

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JAN 24 2014

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Jr., Circuit Court Judge

Case No.: 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington,
Stephen C. Black, Bradley Kirk Bray, Mark D'Amico,
Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly
Levasseur, John Martin Loughlin, Joe Maranville,
Khalif Middleton, Chelcie Oxentine, Judith A. Parker,
Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba,
Sherry Singleton, Steven G. Thoni, Stratton Vitikos,
Michael H. Willis, and Michael J. Zanardo Respondents/Appellants,

v.

CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts, ...Appellant/Respondent

RECORD ON APPEAL

VOLUME I OF III

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Attorneys for Respondents/Appellants

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-267-43

Timothy A. Zinn, et al.
PLAINTIFF(S)

CFI Sales & Marketing, Ltd.
d/b/a Westgate Resorts
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : ☐ Plaintiff ☐ Defendant
	or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

*Jury verdict in favor of the plaintiff Laura Arrington against the defendant for \$2,769.00.
Jury verdict for defendant as to claims for damages by all other plaintiffs.
See attached verdict forms.*

*Plaintiff's Motion to Triple Damages is GRANTED.
Plaintiffs' Motion for New Trial is DENIED.
Plaintiffs' Motion for Attorney Fees is PARTIALLY GRANTED and PARTIALLY DENIED.*

Attorney Gene M. Connell, Jr. and/or attorney David J. Canty are to prepare a formal order.

ORDER INFORMATION

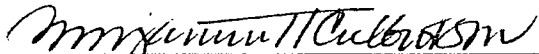
This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Laura Arrington	CFI Sales & Marketing, Ltd. d/b/a Westgate Resorts	\$10,478.04

If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


 Benjamin H. Culbertson, Circuit Court Judge

2148
 Judge Code

June 5, 2012
 Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Gene M. Connell, Jr.
 David J. Canty

John S. Wilkerson, III

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR THE DEFENDANT(S)

 CLERK OF COURT

Court Reporter: Grace Hurley

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

VERDICT
RE: **Laura Arrington**

FILED
HORRY COUNTY
12 JUN -6 AM 11:59
CLERK OF COURT

(Check one)



We, the jury, find in favor of the plaintiff **Laura Arrington** and award the said plaintiff judgment against the defendant in the amount of:

\$ Two thousand seven hundred sixty nine / 100

February 17, 2012

Deborah A. Monahan

Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

VERDICT
RE: **Robert Adams**

FILED
NOTARY PUBLIC
12 JUN -6 4:10:59
JULIA A. WARD
CLERK OF COURT

(Check one)

☐ We, the jury, find in favor of the plaintiff **Robert Adams** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Robert Adams.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

VERDICT
RE: **Stephen C. Black**

FILED
HORRY COUNTY
12 JUN -6 AM 11:59
CLERK OF COURT

(Check one)

☐ We, the jury, find in favor of the plaintiff **Stephen C. Black** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Stephen C. Black.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,
Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,
Defendant.

VERDICT
RE: **Bradley Kirk Bray**

FILED
HORRY COUNTY
12 JUN -6 4:11:59
CLERK OF COURT
MELANIE JONES-WARD

(Check one)

☐ We, the jury, find in favor of the plaintiff **Bradley Kirk Bray** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Bradley Kirk Bray.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

(Check one)

VERDICT
RE: **Mark D'Amico**

FILED
HORRY COUNTY
12 JUN -6 AM 11:59
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **Mark D'Amico** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Mark D'Amico.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

(Check one)

VERDICT
RE: **Thomas A. DeVitis**

FILED
HORRY COUNTY
12 JUN -6 AM 10:59
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **Thomas A. DeVitis** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Thomas A. DeVitis.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

)
)
) Plaintiffs,
)
)

vs.

)
) CFI Sales & Marketing, Ltd. d/b/a
) Westgate Resorts,
)
)

) Defendant.
)
)

(Check one)

VERDICT
RE: **Rodney Eddie Haynes**

FILED
Horry County
12 JUN -6 4:10:59
JUL 15 11:00:35-AM
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **Rodney Eddie Haynes** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Robert Eddie Haynes.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

)
)
) Plaintiffs,
)
)

vs.

