person, to perform work for him. Respondent has no knowledge on the basis of which to admit or deny whether claimant did or did not earn wages, was paid wages, or is owed wages, and therefore denies the same. Respondent also has no knowledge on the basis of which to assess the Bureau’s determination and therefore denies the same.

“As to Paragraph III, Respondent has no knowledge on the basis of which to admit or deny the allegations therein, and therefore denies the same. In particular, Respondent denies having received any notice pursuant to ORS 652.140 and ORS 652.150.

“For his affirmative allegations, Respondent states as follows:

“1. Respondent is a natural person and, as such, does not do business in the State of Oregon.

“2. Respondent received a copy of the Order of Determination on April 4, 2006. Accordingly, this Request for Hearing and Answer is timely.

“3. Respondent received, in his capacity as designee of Meritage at Little Creek Homeowners’ Association, Inc., as well as, possibly, in his capacity as principal in other legal entities, correspondence concerning this claim. At no time did any correspondence assert that the wage claim was being brought against Respondent personally. Although the Bureau seems to have asserted the wage claim against numerous entities from time to time, the one entity that it was *not* asserted against was Respondent personally.

“4. Pursuant to ORS 650.140 [sic] and ORS 652.150, therefore, no written notice was provided to Respondent and, therefore, no penalty wages are assessable.

“5. Respondent reserves the right to raise, at hearing or at trial, any additional or supplementary defenses that may be available to him under Oregon law.”

4) On May 17, 2006, the Agency requested a hearing and filed a motion to amend Order of Determination # 05-3331 to add as Respondents, Kurt E. Freitag dba Big Fish Partners I and Meritage Homeowners’ Association fka Meritage at Little Creek Homeowners’ Association, Inc. (“Meritage”). As reasons for the amendment, the Agency stated that 1) the status of the potential respondents is “unclear from the file”; 2) Kurt E. Freitag dba Big Fish Partners I apparently issued Claimant a 1099 for wages earned in 2004; 3) Claimant listed Meritage as his employer on the wage claim form; and 4) Meritage is an active non-profit corporation for which Respondent Freitag serves as president. The Agency asserted that because Respondent Freitag was served with the original Order of Determination, filed an answer, and is president of Meritage, all of the potential Respondents have notice of the wage claim and could not claim surprise. On May 18, 2006, the forum granted the Agency’s motion and gave the named

Respondents until June 7, 2006, to file an answer to the amended Order of Determination. On May 18, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on September 19, 2006. With the Notice of Hearing, the forum included copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

5) On May 18, 2006, the ALJ issued an order pertaining to fax filings and timelines for responding to motions and service of documents.

6) On May 24, 2006, the Agency sent documents to the Hearings Unit that initially were filed with the Agency's Judgment Unit and subsequently forwarded to Agency case presenter Domas. In her cover letter, Domas stated she had not received copies of the documents, apparently intended for the Hearings Unit, and she had taken the liberty of making copies before sending them to the Hearings Unit. The documents were from Respondents and included a response in opposition to the Agency's motion to amend, a request for subpoenas, an answer to the amended Order of Determination, and a letter authorizing Kurt E. Freitag to act as Respondent Meritage's authorized representative and to represent "Big Fish Partners." In the answer to the amended Order of Determination, Respondents stated, in pertinent part:

"(1) Big Fish Partners is a general partnership engaged in the development of property commonly known as Meritage at Little Creek. Big Fish Partners is a licensed developer under Oregon law. As such, Big Fish is entitled to hire only licensed general contractors for construction related work. Upon information and belief, claimant Ryan Dougherty [sic] is not now and never has been a licensed general contractor. Big Fish Partners, therefore, denies that it has hired and asserts that it cannot hire this person for construction related work.

"(2) Meritage at Little Creek Homeowners' Association, Inc. is a not for profit corporation engaged in the management of common areas for the Meritage Development. At the time in question, Meritage Homeowners'

Association collected no dues and therefore has no funds to hire, retain or pay any person for work. As such, Meritage Homeowners' Association, Inc. denies it did or has hired the claimant.

“(3) Both Respondents deny that they are properly added to this matter, pursuant to the Motion filed.

“(4) Both Respondents assert, as they did in the Motion, that they were never properly served or corresponded with on this matter by the Agency. As such, even if a judgment for the wage portion were assessed against them, they are not liable for any penalties due to lack of notice.

“(5) Both entities hereby request costs and penalties against the Agency for malicious prosecution and frivolous claims.”

In their response to the Agency's motion to amend the Order of Determination, Respondents contended that 1) the Agency should be “required to prosecute this matter against the Respondent named, or else dismiss against the Respondent and file against some other person or entity” and 2) service on Freitag was not sufficient to constitute service on the corporation.

7) On May 26, 2006, the forum, treating Respondents' response to the Agency's motion as a motion for reconsideration of the prior ruling granting the Agency's motion, denied the reconsideration request as to the amendment, but concluded that proper service upon Respondents was not adequately demonstrated and directed the Agency to serve the additional Respondents with the amended Order of Determination and provide the proof of service to the Hearings Unit. Respondents were granted leave to file an amended answer and request for hearing within 20 days of their receipt of the amended order. On June 6, 2006, the Agency filed with the Hearings Unit proof of service for Respondents Freitag and Meritage.

8) On June 1, 2006, the Agency filed an objection to Respondents' request for subpoenas. On June 19, 2006, Respondents filed a reply to the Agency's response. On June 19, 2006, the ALJ issued a discovery order requiring the Agency to provide certain documents to Respondents and granting Respondents' request to subpoena

Claimant. The ALJ denied Respondents' request to subpoena "any Agency employee or personnel with knowledge of this matter" as lacking specificity.

9) On July 12, 2006, the Agency provided the Hearings Unit with proof of service for Kurt E. Freitag dba Big Fish Partners I.

10) On July 28, 2006, Respondents moved for a change in the hearing date and a request to reissue subpoenas or permission to amend the existing subpoenas. The Agency had no objection to rescheduling the hearing and on August 1, 2006, the ALJ issued an order granting Respondents' motion and rescheduling the hearing for October 10, 2006.

11) On August 1, 2006, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and, a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by September 29, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On September 18, 2006, the Agency filed a motion to consolidate two "related" cases (Case No. 65-06 and Case No. 77-06) "pending before the forum."<sup>i</sup> Respondents did not file a response to the Agency's motion. The ALJ denied the motion on September 25, 2006, because the only charges pending before the forum at that time were those contained in the Order of Determination, Case No. 77-06. Thereafter, on the same date, the Agency submitted a request for hearing on a Notice of Intent to Assess Civil Penalties for Child Labor Violations ("NOI"), Case No. 65-06, that issued against Respondents on July 24, 2006, and renewed its request to consolidate the pending cases.

13) In the NOI, the Agency alleged Respondents violated Oregon child labor law provisions by 1) employing at least three minors without first obtaining an annual employment certificate; 2) employing at least three minors without first verifying the age of the children; 3) employing at least one minor to engage in work declared to be hazardous for minors under 16 years old; 4) employing at least one minor to engage in work declared to be particularly hazardous or detrimental to the health or well being of minors under 18 years old; and 5) failing to post a validated employment certificate. In the NOI, the Agency proposed civil penalties totaling \$11,000. Respondents timely filed a request for hearing and an answer that stated, in pertinent part:

“(1) As to allegation 1, all Respondents deny having employed any of the named persons. In addition, Respondents deny that any person who may have been in their employ was a ‘minor’ as defined relative to ORS 653.307.

“(2) As to allegation 2, Respondents reiterate their denials in Paragraph 1 and affirmatively allege that any person who may have been hired was hired based upon information provided to them by the hiree himself or herself.

“(3) As to allegation 3, Respondents reiterate their denials in Paragraphs 1 and 2. In addition, Respondents maintain that none of the Respondents engaged in any of the activities cited during the period set forth in the complaint. Furthermore, Respondents assert that the work cited does not violate any administrative rules or statutes.

“(4) As to allegation 4, Respondents reiterate their denials in Paragraphs 1-3. Further, Respondents deny that the person named in this paragraph suffered bodily injury while performing any work while in Respondents' hire.

“(5) As to Paragraph 5, Respondents deny that they had any employees during the time in question.

“(6) As to Paragraph 6, Respondents deny that penalties are warranted under the administrative rules.

“Respondents hereby assert and reserve all affirmative defenses available to them under law. In particular and without limitation, Respondents assert that ORS 653-370 [sic] is unconstitutionally vague, insofar as it does not provide a definition of the term ‘minor.’ Section 653.010 provides definitions that apply to sections ‘653.010 to 653.261.’ 653.010 provides no definition for the term ‘minor’ as used in section 653.370, nor is the

term defined in any section subsequent to 653.261. As such, the provisions of this section are unenforceable. In addition, Respondents assert that the complaint is time-barred under Oregon law.”

14) On September 25, 2006, the ALJ issued an order granting the Agency’s motion to consolidate after determining that there were common questions of fact and “perhaps some related questions of law in the two cases.”

15) On September 29, 2006, the Hearings Unit received the Agency’s written motion for an extension of time to file case summaries as a follow-up to an oral motion that was granted after Respondents indicated they did not object to an extension. On October 2, 2006, the ALJ issued an order affirming the oral ruling extending the time for filing case summaries.

16) On September 29, 2006, the Hearings Unit received Respondents' reply to the Agency’s motion to consolidate, Respondents' motion for an order compelling the agency to produce its “complainants” and other requested discovery, and Respondents' motion “to avoid a sham hearing.” On the same date, the ALJ convened a prehearing conference with the participants to discuss Respondents' motions and resolve remaining discovery issues. The ALJ ordered the Agency to provide Respondents with any discovery previously ordered and not yet produced and both participants agreed to manage the discovery issues cooperatively in a timely manner. Based on the timing of the Agency’s request for hearing on the child labor issues, the ALJ concluded that Respondents' notice of hearing on those issues was not sufficient to allow adequate preparation. The hearing was subsequently bifurcated and hearing on the child labor violations was deferred until December 12, 2006.

17) The Agency and Respondents timely filed case summaries.

18) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) During the hearing, the Agency offered a wage assignment, executed by Claimant earlier in the morning, as an exhibit and as evidence of Claimant's intent to assign his wages to BOLI for collection. The Agency's case presenter stated that the wage assignment, ordinarily executed at the time a wage claim is filed, was not in the file when the Agency began hearing preparations and there was no way to determine if it was ever signed prior to the wage claim investigation or if it was initially signed but later misplaced.<sup>ii</sup> Respondents objected and moved for dismissal of the wage claim with prejudice on the ground that the assignment was procedurally flawed and that allowing the assignment *nunc pro tunc* "may very well terminate some of Respondents' rights to pursue that particular matter." Respondents also argued the assignment was a prerequisite to issuing a charging document as evidenced by the Agency's allegation in the Order of Determination that Claimant had assigned his wages to the Agency. The ALJ received the exhibit but held the record open until November 10, 2006, to allow briefing on the issue of whether a wage assignment is required before the Agency may proceed on a wage claim, and, if so, whether a wage assignment may be made *nunc pro tunc*. The ALJ reserved ruling on Respondents' motion to dismiss the Order of Determination until issuance of the proposed order.

20) The Agency and Respondents timely filed briefs and the hearing record pertaining to the Agency's Order of Determination closed on November 10, 2006.