)
) CFI Sales & Marketing, Ltd. d/b/a
) Westgate Resorts,
)
)

) Defendant.
)
)

VERDICT
RE: **Holly Levasseur**

FILED
HOLLY COUNTY
12 JUN -6 AM 11:59
NEW JERSEY
CLERK OF COURT

(Check one)

☐ We, the jury, find in favor of the plaintiff **Holly Levasseur** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Holly Levasseur.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

)
)
) Plaintiffs,
)
)

vs.

)
) CFI Sales & Marketing, Ltd. d/b/a
) Westgate Resorts,
)
)

) Defendant.
)
)

(Check one)

VERDICT
RE: **John Martin Loughlin**

FILED
HORRY COUNTY
12 JUN -6 4:10:59
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **John Martin Loughlin** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff John Martin Loughlin.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

VERDICT
RE: **Chelscie Oxentine**

FILED
HORRY COUNTY
12 JUN -6 4:11:59
CLERK OF COURT

(Check one)

☐ We, the jury, find in favor of the plaintiff **Chelscie Oxentine** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Chelscie Oxentine.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

(Check one)

VERDICT
RE: **Judith A. Parker**

FILED
12 JUN -6 AM 10:59
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **Judith A. Parker** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Judith A. Parker.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,

Defendant.

(Check one)

VERDICT
RE: **Cynthia G. Reilly**

FILED
HORRY COUNTY
12 JUN -6 AM 11:59
CLERK OF COURT

☐ We, the jury, find in favor of the plaintiff **Cynthia G. Reilly** and award the said plaintiff judgment against the defendant in the amount of:

\$ _____

☒ We, the jury, find in favor of the **defendant** as to claim for damages by the plaintiff Cynthia G. Reilly.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2009-CP-26-0043

Timothy A. Zinn, *et al.*,
Plaintiffs,

vs.

CFI Sales & Marketing, Ltd. d/b/a
Westgate Resorts,
Defendant.

VERDICT
RE: Timothy A. Zinn

FILED
HORRY COUNTY
12 JUN -6 AM 11:00
CLERK OF COURT
MELANIE HARRIS-WARD

(Check one)

☐ We, the jury, find in favor of the plaintiff Timothy A. Zinn and award the said plaintiff judgment against the defendant in the amount of:

\$ _____.

☒ We, the jury, find in favor of the defendant as to claim for damages by the plaintiff Timothy A. Zinn.

February 17, 2012

Deborah A. Monahan
Deborah A. Monahan
Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura
Arrington, Stephen C. Black, Bradley
Kirk Bray, Mark D'Amico, Thomas A.
DeVitis, Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn C.
Lanpher, Holly Levasseur, John Martin
Loughlin, Joe Maranville, Khalif
Middleton, Chelcie Oxentine, Judith A.
Parker, Matthew W. Reed, Cynthia G.
Reilly, Gerald Ryba, Sherry Singleton,
Steven G. Thoni, Stratton Vitikos,
Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a Westgate Resorts,

Defendants.

ORDER

FILED
HORRY COUNTY
2012 AUG -7 AM 10:36
MELANIE HUGGINS-WARD
CLERK OF COURT

BACKGROUND FACTS

This matter is before the Court based on Plaintiffs' Motion for New Trial, for Declaratory Judgment as to Contract Being in Violation of the Payment of Wages Act , for Treble Damages and for Attorneys' fees. Briefly, this case was tried before me the week of February 13, 2012. The jury returned a verdict for Plaintiff Laura Arrington only in the amount of \$2,974.00. Plaintiffs seek a new trial as to all Plaintiffs. Plaintiffs' further seek in the alternative treble damages as to the claim of Laura Arrington, attorneys' fees under the payment of wages statute and attorneys' fees under the South Carolina Declaratory Judgment Act for prevailing on that cause of action regarding the employment contract with all Plaintiffs. For purposes of simplicity and because the Plaintiffs' motion is complex, the Court divides the motion into subparts.

1
mtc

I. PLAINTIFFS' MOTION FOR A NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT IS DENIED.

Plaintiffs moved for a new trial pursuant to SCRCP 50(b) which provides in pertinent part:

A party who has moved for a directed verdict may move to have the verdict and any judgment entered therein set aside and to have judgment entered in accordance with his motion for a directed verdict...

The courts of this state have held "the test which guides this court and the exercise of its power and duty to set aside a verdict on the ground of inadequacy is whether the verdict is so shocking and outrageous as to manifestly show that the jury was actuated by considerations not founded on the evidence and/or instructions of the court." *Ravan v. Greenville Co.*, 315 S.C. 447, 434 S.E.2d 296 (Ct.App. 1993).

In this case, at the close of the evidence the Plaintiffs moved the court for a directed verdict on S.C. Code Ann. § 41-10-10 entitled the "Payment of Wages Act" as to all Plaintiffs. Plaintiffs also requested that the court find as a matter of law that wages due the Plaintiffs were not paid according to the Act and that Defendant violated numerous sections of the Act including S.C. Code Ann. § 41-10-10, et seq. The court believes and still finds that this was an issue for the Court and should not be submitted to the jury. Plaintiffs have argued to the court that the payment of wages statute was an action at law and that a jury trial was mandatory. This court declined to adopt that position at trial and continues to do so. Thus, I deny Plaintiffs' motion for a new trial on that ground.

The court also fails to grant a new trial as to Plaintiffs Lanpher, Wills, Middleton, Thoni and Loughlin. The court finds that there was no evidence that these Plaintiffs had a case and thus refused to allow them to submit their claims to the jury.

Further, the court declines a new trial based on Plaintiffs' grounds that the court erred in determining that wages in excess of \$3,500.00 were in the reserve account as no contractual

2 / mtc

provision allowed for such characterization. The court continues to believe that this case is tied to the previous class action which was settled and refuses to change its ruling on this point.

The Plaintiffs also argue that the court erred in directing a verdict as to the cause of action for breach of contract accompanied by a fraudulent act finding no evidence of fraud. The court finds in this case that there was no evidence of fraud and does not believe that the charge back provision of the contract, the reserve provision of the contract or designating unpaid wages as reserve funds constituted fraud. Further, the court finds that down payment required of each customer along with the upselling and down selling of timeshares to customers is not evidence of fraud. While there was evidence that no separate reserve account was kept by the Defendants by Connie Sharpe, this does not rise to the level of fraud. Further, while employee Michael Wills and Defendant's employee Connie Sharpe testified that Defendants would sometimes contact buyers in house after the sale to upsell to a more expensive timeshare unit, this is not evidence of fraud. Accordingly the court declines to grant Plaintiffs a new trial.

II. DEFENDANT'S CONTRACT WITH THE PLAINTIFFS DOES VIOLATE THE PAYMENT OF WAGES ACT.

At the close of the trial, I advised the parties that I would review whether or not the Defendant violated the South Carolina Payment of Wages Act, § 41-10-40(a). This Act provides "Every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday." Defendant's contract with the Plaintiffs, including schedule A on page 2, paragraphs VI and VII, purports to establish a scheme whereby Plaintiffs' wages will not be paid on their regular payday but rather will be withheld in part until following separation from the payroll. The Plaintiffs contract with Defendants states:

...the funds remaining in the reserve account will be reimbursed to the employee
only after the [Defendant] has determined that six (6) timely and consecutive

3/mk

monthly payments have been made on each sale made by employee for which employee has been paid a commission.”

Further, Defendants violated § 41-10-50 which provides that “When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days.” A review of the contract in this case clearly shows that this section of the Payment of Wages Act was violated by the Defendants.

Further, S.C. Code § 41-10-40(C) was violated by Defendants. This section provides” “An employer shall not withhold or divert any portion of an employee’s wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of Section 41-10-30.”

Here, the contract of Defendants violates all of the above code sections. First, Plaintiffs wages were reduced without notice. Second, wages were withheld after separation from the payroll. Third, the chargeback scheme is unenforceable and is contrary to the South Carolina Payment of Wages Statute in that an employee could sell a timeshare product and actually not be paid for ten years after the sale. See *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 (2006) (employment agreement violated § 40-10-30 because employees given no time certain when payment would occur).

For the reasons set forth above, Defendant’s employment contracts with Plaintiffs violates the Payment of Wages Act as a matter of law and this court so declares that the contract is void as against public policy.

4/mtc

III. PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES FOR THE DECLARATORY JUDGMENT CAUSE OF ACTION.

While this court has declared the Defendant's employment contract with the Plaintiffs violative of the Payment of Wages Act as a matter of law, this court declines to award attorney's pursuant to S.C. Code § 15-53-100.