21) After considering the briefs filed by the Agency and Respondents, the ALJ determined that 1) ORS 652.332 sets forth the process applicable when the Commissioner elects to seek collection of a wage claim administratively and does not mandate that a wage assignment be taken prior to pursuing an administrative action;<sup>iii</sup> 2) although the Commissioner has the authority to take assignments, in trust, of wage claims under ORS 652.330, it is the receipt of a wage claim that triggers the

Commissioner's authority to investigate and enforce a wage claim under both ORS 652.330 and ORS 652.332; 3) Claimant filed a wage claim and either signed a wage assignment at that time and it was misplaced, or he inadvertently neglected to include a wage assignment with the signed wage claim form and it was not noticed until the hearing date; 4) by his actions when filing the wage claim and his testimony at hearing, Claimant demonstrated an intent to assign his wages to the Commissioner; 5) Respondents failed to articulate any right that was adversely affected by Claimant's wage assignment at hearing; and 6) Respondents' contention that Claimant was paid in full before he executed a wage assignment was not supported by credible evidence. Based on those facts, the ALJ concluded that Claimant's wage assignment at hearing was in accordance with applicable statutes and rules and the timing of the assignment did not prejudice Respondents in any manner. Respondents' motion to dismiss with prejudice was denied and the Commissioner affirms that ruling.

22) On October 27, 2006, Respondents moved for a discovery order based on a previous attempt to obtain informal discovery pertaining to the child labor issues by letter dated October 5, 2006. The Agency filed a timely response stating that Respondents were provided with all documents contained in the investigative file and that the remaining requests were vague, overbroad, ambiguous, and not calculated to lead to the discovery of relevant evidence.

23) On November 29, 2006, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and, a brief statement of the elements of the claim and any penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by December 6, 2006, and notified them of

the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order scheduling a prehearing conference on December 4, 2006, to discuss rescheduling the hearing on the child labor issues and Respondents' motion for discovery order. Following verbal discussions between the Hearings Unit and the participants on the same date, the prehearing conference was rescheduled for December 5, 2006, the hearing was rescheduled for January 17, 2007, and the due date for case summaries was changed to January 5, 2007.

24) On December 5, 2006, the ALJ conducted a prehearing conference to resolve the issues that were raised in Respondents' motion for discovery order. Following argument on the motion, the ALJ ruled that Respondents' motion lacked specificity and was vague and premature because they had not yet served written interrogatories or requests for admissions on the Agency. Based on the ALJ's ruling, Respondents agreed to promptly serve interrogatories and requests for admissions on the Agency along with a detailed request for documents. The Agency agreed to promptly respond and further agreed to find a way to provide Respondents with the information that formed the basis of the child labor complaint without providing the case presenter's notes prepared in anticipation of litigation.

25) During the December 5 prehearing conference, the ALJ noted she had received reports from BOLI staff that Respondent Freitag had made numerous phone calls to several Portland office staff on November 29, 2005, the same day the Hearings Unit Coordinator ("HUC") attempted to contact the participants to arrange the prehearing conference. According to the reports, he was belligerent and verbally abusive to the BOLI staff members he contacted and refused to leave his name and number for a return call. His phone calls were precipitated by his inability to reach the HUC when he returned her call without success during the noon hour. The ALJ advised

Respondent Freitag during the prehearing conference that his conduct was not acceptable and would not be tolerated.

26) On January 3, 2007, the ALJ issued an order notifying the participants that the hearing location had changed to Newport Parks and Recreation Building, 225 SE Avery Street, Newport, Oregon.

27) The Agency timely submitted a case summary on January 5, 2007.

28) On January 8, 2007, Respondents moved for an order compelling the Agency to provide the materials and information, including responses to interrogatories, requested in Respondents' letter dated December 6, 2006. Respondents also moved for a continuance or dismissal of the matter pertaining to the child labor violations stating that "no citizen is required to tolerate government harassment" and submitting the "Complainants sole purpose in this matter is to attempt to use deception and innuendo to penalize Respondent."

29) The Agency timely filed a response to Respondents' discovery motion indicating it had already provided the complete investigative file and intended to provide additional information as it became available, but no later than January 11, 2007. The Agency further indicated its efforts to obtain additional information were ongoing and that other requested information was either not discoverable or nonexistent. The Agency further moved the forum to take official notice of the wage claim proceeding, Case No. 77-06, for the purposes of the child labor proceeding. In its response, the Agency stated, in pertinent part:

"In conclusion, it should be apparent from the proceedings in these cases to date that the Agency conducted a fair and thorough investigation, not to intimidate and harass Respondents, but to enforce the wage and hour laws and to prevent Respondents from exploiting and harming minors. If anyone is to be accused of intimidation and harassment it is Mr. Freitag due to the misconduct in his dealings with Agency staff on November 29, 2006."

The Agency included a copy of an e-mail that was sent to the BOLI Legal Policy Advisor on November 29, 2006, from a BOLI staff person, stating in pertinent part:

“The Salem office received 3 calls this afternoon from an individual at 541-574-9483 (maybe) who stated he was an attorney. He declined to provide his name.

“Anyway, he stated he had received a call from someone at the Hearings Unit (per Vickie it was Etta’s number) and tried to call back but after 3 hours of trying only learned everyone was at a lunch meeting (his words).

“Vickie spoke with him the first time, then Bob and then me. He refused to leave a number (we got the above # off caller id and it is in Newport without any further info available). He said he doesn’t call people or leave msgs for those who work for him (i.e. gov’t employees). He only leaves msgs for those he works for.

“He had a whole list of complaints about the bureau although I’m not sure which state agency he thought he was speaking with. I declined to give him my full name, only my first name. He had a lot of other questions about my previous work and qualifications for this job which I also declined to answer except for self-employment and military service.

“After about 10 minutes of his ranting & raving I provided him your number and suggested he call you. He did not want to be transferred. After informing him that I was terminating the call, I hung up.

“Hope you don’t hear from him.

“Apparently, this person (per Etta) is Kurt Freitag and Jeff has a case in which he is the respondent. I see that I had one a couple of years ago.”

Based on Respondent Freitag’s demonstrated hostility toward government process and as a precautionary measure, the ALJ arranged to have an Oregon State Police officer present at the scheduled hearing.

30) On January 9, 2007, the ALJ issued a discovery order compelling the Agency to produce certain documents and information pertaining to the BOLI child labor investigation. The Agency also was ordered to answer specific interrogatories relevant to the proceeding. The ALJ also noted that “in light of the Agency’s failure to respond at all to Respondents’ December 6, 2006, letter which was written based on a mutual agreement reached during the prehearing conference to expedite discovery resolution, the forum will allow Respondents some concessions at hearing to be determined at the

time of hearing, including leaving the record open if necessary to receive additional evidence from Respondents.” The ALJ also took official notice of the entire record of Case No 77-06 to avoid duplicating testimony and evidence.

31) Due to inclement weather on the hearing date, the ALJ was unable to travel from Portland to Newport. The hearing was cancelled and subsequently reset for February 21, 2007. The hearing was also relocated to the Planning Department Conference Room, at 210 SW 2<sup>nd</sup> Street, Newport, Oregon.

32) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

33) At the start of hearing, Respondent Freitag, acting individually and as Respondent Meritage’s authorized representative, stated he did not intend to participate in the hearing and was present only to make an appearance and place certain evidentiary objections on the record. Respondent Freitag also moved for dismissal with prejudice on the ground the Agency did not make available information pursuant to the ALJ’s discovery order. Respondent Freitag also stated he did not receive the Agency’s case summary. Agency case presenter Burgess produced a five page document entitled “Agency Response to Discovery Request” that included a certificate of service establishing that Respondents were served by first class mail on January 11, 2007.<sup>iv</sup> The Agency’s case summary also included a certificate of service showing Respondents were served by first class mail on January 5, 2007. Burgess stated that neither document was returned to the Agency by the U. S. Post Office as undeliverable. In response to the ALJ’s inquiry, Respondent Freitag acknowledged he received the Notice of Intent, the orders postponing the hearing, and the case summary order, but denied receiving the Agency’s response to the discovery request or the Agency’s case

summary. After considering the arguments, the ALJ concluded that the Agency timely responded to the discovery order and the response and case summary were properly served on Respondents by U. S. Mail. Respondents' motion to dismiss was denied and the ALJ advised Respondent Freitag that any objections to certain Agency exhibits must be made when offered during the hearing. Respondent Freitag remained present throughout the hearing.

34) During the hearing, the Agency offered paycheck stubs that were not provided to Respondents previously in accordance with the ALJ's discovery order. The ALJ admitted the paycheck stubs as evidence and left the record open to allow Respondents additional time to produce documents to rebut the paycheck stubs Claimant produced at hearing. On March 1, 2007, Respondents submitted various documents that included a fax transmission from Joseph Hughes Construction Company, a subcontract order, an invoice, and an unrecognizable photograph sans description. On March 7, 2007, the Agency filed objections to the post-hearing documents filed by Respondents and requested that the forum refuse to receive them into evidence. On March 13, 2007, Respondents filed a response to the Agency's objections, a renewed motion for dismissal, and additional documents "related to undisclosed documents." After reviewing the documents Respondents submitted, the ALJ determined that none of the documents serve as rebuttal to the Claimant's paycheck stubs and, contrary to Respondents' assertion, there were no other documents admitted as evidence that were not previously provided to Respondents. The ALJ found that Respondents submitted documents more fitting for their case in chief instead of evidence relating to the paycheck stubs. Respondents did not file a case summary in accordance with the ALJ's case summary order and the ALJ concluded the Agency was prejudiced by Respondents' failure to provide the documents

prior to hearing. Moreover, even if the documents had been admitted, they lack foundation and their probative value is not apparent. Consequently, the documents were not admitted into the record as substantive evidence.

35) The record pertaining to the child labor violations closed on March 13, 2007.

36) The ALJ issued a proposed order on June 13, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency did not file exceptions. Respondent filed exceptions that are addressed in the opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material herein, Respondent Kurt E. Freitag (“Respondent Freitag”) was an individual using the duly registered assumed business name of Big Fish Partners I to conduct a property development business in Newport, Oregon. Respondent Freitag’s principal place of business was located at 4628 N. 39<sup>th</sup> Place, Phoenix, Arizona, and his mailing address was PO Box 16495, Phoenix, Arizona. Respondent Freitag’s address, as the assumed business name registrant, was 1105 Church Street, Evanston, Illinois.

2) At times material herein, Respondent Meritage Homeowners’ Association (“Respondent Meritage”), formerly known as Meritage at Little Creek Homeowners’ Association, Inc.,<sup>v</sup> was duly registered in Oregon as a nonprofit corporation. Respondent Meritage’s principal place of business is located at “3360 et al. NW Oceanview,” i.e., TL 300 at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive, Newport, Oregon,<sup>vi</sup> and its mailing address is PO Box 429, Newport, Oregon. During all times material, Respondent Freitag was Respondent Meritage’s corporate president and secretary with a corporate office located at 881 NW Beach, Newport, Oregon.