The courts of this state have not explicitly ruled on attorneys' fees under this statute; however, at least one court has allowed for attorney's fees under S.C. Code § 15-53-100. In *S. C. Electric and Gas v. Hartough*, 375 S.C. 541, 654 S.E.2d 87 (S.C. App. 2007) the court mentioned S.C. Code § 15-53-100 as a basis for awarding fees. Here, the court finds that awarding of fees is discretionary and even though the contract between the parties did violate the payment of wages statute, only one plaintiff prevailed. Accordingly, the court declines as a matter of law to award attorneys' fees on the declaratory judgment cause of action.

IV. PLAINTIFF ARRINGTON'S AWARD SHOULD BE TREBLED AND SHE SHOULD IS ENTITLED TO ATTORNEYS' FEES.

The court finds as a matter of law that Arrington's verdict of \$2,769.00 should be trebled. The payment of wages statute allows for treble damages and Arrington proved to a jury the contract between the parties was a violation of the payment of wages statute.

Accordingly, Plaintiff trebles Laura Arrington's award of \$2,769.00 such that judgment against the Defendant is \$8,307.00. The Defendant violated the S.C. Payment of Wages Act by modifying the employment contract with Arrington without written notice and by failing to pay her wages within the time specified by law. Accordingly, trebling is appropriate as to her claim only.

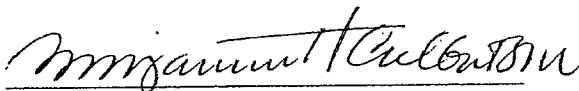
As to attorneys' fees, counsel for Plaintiffs submitted attorneys' fees of \$35,700.00 for Attorney Connell and \$18,576.00 for Attorney Canty. The court finds only one Plaintiff prevailed

5/2012

and accordingly the court cannot grant attorneys' fees as requested and only grants a prorata share of attorney Connell's and attorney Canty's fees in the total sum or \$2,171.04.

Finally, it should be noted that the court heard these pretrial motions without oral argument as permitted by Rule 59(f) SCRPC. Accordingly

IT IS SO ORDERED.



Benjamin H. Culbertson
Resident Circuit Judge
Fifteenth Judicial Circuit

July 19, 2012

— Sumter, South Carolina —

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
Arrington, Stephen C. Black, Bradley)
Kirk Bray, Mark D'Amico, Thomas A.)
DeVitis, Rodney Eddie Haynes, Jimmy)
Kelly, Whitney Renee Knox, Lynn C.)
Lanpher, Holly Levasseur, John Martin)
Loughlin, Joe Maranville, Khalif)
Middleton, Chelcie Oxentine, Judith A.)
Parker, Matthew W. Reed, Cynthia G.)
Reilly, Gerald Ryba, Sherry Singleton,)
Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)

Defendants.)

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

John S. Wilkerson, III, Esq.
Turner Padget Graham & Laney, PA
P.O. Box 22129
Charleston, SC 29413-2129

Audra Byrd, Esq.
Turner Padget Graham & Laney, PA
P. O. Box 2116
Myrtle Beach, SC 29578

Richard Epstein, Esq.
Myrna L. Maysonet, Esq.
Greenspoon Marder, P.A.
201 East Pine Street, Suite 500
Orlando, FL 32801

DOCUMENTS: Order of Judge Culbertson filed August 7, 2012

DATE OF MAILING: August 8, 2012

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 8th day of August, 2012.

Mary J. O'Donnell
Notary Public for South Carolina
My Commission Expires: 6/1/16

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-26-43

Timothy A. Zinn, *et al.*
PLAINTIFF(S)

CFI Sales & Marketing, Ltd.
d/b/a Westgate Resorts
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.***
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Rule 59(e) Motion is DENIED.

***This motion is decided without oral arguments.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

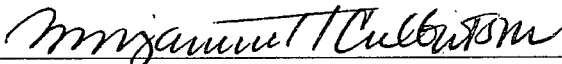
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

September 27, 2012
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Gene M. Connell, Jr.