3) In 2004, Respondent Freitag owned development property in Newport, Oregon, designated as Lincoln County Tax Lot 10-11-32-AC-00300 ("TL 300"). The property, located at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive, is the site of an ongoing townhouse development project that includes subdividing the tax lot for townhouse construction in at least three separate phases. The first phase, Meritage Phase I, includes six completed townhouse units. Four units, A through D, are located at 3360 NW Oceanview Drive and two units, A and B, are located at 3380 Oceanview Drive. All six units, upon completion, were sold by April 29, 2005. At the time of sale, the buyers obtained title to the units in Meritage Phase I. The second phase, Meritage Phase II, also includes six townhouse units. Four units, A through D, are located at 3420 Oceanview Drive and two units, A and B, are located at 3440 Oceanview Drive. Five of the six units in Meritage Phase II were still under construction and were not sold during times material herein. By January 14, 2006, all of the Meritage Phase II units were sold and titles were transferred to the buyers. Before the townhouse units were sold, Respondent Freitag and his wife, Rita Schaeffer, held title to the units. The address for both was recorded at the Lincoln County Assessor's Office as PO Box 429, Newport, Oregon. The original tax lot, TL 300, still exists because development is ongoing and townhouse construction continues as Meritage Phase III. Since December 19, 2003, and at all material times herein and currently, Respondent Meritage, "attention Kurt Freitag and Rita Schaefer, PO Box 429, Newport, Oregon," holds title to at least two tracts in TL 300 - a common area designated as "tract A" and another area that may or may not be a common area designated as "tract B."

4) In or around March 2004, Respondent Freitag dba Big Fish Partners I contracted with Joseph Hughes Construction ("JH") to perform construction work at the site known as the Meritage Development project. JH and its subcontractors handled the

exterior work on the townhouses while Freitag's "forces" handled the interior drywall work. On June 15, 2005, the Oregon Construction Contractor's Board ("CCB") notified JH that "the developer" on the Meritage project was not licensed and that JH's CCB license was in jeopardy if it continued to work for an unlicensed developer. JH immediately ceased work on the project and sent Respondent Freitag and all of JH's subcontractors a "stop work letter" on June 15, 2005. Other than returning to the job site to pick up some equipment on June 16, JH employees and subcontractors under JH's control were not on the job site after June 15, 2005. JH subsequently terminated its contract with Respondents pursuant to a provision that permitted JH to "terminate upon seven (7) days written notice when the work has been stopped for a period of at least thirty (30) days through no fault of the contractor \* \* \*." In its termination notice issued to Respondents on September 6, 2005, JH stated, in pertinent part:

"Additionally, pursuant to Paragraph 14.4.3, you have repeatedly and in unconditional terms expressed via e-mail and other communications that you have no intention of paying the most recent billings issued by Joseph Hughes, LLC, in connection with its work on the project. Quite apart from any additional charges that may be due as a result of your failure to be registered and the resulting additional costs, you have repeatedly leveled a wide variety of arguments, none of which are legitimately based upon the terms of the contract or the circumstances that led to the suspension of work, sufficient to form a basis for non-payment. Under Oregon law, you are obligated to conform to the Private Works Prompt Pay act. You have been represented by counsel in connection with this project for at least 60 days. Despite that, and despite receiving billings in accordance with the terms of the contract, you have not complied in any fashion with the Private Works Prompt Pay Act."

The termination notice was addressed to: "Kurt Freitag or Meritage Development or Big Fish Partners I."

5) Effective August 24, 2005, Respondent Freitag became licensed with the CCB as a "licensed developer." His "Employer Status" is listed as "Exempt." Prior to that date, Freitag was not licensed as a property developer in Oregon.

6) During the summer 2004, Claimant responded to a local newspaper advertisement seeking laborers to perform work on the Meritage construction site. Claimant's birthdate is November 23, 1988, and he was a high school student looking for summer work. Claimant's mother, who had met Respondent Freitag previously at a steakhouse where she worked, encouraged Claimant to apply and drove him to the job site for an interview. Respondent Freitag was at the job site and conducted a brief interview. Freitag asked Claimant how old he was and Claimant told him he was 15 years old. After asking Claimant a few questions about his experience, Freitag hired Claimant and agreed to pay him \$8 per hour.

7) Claimant worked with approximately five other laborers, including Kelly Johnson and another teenager, Seth Mross, whose birthdate is September 30, 1986. No one asked about Mross's age when he applied for the laborer job that summer.

8) During the summer 2004, Claimant and Mross performed work at the Meritage construction site that included site clean-up, landscaping, rock work, digging holes and trenches, building fences, and clearing out brush and trees. Although neither had experience with power equipment, Claimant and Mross used power saws to cut up branches and clear shrubs and brush. They also used a wood chipper that consisted of a wheel grinder and "big spouts" to grind the branches and brush. Freitag purchased two power saws from Wal-Mart for the crew to use because he did not want them using his "good saws." Although Respondent Freitag also provided the other equipment used at the work site, including a backhoe, skill saws, drills, bobcats, and an excavator, he did not supply safety equipment for power saw use or harnesses for hauling rock up a steep embankment for a rock wall that the crew, including Claimant and Mross, constructed on the property.

9) During the rock wall construction in 2004, Claimant, Mross, and Johnson loaded boulders into a “bucket” on a backhoe and Respondent Freitag then drove the loaded backhoe down a driveway to the street where the boulders were unloaded at the bottom of an embankment that ran along the street. Claimant and Mross used their hands and shovels to haul and place boulders weighing between 60 and 100 pounds along the embankment that was on an approximately 45 degree slope. Claimant, Mross, and Johnson lifted or dragged the boulders up the incline to form a rock wall approximately 30’ from street level to the top of the embankment. They completed about 15 or 20 feet of rock wall along the embankment in two days. When Johnson asked Respondent Freitag for ropes or harnesses to aid in the boulder placement, Freitag responded that “the slaves of Egypt moved larger stones than that, so you should be able to do the same.”

10) During the summer 2004, as Mross stood at the top of a large brush pile cutting up branches in the common area, he “nicked his shin” with a power saw. The power saw cut through his pants and skin and drew blood. Mross tied a piece of cloth around his shin and kept on working with the crew. He did not believe it was serious enough to seek medical treatment, but the cut left a permanent scar. Mross did not report the injury to Respondent Freitag.

11) During the summer 2004, the laborers were paid every two weeks and Respondent Freitag signed and issued the checks. Claimant was paid for all of the hours he worked that summer and all of his pay checks were signed by Freitag. At the end of the year he received a Form 1099 that showed his earnings from “Big Fish Partners, PO Box 16495, Phoenix, Arizona,” during 2004, totaled \$2,552.

12) Sometime in June 2005, Respondent Freitag’s employee or associate, Joya Menashe, called Claimant’s mother and asked her if Claimant was interested in

working another summer for Respondent Freitag. Claimant agreed and was hired as a laborer at the same job site, performing the same work as the year before and at the same wage rate of \$8 per hour.

13) Claimant began working at the Meritage construction site on June 23, 2005. On his first day, he was greeted by Respondent Freitag who put him to work “re-boxing” materials that had been previously delivered. Claimant and Respondent Freitag did not get along well during Claimant’s first week of work. Claimant perceived Respondent Freitag was overly critical of his work and was insulted by some of Freitag’s comments. Following a particularly upsetting encounter with Respondent Freitag, Claimant quit his employment on June 29, 2005, after finishing out the work day per Menashe’s request.

14) Mross and Brandon Haro, whose birthdate is September 29, 1987, also worked at the Meritage construction site during the 2005 summer. Mross told Haro to “show up at the job site and start working.” Haro filled out some paperwork when he started the job and later received paychecks signed by Respondent Freitag. Haro did not use a wood chipper that summer, but he worked around heavy machinery and used a power saw and shovel while landscaping. In 2004 and 2005, Menashe was present on the job site and primarily worked on the interior design of the townhouses. Although Menashe occasionally supervised the laborers, Freitag gave the instructions and made the decisions about the work to be done. When he was present on the job site, Freitag supervised Claimant, Mross and Haro and they perceived him as the “boss of the operation.”

15) Respondents have never applied for or obtained an employment certificate from BOLI.

16) After Claimant quit his employment, he immediately submitted an “invoice” that included his handwritten dates and hours worked. The typewritten invoice was actually a “sample” invoice dating back to August 2004 that included space for a name, address, social security number, birthdate, and under the heading, “Meritage Labor/Work Description,” there were sample dates, descriptions of labor performed, e.g. “Helped set up warehouse & coordinate Staining & Tablesaw etc.[,] MERITAGE LANDSCAPING, INSTALLED INSTALLATION IN UNIT 2D17[,]” and hours worked. Claimant used the sample invoice to write down his work hours and describe the work he performed each day. He did not provide any additional information. As he had done the previous summer, he put the invoice through a mail slot at the Meritage office located at 881 NW Beach in Newport, which was Respondent Meritage’s corporate office. The invoice showed that he worked 7.5 hours on June 23, 8 hours on June 27, 8 hours on June 28, and 8.5 hours on June 29, 2005. He described his work each day as “site labor/clean-up”; “site labor/clean-up/dug out Electric & Water boxes/clean out carport”; “site labor/clean-up/dug out Electric & Water boxes”; and “site labor/clean-up/recycling.” After some communication with Respondents, Claimant sent in a variation of the invoice that contained the same information as in the first invoice and additional information, including his name, address, social security number, birthdate, pay rate, and total hours worked.

17) In a letter addressed to “Ryan Doherty, 530 SW Fall Street, Unit 1, Newport, OR 97365,” typewritten on “Meritage at Little Creek” letterhead and dated August 1, 2005, Claimant was advised that the invoices he submitted were not acceptable and he was asked to submit a timesheet including certain information. The letter stated in pertinent part:

“Dear Sir:

“We are again returning the enclosed invoice that was apparently forwarded to us by you. As noted in an earlier letter, to be paid on an hourly basis requires a time sheet with the following information:

- Date
- Time arriving at the jobsite
- Time beginning and ending any breaks, including short breaks or lunch
- Time leaving the jobsite
- Total for the day
- Total for the period
- Rate of pay
- Name
- Address
- SSN
- Signature indicating that you attest, under penalty of perjury, to the accuracy of the record

“If you forward us that information not later than Friday, August 5, we may have the information in time for the next check run. Any information received later will not be processed until August 15.

“ACCOUNTING”

The following addresses were included on the Meritage letterhead: PO Box 429 and 881 NW Beach Drive, Newport, Oregon.

18) Following the August 1 letter, Complainant submitted a time sheet that subsequently was rejected by letter dated August 12, 2005. The letter, typewritten on the same “Meritage at Little Creek” letterhead as the August 1 letter, stated in pertinent part:

“To: Ryan Doherty

“Re: ATTACHED TIME SHEET

“We enclose the attached time sheet. Based on our information, this time sheet is inaccurate.

“For example, on no occasion did you take a ten minute break for lunch. In fact, we require a thirty minute, unpaid lunch break each day. In

addition, on Monday, June 27, you took a fifteen-minute break at about 11 a.m., a lunch break from about 12:30 to 1:15, and two afternoon breaks.

“Furthermore, we have no record of your ever working as late at [sic] 5:30.

“Please note that it is the worker’s responsibility to maintain accurate records and provide an accurate account of his or her time. We do on site monitoring to ensure that time is correctly kept. In the past, we note that we have had to correct your time sheets on several occasions. You should be aware that making a false claim may be a felony.

“Please complete the time sheet accurately and return it to us at your earliest convenience. If you prefer, we can provide you with our records, which you will need to sign. Kindly MAIL this information to us at the address about, or to:

ACCOUNTING  
POB 16495  
PHOENIX, AZ 85011”

19) Before he filed a wage claim, Claimant on several occasions provided Respondents all of the payroll information they requested. Claimant did not receive any wages for the hours he worked from June 23 through June 29, 2005. Subsequently, he filed a wage claim with BOLI on October 15, 2005. On the wage claim form, Claimant identified “Meritage” as the “Name of Employer’s Business” and “881 NW Beach, Newport” as the “Employer’s Business Address.” Claimant left blank the space for “Business Owner’s Name” because he was not certain of who owned the business.

20) In November 2005, “Meritage” ordered certain ads to appear between November 23 and December 21, 2005, in the “help wanted” section of the Newport News Times. One ad stated:

“HARD WORKERS

“Laborers needed. Experience with equipment and tools a plus. Must work weekends. Jobs and references to:

Worker Jobs  
PO Box 429  
Newport, OR 97365”

Another ad requested experienced carpenters and requested that applicants send “jobs and references” to “Carpenter Jobs” at the same PO Box 429 in Newport. The ad for laborers was similar to the one Claimant responded to in 2004.

21) On November 9, 2005, BOLI notified Respondent Meritage that Claimant had filed a wage claim for unpaid wages totaling \$256 at the rate of \$8.00 per hour from June 23 through June 29, 2005. The BOLI notification stated, in pertinent part:

“IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

“IF YOU DISPUTE THE CLAIM, complete the enclosed ‘Employer Response’ form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before November 23, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

The notice was mailed to Respondent Meritage at 881 NW Beach, Newport, Oregon, with a copy to PO Box 429, Newport, Oregon. The notice included a request that a reply be made to BOLI Office Specialist Wanda Gangle’s attention.

22) By letter dated November 14, 2005, Respondent Freitag responded to the notice, stating in pertinent part:

“Dear Ms. Gangle:

“I am responding to the notice you sent, a copy of which is attached. First, the claimant is not and never has been an employee of the Meritage Homeowners’ Association. He did provide clean-up and other manual labor on an as-needed basis for the then-contractor for the Meritage development. But this activity has nothing to do with the homeowners association. As such, the assertion that the claimant worked for or was employed by the homeowners association is completely false.

“The work arrangement that the claimant did have was terminated for several reasons, primarily related to his repeated failure to perform the duties assigned to him. Nevertheless, some payment MAY be due to him. At this time, it is impossible for us to tell. I have requested repeatedly that

the claimant provide the minimum information needed for him to be paid for any hours he actually worked. That includes:

- Date of work
- Time arriving at work
- Time of any breaks, including lunch
- Time departing
- A description of the actual work done during any hours claimed

“The claimant has refused or failed to provide that information, or else provided information that was obviously fictional. For instance, every person on site is required to take an unpaid break in the morning and one in the afternoon. These usually amount to twenty minutes or a half hour, but they must be no less than fifteen minutes. In addition, everyone is required to take a one hour lunch break, which is also unpaid. Most often, these stretch to an hour-and-a-half or two hours.

“The claimant first maintained that he had worked 32 hours in four days, but when required to actually account for those hours could not do so. Finally, he fabricated a work schedule that showed ten minutes for lunches, no morning or afternoon breaks, and so forth. The ten-minute lunches were obviously concocted to allow him to attempt to charge for a full hour through rounding up.

“I am still willing to present any true and accurate time claim, containing the above listed information, to the contractor. I am assured that any such time claim, meeting the above criteria, will be paid. However, any further attempts at what amounts to larceny will not be paid but rather reported to the appropriate law enforcement authorities. We maintain that stealing money through the false pretense of claiming hours one did not work is no different than holding up a liquor store for the same amount.”

The letter was typewritten on Meritage at Little Creek letterhead and signed, “K. Freitag.”

23) On November 21, 2005, BOLI compliance specialist Margaret Pargeter sent a letter to “Kurt Freitag, President of Meritage Homeowners’ Association,” stating in pertinent part:

“The wage claim of Ryan Anthony Doherty has been assigned to me for resolution. I have reviewed the information submitted by you as well as that submitted by the claimant with his wage claim. This letter will summarize my conclusions based on the evidence now available.

"You state the claimant was never employed by Meritage Homeowners' Association, if this is the case, please provide me with the name, address and phone number of the contractor whom Mr. Doherty was employed by.

"It is the responsibility of the employer, not the employee, to maintain accurate records of the hours worked by the employee per Oregon Revised Statute 653.045 and Oregon Administrative Rule 839-020-0080 (copies enclosed).

"Regarding meal and rest breaks, while it may have been your policy to provide a ten minute rest break for each four hours worked and an hour lunch, if the employee did not actually take the lunch, the employee must be paid. If you are saying he did take lunch, please provide me with witness statements from co-workers who worked on those same days, and their names, addresses and phone numbers where I can reach them.

" \* \* \* \* \*

"Please take one of the following actions by December 1, 2005:

"1. Have the contractor submit to me a check payable to Ryan Anthony Doherty in the gross amount of \$252.00 along with an itemized statement of lawful deductions, if any.

"2. Submit to me any evidence he did not work the hours claimed, or that he has been paid.

"3. Submit evidence my computations are incorrect.

"If I do not hear from you by December 1, 2005, I will pursue collection of wages owed through the Administrative Process in which case interest and civil penalties will be added to the wages owed."

24) By letter dated November 29, 2005, Respondent Freitag responded to

Pargeter's letter, stating, in pertinent part:

"I am responding to your letter of November 21.

"First, unless Mr. Doherty has some document proving he was employed by Meritage Homeowners' Association, I know of no obligation that we have to prove that he did not [sic]. In addition, we do not have an obligation to provide you with the name of any other employer he may have worked for. Since he was not an employee of ours, we have no obligation to keep a record of his time. If you disagree with this, then I claim that I worked for six years for your agency and am owed \$155,536.00. See if you are able to prove I did not.

"More seriously, the HOA does not now and never has employed anyone. As far as I know, Mr. Doherty was never EMPLOYED by anyone at all. He worked as an independent contractor doing construction cleanup. Since several contractors work on the site, I do not know with whom he had a

contractual relationship. If he does not know, then I think that should be illustrative of the problem here.

"I would also note the following:

- You claim that Mr. Doherty worked 'June 23, 2005 to June 29, 2005.' That includes a Sunday. What hours did he work on Sunday?
- Mr. Doherty, if in fact he worked at all, took lunch periods since everyone on site takes lunch at the same time.
- Mr. Doherty has presented at least six different versions of his hours and time. Which one are you claiming is correct?

"It appears to me that you have taken little if any time to research this matter. That does not seem to be consistent with the fact that you are being paid to do nothing other than such research. If you are claiming Mr. Doherty worked for the Meritage HOA, please provide ANY evidence of ANY kind that this is the case. If you or Mr. Doherty have [sic] no such evidence, I cannot really take seriously this claim. If Mr. Doherty is simply claiming that he was working on the site, then it certainly seems to me that the burden of proof is on him – not on me – to determine whom he was working for."

The letter was typewritten on Meritage at Little Creek letterhead and signed, "Kurt E. Freitag."

25) Following inquiries with the City of Newport about the Meritage development, including property ownership information, Pargeter sent Respondent Freitag a letter dated December 27, 2005, stating, in pertinent part:

"I received your letter of November 14, 2005. I did not say Mr. Doherty worked on Sunday I said he worked during the period June 23, 2005, to June 29, 2005. Since I already sent you a list of exactly what work he says he performed, and on what dates and times, you already know that he doesn't claim to have worked on Sunday.

"In your letter, you argue that time spent by Mr. Doherty performing construction labor, and construction labor clean-up work was done as an independent contractor. The standards used by the Bureau for determining whether or not someone performs services as an employee or an independent contractor are five-fold. These five factors are discussed in [*In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996)].

" \* \* \* \* \*

"With reference to the degree of control exercised by Mr. Doherty you controlled what work would be done, when it was to be done and where it

was to be done. Clearly if the work was not done, Mr. Doherty would be dismissed. Mr. Doherty does not have a business license, he does not advertise himself as a construction contractor, and he did not perform construction work for any other business while working the Oceanview Drive properties (10-11-32-AC tax lot 300) being developed by Meritage Homeowners' Association. A woman named Joya who works in the office at Meritage Homeowners' Association, contacted Mr. Doherty and asked him to return to work for Meritage Homeowners' Association.

"There was no financial investment on the part of Mr. [Doherty] other than his labor at the site. Mr. Doherty does not own a construction business and does not advertise himself as such.

"Mr. Doherty could not negotiate how much he would charge for specific services performed. You determined the opportunity for profit and loss for Mr. Doherty by setting a wage of \$8.00 per hour worked.

"Mr. Doherty required no specialized training or prior experience to perform his duties. His initiative was limited to shoveling dirt, picking up debris, and sorting recycling.

"With reference to the permanency of the relationship, Mr. Doherty did not leave the job to work as a contractor for anyone else.

"After analyzing these factors, the economic reality is that Mr. Doherty was not in business for himself but was dependent on Meritage Homeowners' Association for his income.

"ORS 653.045 requires employers to keep accurate payroll records. It is the burden of the employer to produce appropriate records to prove the precise number of hours worked. \* \* \* In this case, Meritage Homeowners' Association did not keep contemporaneous records of hours worked by Doherty. Doherty, however, did. You verbally disputed the hours worked by Mr. Doherty, but did not submit any actual time records as is required [by statute]. Mr. Doherty has responded with a detailed explanation of his hours of work \* \* \* where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency to show the amount and extent of work performed by the worker as a matter of 'just and reasonable inference' and 'may then award damages to the employee, even though the result may be only approximate.'

"You asked me to send evidence he worked for Meritage Homeowners' Association. I enclose copies of letters submitted to Mr. Doherty by Meritage Homeowners' Association. \* \* \*

"As indicated in my letter of November 21, 2005, I am requesting that Meritage Homeowners' Association submit to this office a check payable to Mr. Doherty in the amount of \$252.00 in wages due to him by January 9, 2006.

"If I do not hear from you by January 9, 2006, I will pursue collection of the wages owed through the Administrative Process in which case interest and civil penalties of \$1,920.00 will be added to the wages owed."

26) By letter dated January 3, 2006, Respondent Freitag replied to Pargeter's letter, stating:

"Perhaps I have not made myself sufficiently clear. I will try again.

"Mr. Doherty does not and has never worked for the Meritage Homeowners' Association, Inc. Indeed the Meritage HOA has absolutely nothing to do with construction of any kind. The HOA, like most HOA's, is responsible for certain on-going activities on behalf of the homeowners, i.e., after the units have been constructed and have been sold.

"You repeatedly, as does Mr. Doherty, claim that we did 'construction clean-up' or 'insulation.' This work does not apply in any way to the HOA. The woman named 'Joya' does not work for the HOA. The HOA is not developing any property whatsoever. I do not care whether Mr. Doherty is a [sic] independent contractor or the president of the United States, he simply does not and never has done any work whatsoever for the HOA.

"You and he simply have the wrong entity."

The letter was typewritten on Meritage at Little Creek letterhead and signed by "K. Freitag."

27) On or about January 9, 2006, "George" from Joseph Hughes Construction, Inc. told Pargeter that Joya Menashe worked for Respondent Freitag.

28) Respondents maintain a website that describes the "townhomes" available for sale in the "Meritage at Little Creek community" and includes a photo of a sign located at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive that says "Meritage at Little Creek."

29) On January 9, 2006, Pargeter sent Respondent Freitag another letter stating, in pertinent part:

"Mr. Doherty was employed by you either directly or through an agent. In June 2005, you owned the properties where Mr. Doherty was working under your direction after being contacted by Joya Menashe, your employee.

“Since Joseph Hughes Construction ceased working on the Meritage at Little Creek Project on June 15, 2005, you were then the only party responsible for the development there.

“Submit to me a check payable to Ryan Doherty in the gross amount of \$252.00 by January 19, 2006, or I will serve an Administrative Order which will include penalty wages for your failure to pay him in a timely manner as is required by ORS 652.140.”

30) Respondent Freitag responded with a letter dated January 17, 2006, stating:

“Your letter dated January 9 is factually inaccurate. Before, during and after the time that Joseph Hughes Construction stopped working on the site, there were – and are – at least two or three general contractors working on the site. In fact, no work of a construction nature is carried on by anyone other than a licensed general contractor (or else a specialty contractor working for the general, or an employee of the general, etc.)

“However, upon occasion, in order to ensure that workers or materialmen receive monies otherwise due to the general contractors, the developer has (as the law allows) made direct payments to said workers or materialmen. If Mr. Doherty believes that he falls into this category, we need to know, at very least, whom he was working for.

“It is very suspicious to me that you and he claimed, at first, that he worked for Meritage HOA, Inc. This, as you now allow, was false. It appears your tack at this point is to claim that it doesn’t matter who actually employed him – if he was on the site I have to pay him. I would be interested to see the legal support for such a position.

“In sum, the following seems to be the case:

- Mr. Doherty submitted pay requests based on work that he could not justify to an entity that did not employ him.
- When he was unable to coerce payment in that way, he attempted to involve the State of Oregon.
- Rather than look carefully at the claim, the claimant, and the circumstances, the State appears to take the position that anything any claimant says, even if internally contradictory, is good enough for you.

“Such a position hardly does you credit. Let me suggest another approach.

“Why not have Mr. Doherty complete an ACCURATE request for payment made out to the entity that actually employed him? If we know the entity, and/or get an accurate description of the work he did, it is possible that funds are being withheld from the contractor, or that the contractor can be

encouraged to pay Mr. Doherty directly. But until Mr. Doherty is able to articulate the basics, I really cannot say that I am inclined to pay him money just because he was able to convince you to threaten us.”

The letter was typewritten on Meritage at Little Creek letterhead and signed by “Kurt E. Freitag.”

31) After receiving additional information about Claimant’s employment, Pargeter sent Respondent Freitag a final letter summarizing her findings and making a final request for Claimant’s wages. Her letter, dated March 1, 2006, stated in pertinent part:

“This is to advise you that this office is in possession of a form 1099 issued by Big Fish Partners to Ryan Doherty for work performed in 2004.

“In 2004, Mr. Doherty was only 15 years of age until November 23, 2004. Oregon law requires all employers to obtain an annual employment certificate that must be posted where any minors work. You did not then, nor do you now have said employment certificate. In addition, minors under the age of 16 may not work on a construction site at all. These are serious violations of Oregon’s laws regarding the employment of minors. I have enclosed a brochure about the employment of minors, and an application for an employment certificate should you decide to employ minors in the future. You may be fined up to \$1000 per violation and each day’s continuance constitutes a separate violation.

“As stated in my previous correspondence, although you may have considered Mr. Doherty to be an independent contractor, facts support that he was an employee.

“This is my final request to you to submit to me a check payable to Ryan Doherty in the gross amount of \$252.00 along with an itemized statement of lawful deductions, if any, by March 13, 2006. If I do not receive payment by that date, I will proceed with the Administrative Process and will include \$1,920.00 in penalty wages which does not include interest or attorneys’ fees. In addition, we will seek penalties for violations of Oregon’s Child Labor laws.”

32) By letter dated March 13, 2006, Respondent Freitag replied to Pargeter’s letter, stating:

“I am writing in reference to your letter referenced above.

“(1) I am not aware of what work, if any, Mr. Doherty did that gave rise to the 2004 1099, but I can assure you that it was not construction related.

In all likelihood, Mr. Doherty mowed grass or participated in light landscaping work. In any case, it was not on a construction site.

“(2) Once again, I have never claimed Mr. Doherty was an independent contractor. You have simply made that up. I claimed THAT HE HAS NEVER WORKED FOR MERITAGE AT LITTLE CREEK HOA.

“You now seem to have switched gears again, and are concerned about something from 2004. If we could keep our attention on one matter at a time [sic]. My earlier recommendation was simple: kindly provide me with THE NAME OF THE ENTITY MR. DOHERTY CLAIMS THAT HE WORKED FOR BUT WAS NOT PAID. It looks like to me that Mr. Doherty may be fabricating work based upon his experience from several years ago. If not, then he MUST know the name of the entity he was working for. I can tell you that it WAS NOT Meritage at Little Creek HOA. I can also tell you that Big Fish Partners hires ONLY entities that are independent contractors.

“Now, I will agree that in the case of people who haul away trash, cut lawns, spread gravel and so forth, when that work is done on a one-time, two-time, etc., basis, we do not necessarily check credentials that closely. But every person signs a document warranting that he is an independent contractor, has insurance, and so forth. Some people lie, I suppose.

“I might also point out that even if we were intimidated and coerced, which you are obviously trying to do, into paying Mr. Doherty amounts he is not owed, we are forbidden by law from paying without obtaining employment information such as proof of citizenship, a form W-4, etc., that we do not have on Mr. Doherty because HE HAS NEVER WORKED FOR US. As such, I do not believe the law allows me to be coerced on this one.

“So, once more, WHAT IS THE NAME OF THE COMPANY OR OTHER ENTITY FOR WHICH HE CLAIMS TO HAVE WORKED? Is that really so hard?”

The letter was typewritten on Meritage at Little Creek letterhead and signed, “Kurt E. Freitag.”

33) Respondent Freitag did not submit a check to BOLI and Claimant was never paid for the work he performed from June 23 through June 29, 2005.

34) Claimant worked 31.5 hours from June 23 through June 29, 2005, at the agreed rate of \$8.00 per hour, earning a total of \$252. As of the date of hearing, Claimant had not been paid his wages.

35) The legal age of majority in Oregon is 18 years old.

36) Claimant was a credible witness. His demeanor was sincere and his testimony was straightforward and responsive. He had a reasonably clear recollection of pertinent facts and did not embellish his testimony in any way. His testimony regarding the hours he spent working on the Meritage construction site was bolstered by other credible witness testimony and by Respondent Freitag's history of paying Claimant for similar work performed at the same site in 2004. The forum credits Claimant's testimony in its entirety.

37) Kelly Johnson's testimony was credible. His ability to recall pertinent facts was keen and he had no apparent bias toward or against Respondents. Johnson's testimony was not impeached in any way. The forum credits his testimony in its entirety.

38) Seth Mross was a credible witness. He had a reasonably clear memory of his work experience at the Meritage construction site in 2004 and 2005 and of his co-workers' work experience during that time. His testimony about his on-the-job injury with a chain saw was believable and not embellished in any way. He was not impeached and the forum credits his testimony in its entirety.

39) Brandon Haro's testimony was credible. He had reasonably good recall of his 2005 work experience on the Meritage construction site and no apparent bias against Respondents. He was not impeached in any way and the forum credits his testimony in its entirety.

40) Pargeter, Gernhart, Christianson, and Wespi were all credible witnesses.

41) Respondent Freitag's testimony was similar in tone and content to the wordy letters he wrote to Pargeter during the wage claim investigation – riddled with internal inconsistencies and punctuated by self-righteous indignation. He relied on glibness rather than evidence to defend his position that Respondents were not

responsible for Claimant's unpaid wages or the child labor violations. Initially, he contended that "[t]he work arrangement" with Claimant "terminated for several reasons, primarily related to his repeated failure to perform the duties assigned to him" and stated that Claimant was not paid his 2005 wages because he did not provide proper paperwork to show he took required breaks and a full lunch hour each day and that "[t]he ten-minute lunches were obviously concocted to allow [Claimant] to attempt to charge for a full hour through rounding up."<sup>vii</sup> Later, he asserted that Claimant "was never EMPLOYED by anyone at all," but rather "worked as an independent contractor doing construction cleanup."<sup>viii</sup> At another point, he suggested some other contractor on the work site employed Claimant.<sup>ix</sup> Later still, when confronted with the 1099 that Respondent Freitag dba Big Fish Partners issued to Claimant in 2004, he suggested Claimant was "fabricating work based upon his experience from several years ago."<sup>x</sup>

Moreover, Respondent Freitag's overall demeanor was reflected in his closing summation when he repeated his previous declarations throughout the hearing that "I just can't take this very seriously, I really can't." He derided Oregon child labor laws by referencing Claimant, stating:

"If he was the kind of kid, I doubt that he is, but if he were the kind of kid who actually went around to construction sites looking for summer work and asked if he could do something, help out around the site, then, number one, I think that's the kind of thing that ought to be going on and, number two, if the State of Oregon has some bull-shit law that says you get in trouble for that, more shame on them, more shame on them \* \* \* and, I think you ought to have more kids going around [to construction sites], I don't care if they are 12 years old. \* \* \* I'm inclined to feel the following: the one thing Mr. Doherty said that made me give him grudging respect is that at least Mr. Doherty got off his duff and tried to make a buck. That was the one impressive thing he said."

When addressing the proposed civil penalties for the alleged child labor violations, Freitag stated:

"I didn't even do the arithmetic, that's how much I care about it. \* \* \* Does the State of Oregon really have so little to do that they're interested in this

stuff and is this really what we are paying taxes to have pursued? If it is, then I just say shame on everybody that's doing that, shame on them. \* \* \* I happen to be a rich guy and the reason I don't know what [the penalty] amount is because it is not substantial enough to affect my lifestyle one way or the other."

In an apparent attempt to justify the alleged violations, Respondent Freitag stated:

"I would almost see it as a badge of honor \* \* \* if somebody says that's right, that's what you did, I'd hang it up on the wall – I might actually do this – I'd point to it and say, look folks, at least what somebody did, it wasn't me, but if it was Joya or Joseph Hughes, whoever it is, that's an indication of a decent person at work there, but that's a decent person."

Respondent Freitag's testimony, when coupled with his demeanor throughout the hearing, was neither believable nor persuasive. Consequently, the forum credited his testimony only when it was an admission or a statement against interest.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent Freitag was an individual engaged in property development at TL 300, located in Newport, Oregon, using the assumed business name of Big Fish Partners I. His mailing address was PO Box 16495, Phoenix, Arizona,

2) At all times material herein, Respondent Meritage was a duly registered non-profit corporation that maintained its principal place of business at TL 300, located in Newport, Oregon. Respondent Freitag was Respondent Meritage's corporate president and secretary with a corporate office located at 881 NW Beach in Newport, Oregon. Respondent Meritage's mailing address was PO Box 429, Newport, Oregon. Respondent Meritage's "accounting" department shared a mailing address - PO Box 16495, Phoenix, Arizona - with Respondent Freitag's business, Big Fish Partners I.

3) Respondent Meritage advertised for laborers to work on the Meritage development at TL 300 in a local newspaper in Newport, Oregon, and ran payroll for the laborers through "accounting" in Phoenix, Arizona, at the Big Fish Partners I mailing address.

4) Respondents Freitag and Meritage co-owned TL 300 and jointly benefited from its development.

5) Respondents Freitag and Meritage jointly engaged the personal services of one or more persons in Oregon, including Claimant, Seth Mross, and Brandon Haro who were Respondents' employees.

6) Claimant was 15 years old and Seth Mross was 17 years old when they worked as laborers for Respondents on the Meritage construction site during the summer of 2004. Claimant and Mross used power saws and wood chippers while performing construction and wood cutting/sawing work.

7) While performing wood cutting/sawing work on Respondents' construction site during the summer of 2004, Mross nicked his shin with a power saw causing injury and a permanent scar.

8) In 2004, Claimant and Mross were paid every two weeks and Respondent Freitag signed and issued the checks. Claimant was paid for all of the hours he worked and at the end of the year he received a Form 1099 that showed his earnings from "Big Fish Partners, PO Box 16495, Phoenix, Arizona," during 2004, totaled \$2,552.

9) Claimant was 16 years old when he worked as a laborer for Respondents on the Meritage construction site from June 24 through June 29, 2005, at the agreed wage rate of \$8 per hour.

10) Brandon Haro was 17 years when he worked as a laborer for Respondents on the Meritage construction site.

11) Respondents did not verify the ages of Claimant, Mross or Haro before they began working as laborers on the Meritage construction site.

12) Respondents did not apply for or obtain an annual employment certificate to hire minors in 2004 and 2005.

13) Respondents did not post a validated employment certificate in a conspicuous place readily visible to all employees.

14) From June 24 through June 29, 2005, Claimant worked 31.5 hours and earned \$252. Respondents have not paid Claimant any wages for the work he performed in 2005, leaving unpaid wages of \$252.

15) Claimant quit Respondents' employment without notice on June 29, 2005, and more than 30 days have passed since Claimant's wages became due.

16) Written notice of nonpayment of wages was sent to Respondents on Claimant's behalf on January 2, 2003.

17) Respondents willfully failed to pay Claimant wages owed to him in the amount of \$252 and is liable for penalty wages.

18) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0479(1)(d), equal \$1,920 ( $\$8 \text{ per hour} \times 8 \text{ hours per day} = \$64 \text{ per day} \times 30 \text{ days} = \$1,920$ ).

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondents were joint employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405, and ORS 653.305 to 653.370.

2) The actions, inaction, statements, and motivations of Kurt E. Freitag, Meritage Homeowners' Association's president, are properly imputed to Respondent Meritage.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310.

4) Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays,

after Claimant quit his employment without notice. Respondent owes Claimant \$252 in unpaid, due and owing wages.

5) Respondent is liable for \$1,920 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due upon termination of employment as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the penalty wages, plus interest on all sums until paid. ORS 652.332.

7) The legal age of majority in Oregon is 18 years old. ORS 109.510.

8) Respondents violated OAR 839-021-0185 by employing at least three minors under 18 years old without verifying their ages.

9) Respondents violated ORS 653.307 and OAR 839-021-0220(2) by employing minors under 18 years old in Oregon during 2004 and 2005 without first obtaining a validated annual employment certificate to employ minors.

10) Respondents violated OAR 839-021-0220(3) by failing to post a validated employment certificate in a conspicuous place readily visible to all employees.

11) Respondents violated OAR 839-021-0102(1)(j) and 839-021-0102(1)(ss) by employing at least one minor child under 16 years old in 2004 to perform work using power driven saws to cut wood, a hazardous occupation.

12) Respondents violated OAR 839-021-0104 by employing at least one minor child under 18 years old in 2004 to perform work using power driven saws to cut wood, an occupation declared to be particularly hazardous or detrimental to the health or well being of minors 16 and 17 years old.

13) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondents Freitag and Meritage for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. ORS 653.370, OAR 839-019-0010(1)&(2), and OAR 839-019-0025.

## OPINION

### WAGE CLAIM

The Agency was required to prove: 1) Respondents jointly employed Claimant; 2) any pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

#### A. Respondents employed Claimant for an agreed upon rate of \$8 per hour.

ORS Chapter 652 governs claims for unpaid agreed wages. Under that chapter, “employer” means any person who engages the personal services of one or more employees. “Employee” means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ORS 652.310(1)(a)&(b). The Agency alleged Respondents jointly employed Claimant and, therefore, must prove 1) Respondents jointly engaged Claimant’s personal services and 2) Claimant rendered his personal services for an agreed upon rate.

In his answer to the original Order of Determination, Respondent Freitag denied he ever employed or retained the services of anyone and alleged he was a “natural person” who did not do business in Oregon. In their answer to the amended Order of Determination, Respondents alleged that “Big Fish Partners” is a partnership that operates in Oregon as a licensed developer and “entitled to hire only licensed general

contractors for construction related work.” Respondents also alleged Respondent Meritage was a “not for profit corporation engaged in the management of common areas for the Meritage Development” that “collected no dues” and therefore had no funds to “hire, retain, or pay any person for work.” Additionally, Respondents deny they may be found liable as joint or co-employers.

This forum has long held that joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon’s wage and hour laws. *In the Matter of Staff, Inc.*, 16 BOLI 97, 115 (1997); *see also In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258, 271 (1995)(when the agency issued an order of determination jointly against three separate employers who shared work crews and equipment, each employer was found to have failed to pay all sums due to claimant and the forum treated the employers as one employer for purposes of penalty wages, which were found against them jointly). This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act (“FLSA”). Under the FLSA, specifically, 29 CFR §791.2:

“(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee’s work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all

joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act \* \* \*.

“(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

“(1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

“(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

“(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.”

In this case, based on a preponderance of credible evidence, the forum finds the following facts are indicia of a joint employment relationship at all times material: 1) Respondent Freitag, an individual, conducted a property development business in Oregon using the duly registered assumed business name of Big Fish Partners I; 2) the mailing address for Respondent Freitag’s property development business is PO Box 16495, Phoenix, Arizona, and his principal place of business is located at 4628 N 39<sup>th</sup> Place, Phoenix, Arizona; 3) Respondent Freitag and his wife, Rita Schaeffer, own development property, known as TL 300, located at the corner of NW 33rd Street and NW Oceanview Drive in Newport, Oregon; 4) Respondent Freitag did not become a licensed developer<sup>xi</sup> in Oregon until August 24, 2005; 5) Respondent Freitag is the president and secretary of Respondent Meritage, an entity formerly known as Meritage at Little Creek Homeowners’ Association, Inc., that holds title to that part of TL 300 known as the common areas located at NW 33rd Street and NW Oceanview Drive in Newport, Oregon; 6) Respondent Meritage’s mailing address is PO Box 429, Newport, Oregon, its principal place of business is located at NW 33rd Street and NW Oceanview Drive (TL 300), Newport, Oregon, and its corporate office is located at 881 Beach

Street, Newport, Oregon; 7) in 2004, after responding to a newspaper ad and interviewing with Respondent Freitag, Claimant, a 15 year old, performed work as a laborer at Respondent Meritage's principal place of business for an agreed wage rate of \$8 per hour; 8) for the work he performed at Respondent Meritage's principal place of business in 2004, Claimant received a paycheck every two weeks, signed by Respondent Freitag, after submitting time sheets and/or invoices to Respondent Meritage's corporate office; 9) for tax purposes, Claimant received a 1099 form sent from Big Fish Partners, PO Box 16495, Phoenix, Arizona, showing he earned wages in 2004 totaling \$2,552 and was paid by Respondent Freitag's property development business, i.e., Respondent Freitag, "Payer's Federal Identification Number 36-4285157"; 10) in 2005, after agreeing to return to work for Respondents, Claimant worked 31.5 hours as a laborer on a construction site at Respondent Meritage's principal place of business for an agreed wage rate of \$8 per hour; 11) following a conflict between Respondent Freitag and Claimant, Claimant quit working at the Meritage construction site and submitted an invoice showing the dates and hours he worked to Respondent Meritage's corporate office; 12) by letter written on Respondent Meritage letterhead, which included addresses of PO Box 429 and 881 NW Beach Drive, Newport, Oregon, Respondent Meritage's "accounting" department advised Claimant that he must submit a time sheet in order to be paid on an hourly basis and that any information received later than August 15 would not be processed; 13) after Claimant provided a timesheet per Respondent Meritage's request, he received another letter on the same letterhead advising him that his timesheet was inaccurate, that they "had no record of [his] ever working as late as 5:30," that "[they] have had to correct [his] timesheets on several occasions," and instructing him to "complete the time sheet accurately" and "MAIL this information to us at the address about or to: ACCOUNTING,

POB 16495, Phoenix, Arizona”; 14) in November 2005, Respondent Meritage advertised for laborers in the Newport News Times and requested that applicants submit “jobs and references” to Respondent Meritage’s mailing address, PO Box 429, Newport, Oregon; 15) Respondent Freitag, acting individually or in concert with Respondent Meritage, provided all of the tools and equipment Claimant used to perform his job in 2004 and 2005, supervised and directed Claimant’s work in 2004 and 2005, and, in his capacity as a sole proprietor, paid Claimant directly for the work he performed in 2004.

From those facts, the forum infers that both Respondents actively participated in the Meritage townhouse development project, including engaging the personal services of Claimant and other laborers to perform landscape construction at the construction site. Respondent Meritage advertised in the local newspaper for the laborers and carpenters that performed work at the Meritage construction site. Respondent Meritage maintained an office where Claimant and other workers submitted their time sheets for the work they performed at the Meritage construction site. Respondent Meritage controlled, to some extent, how, when, and whether Claimant would be paid, as evidenced by its correspondence with Claimant after he quit his job in 2005. On the other hand, Respondent Freitag controlled and directed the work performed by Claimant and the other laborers and signed their paychecks. Respondent Freitag paid their wages as a sole proprietor using the assumed business name of Big Fish Partners I, as evidenced by credible testimony in the record and the 1099 form he provided Claimant in 2004.

The forum further infers from those facts that Claimant was under the simultaneous control of Respondents and simultaneously performed services for both. Each Respondent had an interest in TL 300’s development and both benefited from the

personal services Claimant and other workers rendered at the construction site in furtherance of its development. For all of those reasons, the forum finds Respondent Freitag acted directly or indirectly in Respondent Meritage's interest regarding personal services Claimant rendered at the construction site, and rather than being disassociated with respect to Claimant's employment, by virtue of Respondent Freitag's control over Respondent Meritage as its corporate president, Respondents shared control of Claimant and other laborers hired to perform work at the Meritage construction site.

Finally, Claimant submitted invoices and a timesheet to Respondent Meritage that displayed his \$8 per hour wage rate and although Respondent Meritage questioned his hours based on its requirement that laborers take breaks and an hour lunch, it did not at any time dispute his hourly rate. Consequently, the forum concludes Claimant rendered his personal services to Respondents for the agreed upon rate of \$8 per hour and was a joint employee of both Respondents.

**B. Claimant performed work for which he was not properly paid.**

A claimant's credible testimony is sufficient evidence to prove work was performed for which the claimant was not properly compensated. *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 147-48 (2004). In this case, Claimant's testimony that he was not paid for construction work he performed for Respondents from June 23 through June 29, 2005, was credible and substantiated by documentary evidence showing Respondent Meritage repeatedly turned down the time records Claimant submitted for payment, not because it denied Claimant performed work at the construction site, but because it questioned the amount and extent of the work he performed. Absent any evidence that Claimant was paid for the hours he submitted to Respondent Meritage, the forum concludes Claimant performed work for which he was improperly compensated.

**C. Claimant worked 31.5 hours for which he was not paid.**

Employers are required to keep and maintain proper records of wages, hours and other conditions and practices of employment. ORS 653.045. When the forum concludes an employee performed work for which the employee was not properly compensated, the burden shifts to the employer to produce all appropriate records to prove the precise hours and wages involved. When, as in this case, the employer produces no records, the forum may rely on evidence produced by the Agency from which “a just and reasonable inference may be drawn.” A claimant’s credible testimony may be sufficient evidence. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 122-23 (2004). Credible evidence established that when Claimant quit working for Respondents, he submitted work hours to Respondent Meritage for payment that were repeatedly rejected based on his purported failure to submit accurate time sheets. At one point, Respondent Meritage, through its accounting department, advised Claimant:

“Please note that it is the worker’s responsibility to maintain accurate records and provide an accurate account of his or her time. We do on site monitoring to ensure that time is correctly kept. In the past, we note that we have had to correct your time sheets on several occasions. You should be aware that making a false claim may be a felony.”

Respondent Meritage then instructed Claimant to “[p]lease complete the time sheet accurately and return it to us at your earliest convenience. If you prefer, *we can provide you with our records*, which you will need to sign.” (emphasis added) Respondents at no time provided Claimant or the Agency with the purported records documenting Claimant’s work hours and did not produce them during the hearing. Consequently, the forum accepts Claimant’s testimony because it was not exaggerated or contradicted by any other credible evidence and was bolstered by other credible witness testimony and documentary evidence. Respondents are jointly and severally liable to Claimant for \$252 in unpaid wages.

## **PENALTY WAGES**

The forum may award penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001).

In this case, credible evidence established that Respondents deliberately withheld Claimant's pay check after he voluntarily quit his employment. The earlier correspondence between Claimant and Respondents demonstrates that Respondents knew Claimant worked hours for which he was due wages. From that point forward, Respondents' excuses for not paying Claimant his wages ranged from blaming Claimant for a purported failure to properly fill out his time sheets to accusing him of fabricating his work hours. Curiously, at hearing, Respondent Freitag insinuated that Respondents failure to pay was an oversight and that the "check was in the mail." From those facts, the forum infers Respondents voluntarily and as free agents failed to pay Claimant all of the wages he earned from June 23 to June 29, 2005, at the time Claimant terminated his employment without notice. Respondents acted willfully and are liable for penalty wages pursuant to ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,920. This figure is computed by multiplying \$8 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

## **CHILD LABOR VIOLATIONS**

In the Notice of Intent to Assess Civil Penalties for Child Labor Violations, the Agency alleged Respondents employed minors from 2003 through 2005 and failed to 1)

obtain an annual employment certificate; 2) verify the minors' ages before employing them; and 3) post a validated employment certificate. The Agency also alleged Respondents employed at least one minor to engage in work hazardous to minors under 16 years old and at least one other minor to engage in work particularly hazardous or detrimental to the health and well being to minors 16 and 17 years old. The Agency further alleged that one minor suffered "bodily injury" as a result.

Respondents deny having employed the minors at issue or any minors "as defined relative to ORS 653.307," and deny "they had any employees during the time in question." In their answer, Respondents maintain that "any person who may have been hired was hired based upon information provided [to Respondents] by the hiree himself or herself," that Respondents did not engage in "any of the activities cited during the period set forth in the complaint," and deny the person named in the complaint suffered bodily injury. Respondents affirmatively allege that ORS 653.370 (providing civil penalties for child labor violations) is "unconstitutionally vague insofar as it does not provide a definition of the term 'minor.'" Respondents assert that ORS 653.010 provides a definition of minor that applies to ORS 653.010 to 653.261 and that the term minor is not defined "in any section subsequent to 653.261." Consequently, Respondents argue, the subsequent provisions are unenforceable.

**A. Respondents Employed Minors In 2004 And 2005.**

The threshold question for the alleged violations is whether Respondents employed minors during the relevant period. For the purposes of ORS 653.305 to 653.370 and OAR 839-0210-0001 to 839-021-0500, "employer" means "any person who employs another person," "employ" means "to suffer or permit to work," and "minor" means "any person under 18 years of age." OAR 839-021-0006(5)(6)&(10).

For reasons stated elsewhere herein, the forum has already concluded that Respondents jointly employed Ryan Doherty and other laborers to work on the Meritage construction site. A preponderance of credible evidence established that Seth Mross and Brandon Haro, along with Doherty, performed work as laborers at the Meritage construction site in 2004 (Mross and Doherty) and 2005 (Mross, Doherty and Haro). Undisputed evidence established that all three were less than 18 years old in 2004 and 2005. Moreover, a preponderance of credible evidence established that, for the purposes of the child labor statutes and rules, Respondents Freitag and Meritage simultaneously suffered or permitted those three persons to work as laborers for Respondents for the benefit of the Meritage development project. The question Respondents raise is whether a person under 18 years old is a minor for the purpose of assessing civil penalties pursuant to ORS 653.370.

Respondents argue that, absent an applicable statutory definition of minor, ORS 653.370 is unenforceable. Notwithstanding the Commissioner's rule defining "minor" as "any person under 18 years of age" for the purposes of ORS 653.370, the plain, ordinary meaning of the term minor, as used in the statute, is a person "having the status of a legal minor not having reached the age of majority or full legal age."<sup>xii</sup> The forum has already taken judicial notice that the legal age of majority in Oregon is 18 years old. Thus, the Commissioner's rule defining "minor" as any person under 18 years of age is consistent with the plain, ordinary meaning of minor as it used in ORS chapter 653, and consistent with the State of Oregon's general definition. Doherty, Mross and Haro were legal minors for the purposes of assessing civil penalties pursuant to ORS 653.370.

**B. Respondents Employed Minors In 2004 and 2005 Without Obtaining An Annual Employment Certificate.**

As joint employers of minors, Respondents were obliged to abide by Oregon child labor laws, including those requiring employment certificates.

ORS 653.307(2) provides:

“An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:

“(a) The estimated or average number of minors to be employed during the year.

“(b) A description of the activities to be performed.

“(c) A description of the machinery or other equipment to be used by the minors.”

OAR 839-021-0220 provides, in pertinent part:

“(1) Unless otherwise provided by rule of the commission, no minor 14 through 17 years of age may be employed or permitted to work unless the employer:

“(a) Verifies the minor’s age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and

“(b) Complies with the provisions of this rule.

“(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland, OR 97232, (971) 673-0836.

“(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.

“ \* \* \* \* \*

“(3) The employer must post the validated employment certificate in a conspicuous place where all employees can readily see it. When the employer employs minors in more than one establishment, a copy of the validated employment certificate must be posted at each establishment. As used in this rule, ‘establishment’ means a distinct physical place of business. If a minor is employed by one employer to perform work in more

than one location, the minor will be considered employed in the establishment where the minor receives management direction and control.

“ \* \* \* \* \*

“(5) The employer must apply for a validated employment certificate once each year by filing a renewal application on a form provided by the Bureau of Labor and Industries. The renewal application must be received by any office of the bureau no later than the expiration date of the validated employment certificate.”

A preponderance of credible evidence established that Respondents employed or permitted at least three minors under 18 years old to work as laborers at the Meritage construction site in 2004 and 2005. The minors ranged in age from 15 to 17 years old. By hiring minors, Respondents had an affirmative duty to apply for and obtain an employment certificate. Based on Respondents' stipulation that they have never applied for or obtained an employment certificate, the forum concludes Respondents violated ORS 653.307 and OAR 839-021-0220 in 2004 and 2005 by failing to apply for and obtain an employment certificate. There is no evidence showing Respondents hired minors in 2003; consequently, Respondents are liable for two violations instead of three as the Agency alleged.

**C. Respondents Employed Minors In 2004 And 2005 Without Verifying The Age Of Each Minor.**

As joint employers who employed persons under 18 years old, Respondents were required to verify the age of all minors by requiring the minors to produce an acceptable proof of age document. OAR 839-021-0185(1). An acceptable proof of age document includes, but is not limited to, a birth certificate, a state-issued driver's license, a U. S. Passport, or other acceptable proof approved by BOLI. OAR 839-021-0185(2). Additionally, Respondents had an affirmative duty to retain a record of the document used to verify each minor's age. A notation in each minor's personnel file

identifying the document used to verify the minor's age satisfies the requirement. OAR 839-021-0185(3).

Doherty and Mross credibly testified that Respondent Freitag did not ask them for documentation showing proof of age. Moreover, when Doherty was hired in 2004, he told Respondent Freitag he was 15 years old, thus, Respondents knew Doherty was a minor but did not ask for documentation proving his age. Haro testified that he filled out "basic" paperwork and showed some identification when he was hired, but did not otherwise describe the type of identification he provided or indicate whether Respondents made copies of the documentation he provided. Respondents, in turn, offered no evidence demonstrating they verified the age of the minors by requiring proof of age at the time of hire or anytime thereafter. In fact, Respondents presented no records, personnel or otherwise, showing they maintained and preserved any of the records required when employing minors. Consequently, the forum concludes Respondents violated OAR 839-021-0185 by failing to verify the ages of the three minors they employed in 2004 and 2005 and to maintain required records showing proof of age.

**D. Respondents Employed At Least One Minor In A Hazardous Occupation.**

The Agency alleged Respondents violated OAR 839-021-0102(1)(j) or OAR 839-021-0102(1)(ss) by employing Ryan Doherty to engage in work declared hazardous for minors under 16 years old.

Under OAR 839-021-0102(1)(j), construction work is hazardous when in it involves "alteration, repair, painting, or demolition of buildings, bridges and structures." There is no evidence that Doherty engaged in construction work that involved any of those activities. However, under OAR 839-021-0102(1)(ss), woodcutting and sawing is deemed hazardous work and Respondents are prohibited from employing a minor to

perform such work. A preponderance of credible evidence established that Ryan Doherty used a power saw to cut and saw wood while clearing brush at Respondents' construction site when he was 15 years old. Credible evidence showed he also used a power driven wood chipper to make wood chips from the cut wood. Based on those facts, the forum concludes Respondents hired Doherty to engage in hazardous work, violating OAR 839-021-0102(1)(ss), and are liable for civil penalties under ORS 653.370.

E. **Respondents Employed A Minor To Engage In Work Declared To Be Particularly Hazardous Or Detrimental To The Health Or Well Being Of A Minor.**

The Agency alleged Respondents violated OAR 839-021-0104 by employing Seth Mross to engage in work declared to be particularly hazardous for minors 16 and 17 years old.

Under OAR 839-021-0104, the Commissioner has adopted those occupations set forth in the FLSA, particularly 29 CFR §570.51 to and including §570.68, as amended in 1998, as occupations particularly hazardous or detrimental to the health and well being of minors 16 and 17 years old. Federal child labor regulations deem the occupation of operating power-driven woodworking machines as particularly hazardous for minors between 16 and 18 years old. 29 CFR §570.55 (Order 5). The term “power-driven woodworking machines” is defined in the regulations as “all fixed or portable machines or tools driven by power and used or designed for cutting \* \* \* wood.” 29 CFR §570.55(b)(1) (Order 5).

A preponderance of credible evidence established that Seth Mross used a power saw to cut and saw wood while clearing brush at Respondents' construction site when he was 17 years old. Credible evidence showed he also used a power driven wood chipper to make wood chips from the cut wood. Mross credibly testified that he was cut

with the power saw he was using while standing on a brush pile cutting tree branches. Although Mross did not consider the injury sufficiently significant to seek medical attention, the power saw cut through his pants and caused bleeding that he stopped by tying some cloth around his leg. Based on those facts, the forum concludes Respondents employed Seth Mross to engage in work declared to be particularly hazardous for minors 16 and 17 years old under the federal regulations, thereby violating OAR 839-021-0104, and the violation is aggravated by the injury Mross suffered while using a power driven saw. Respondents are liable for civil penalties for one violation, pursuant to ORS 653.370.

**F. Respondents Failed To Post A Validated Employment Certificate.**

Based on Respondents' admission that they did not apply for or obtain an annual employment certificate, the forum concludes Respondents also failed to post a validated employment certificate in a conspicuous place readily visible to all employees in 2004 and 2005, in violation of OAR 839-021-0220(3). Although the Agency alleged Respondents failed to post a validated employment certificate in 2003, there is no evidence in the record showing Respondents employed minors during that period. Consequently, the forum finds Respondents are liable for only two violations of OAR 839-021-0220(3).

**CIVIL PENALTIES**

Respondents are liable for nine violations of Oregon child labor laws. Each violation is a separate and distinct offense. OAR 839-019-0015. Pursuant to OAR 839-019-0025(1), the maximum civil penalty for any one violation is \$1,000 and the actual amount depends upon "all the facts and any mitigating and aggravating circumstances." Additionally, the minimum civil penalty for employing minors without a valid employment certificate is \$100 for the first offense, \$300 for the second offense, and \$500 for the

third and subsequent offenses. OAR 839-019-0025(2). The Agency seeks the maximum penalty for each violation.

When determining the actual amount, the forum must consider Respondents' history in taking all necessary measures to prevent or correct violations; any prior violations, if any; the magnitude and seriousness of the violations; the opportunity and degree of difficulty in complying with the statutes and rules; and any mitigating circumstances. OAR 839-019-0020. Respondents are required to provide the Commissioner with evidence of any mitigating circumstances. OAR 839-019-0020(2). Respondents offered no evidence of mitigating circumstances. However, there are several aggravating circumstances in this case that illustrate the seriousness of Respondents' child labor violations.

First, there is no evidence Respondents took any measures at any time to correct or prevent the violations. In fact, Respondent Freitag readily admitted that Respondents had never requested or obtained an annual employment certificate and stated in his closing argument that “kids” - even 12 year olds – with a desire to work on construction sites should be given that opportunity without “some bull-shit law that says you get in trouble for that.” Second, while there is no evidence of prior violations, the forum finds it likely Respondents will not have any qualms about committing future violations. Respondent Freitag was quick to point out that “as a rich man,” he was not affected by the penalty amount; indeed, he perceived any sanctions as a “badge of honor” and the hallmark of a “decent person.” Third, and significantly, a minor was injured while operating a power driven saw on Respondents' watch. It matters not that the injury was slight. The power saw in a less sure hand or on another day could have caused significantly more damage. The fact that it did not in this case is not the point. The purpose of labor laws generally is to protect workers from employer exploitation.

Children are particularly vulnerable; hence, the child labor laws hold employers to certain standards that enable minors to participate in the workforce without risk to life and limb. Respondents' cavalier attitude toward those laws reflects an indifference to the law that poses a serious risk to the minors they employ in the construction business. Moreover, their demonstrated disdain for child labor laws has convinced the forum they have no intention of complying with those laws in the future.

Having considered the aggravating circumstances and there being no mitigating circumstances to consider, the forum concludes that the maximum penalty for each violation is an appropriate penalty for Respondents' failure to comply with Oregon's child labor laws. Consequently, Respondents are jointly and severally liable for \$9,000 for the violations of ORS 653.307, OAR 839-021-0220(2)&(3), OAR 839-021-0185, OAR 839-021-0102(ss), and OAR 839-021-0104.

## **RESPONDENTS' EXCEPTIONS**

Respondents timely filed exceptions to the proposed order and "request that the Commissioner reject the proposals in their entirety."

### *Exception I*

Respondents contend the Agency had no standing to pursue Claimant's wage claim because he had not assigned his wages to the Commissioner prior to hearing and "by that time, the claimant had already been paid his full claim by Joya Menashe, the self-confessed obligator." As such, Respondents argue, "there was no claim to assign and the Agency had no basis for pursuing the issue." Respondents' argument has no merit. First, there is no credible evidence that Claimant was paid any wages due and owing at any time by Menashe or anyone else, including Respondents. Respondents produced no cancelled checks or any other documentation that contradicts the credible evidence showing Claimant was not paid any wages for the work he performed in June

2005. Second, for reasons already stated elsewhere herein, Respondents failed to persuade this forum that a wage assignment must be taken before the Commissioner may initiate enforcement proceedings.<sup>xiii</sup> For those reasons, Respondents' exception is **DENIED**.

*Exception II*

Respondents reiterate their contention that Claimant “had already been paid the full amount of the claim prior to the hearing \* \* \* [t]herefore, there is at least no basis for a judgment in this amount.” There is simply no evidence to support that claim; thus, Respondents' exception is **DENIED**.

*Exception III*

Respondents contend the ALJ ignored “the unrebutted testimony, supported by affidavit, that the wage claimant was being retained and paid by Joya Menashe, not one of the respondents.” First, there is no “unrebutted testimony” in the record that Claimant was hired and paid by Menashe. A preponderance of credible evidence, including Claimant’s testimony and that of other credible witnesses, contradicts Menashe’s unsworn statement and demonstrates that Respondents employed Claimant and did not pay him for the work he performed in June 2005. Second, Menashe’s purported “affidavit” contained material inconsistencies that Respondents did not attempt to resolve by calling her as a witness at the hearing. Third, contrary to Respondents' assertion that Menashe “admitted she was responsible for payment of the wage claimant,” Menashe denied Claimant was ever her employee. Respondents' reliance on Menashe’s unreliable and unsworn statement is misguided. Therefore, Respondents' exception is **DENIED**.

*Exception IV*

Respondents' assertion that there is no evidence to support a finding that Respondent Meritage was connected to this matter has no merit. Respondents' exception is **DENIED**.

*Exception V*

Respondents' contention that Claimant "was caught lying about events surrounding the claim" has no basis in fact. Consequently, Respondents' exception is **DENIED**.

*Exception VI*

Respondents' claim that "there is no legal minimum age for work covered by the penalty being sought" is nonsensical and frivolous and Respondents' exception is **DENIED**.

*Exception VII*

Respondents' claim that "the wage claimant was working for Joya Menashe at his mother's behest, affording the 'employer' an *in loco parentis* exclusion from age requirements, if any," is incorrect. ORS 653.365 provides a civil penalty exemption for parents or persons standing in place of the parents. The statute's provisions do not apply to a person standing in place of the minor's parents *and* who has custody of the minor. ORS 653.365(2). Respondents proffered no evidence that Menashe or anyone other than Claimant's parents had custody of Claimant during times material. Respondents' exception is **DENIED**.

*Exception VIII*

Respondents' claim they were precluded from adequately defending themselves because the Agency "refused to provide meaningful and timely discovery." That claim has no basis in fact and Respondents' exception is **DENIED**.

*Exception IX*

Respondents' contention that "unrebutted evidence at hearing, including the evidence of Hughes Construction itself, was that during the period in question Hughes and Hughes alone employed all contractors, subcontractors and other workers at the site" is not supported by any credible evidence in the record. Consequently, Respondents' exception is **DENIED**.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Kurt E. Freitag** and **Meritage Homeowners' Association** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Ryan Anthony Doherty, in the amount of TWO THOUSAND ONE HUNDRED AND SEVENTY TWO DOLLARS (\$2,172), representing \$252 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$1,920 in penalty wages, plus interest at the legal rate on the sum of \$252 from August 1, 2005, until paid, and interest at the legal rate on the sum of \$1,920 from September 1, 2005, until paid.

FURTHERMORE, as authorized by ORS 653.370, and as payment of the penalties assessed for violations of ORS 653.307, OAR 839-021-0220, and OAR 839-021-0102(p), the Commissioner of the Bureau of Labor and Industries hereby orders **Kurt E. Freitag** and **Meritage Homeowners' Association** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of NINE THOUSAND DOLLARS (\$9,000), plus any interest thereon that accrues at the legal rate between a date ten days after the

issuance of the Final Order and the date Kurt E. Freitag and Meritage Homeowners' Association complies with the Final Order.

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<sup>i</sup> Inexplicably, the Agency's motion to consolidate was not marked as an exhibit and is not included in the hearing file. Its existence is otherwise documented in the ALJ's ruling on the motion, marked as Exhibit X-20.

<sup>ii</sup> Claimant testified he signed several documents when he filed his wage claim, but could not remember if the documents included a wage assignment form.

<sup>iii</sup> Cf ORS 652.330 ("The Commissioner of the Bureau of Labor and Industries shall enforce ORS 652.310 to 652.414 and to that end may \* \* \* [t]ake assignments, in trust, of wage claims \* \* \* for payment of wages from the assigning employees \* \* \*" and "sue employers on wage claims \* \* \* thus assigned \* \* \* for collection of wages[.]" and is "entitled to recover, in addition to costs, such sum as the court or judge may adjudge reasonable as attorneys fees at trial and on appeal.").

<sup>iv</sup> At hearing, the Agency's Response to Discovery Request was marked as exhibit A-24. Since the wage claim proceeding includes an exhibit (wage claim assignment) with the same exhibit number, the forum renumbered the Agency's Response to Discovery Request and it is now exhibit A-26.

<sup>v</sup> The Corporation Division records show that on November 28, 2003, Meritage at Little Creek Homeowners' Association, Inc. changed its name to Meritage Homeowners' Association.

<sup>vi</sup> See *infra* Finding of Fact – The Merits 3.

<sup>vii</sup> See *supra* Finding of Fact – The Merits 22.

<sup>viii</sup> See *supra* Finding of Fact – The Merits 24.

<sup>ix</sup> See *supra* Finding of Fact – The Merits 30.

<sup>x</sup> See *supra* Finding of Fact – The Merits 32.

<sup>xi</sup> He is licensed as a sole proprietor and his "employer status" is listed as "exempt." See *supra* Finding of Fact – the Merits 5.

<sup>xii</sup> See Webster's Third New International Dictionary 1439 (2002).

<sup>xiii</sup> The ruling on Respondents' motion to dismiss based on the Agency's purported failure to take a wage assignment before issuing the Order of Determination has been supplemented for further clarification. See *supra* Finding of Fact – Procedural 21.