David J. Canty

ATTORNEY(S) FOR THE PLAINTIFF(S)

John S. Wilkinson

R. Hawthorne Barrett

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

The South Carolina Court of Appeals

Timothy A. Zinn, Robert Adams, Laura Arrington,
Stephen C. Black, Bradley Kirk Bray, Mark D'Amico,
Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly
Levasseur, John Martin Loughlin, Joe Maranville, Khalif
Middleton, Chelcie Ozentine, Judith A. Parker, Matthew
W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry
Singleton, Steven G. Thoni, Stratton Vitikos, Michael H.
Willis, Michael J. Zanardo, Respondents/Appellants,

v.

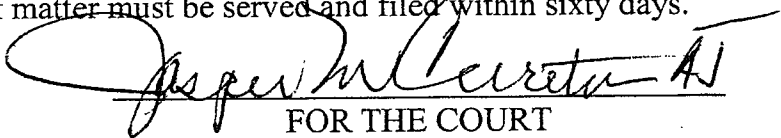
CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,
Appellant/Respondent.

Appellate Case No. 2012-213193

ORDER

Respondents/Appellants' counsel have filed a motion to be relieved from representation of Cynthia Reilly, explaining that Reilly has advised counsel she wishes to obtain new counsel. Reilly was served with the motion, and Appellant/Respondent does not oppose the motion.

The motion to be relieved is granted. Reilly has thirty day to obtain new counsel, or this court will presume she is proceeding pro se. All parties' initial appellant's briefs and designations of matter must be served and filed within sixty days.


FOR THE COURT

Columbia, South Carolina

FILED

6/13/13

cc:

Gene McCain Connell, Jr.

David James Canty

R. Hawthorne Barrett

John S. Wilkerson, III

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
Arrington, Stephen C. Black, Bradley)
Kirk Bray, Mark D'Amico, Thomas A.)
DeVitis, Rodney Eddie Haynes, Jimmy)
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Middleton, Chelscie Oxentine, Judith A.)
Parker, Matthew W. Reed, Cynthia G.)
Reilly, Gerald Ryba, Sherry Singleton,)
Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)

Defendants.)

COMPLAINT
(Breach of Contract)
JURY TRIAL DEMANDED

HORRY COUNTY
09 JAN -5 AM 10:54
KELLY HUGHINS
CLERK OF COURT

The Plaintiffs, Complaining of the Defendant would respectfully show unto this Honorable Court as follows:

1. The Plaintiffs are citizens and residents of the County and State aforesaid, the Defendant is a Florida limited partnership domesticated in South Carolina, employment of the Plaintiffs by the Defendant occurred in the County and State aforesaid, and this Honorable Court has jurisdiction in this matter.

2. That at various times between December, 2004 and the present the Plaintiffs were employed by the Defendant as timeshare sales personnel at Defendant's development in the County and State aforesaid.

11. That the Defendant's practices with regard to withholding or diverting portions of Plaintiff's wages do not comply with S.C. Code Ann. Section 41-10-40(C) (1976) as amended.

12. That the Defendant's practices with regard to time and place of payment of wages do not comply with S.C. Code Ann. Section 41-10-40(D) (1976) as amended.

13. That the Defendant's practices with regard to payment of wages to discharged employees do not comply with S.C. Code Ann. Section 41-10-50 (1976) as amended.

14. That the Defendant has failed and refused to timely pay wages due within the meaning of S.C. Code Ann. Section 41-10-80(C) (1976) as amended.

15. That numerous provisions of documents which Defendant requires Plaintiffs to endorse in contravention of Chapter 10 of Title 41 of the Code of Laws of South Carolina are void ab initio and utterly without legal force or effect.

16. That Plaintiffs are informed and believe that they are entitled to this Honorable Court's Declaratory Judgment as set forth supra.

FOR A THIRD CAUSE OF ACTION
(Wages, Penalties and Attorney's Fees)

17. That all of the material allegations of the foregoing causes of action are hereby reiterated and realleged as if fully set forth verbatim.

18. That the Plaintiffs herein are due wages from the Defendant which the Defendant has failed and refused to timely pay.

19. That the Defendant's persistent and pervasive pattern of unlawful conduct towards Plaintiffs precludes any finding of good faith on the part of Defendant.

20. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant for three (3) times the amount of wages due plus the costs of this action

and a reasonable attorney's fee pursuant to S.C. Code Ann. Section 41-10-80(C) (1976), as amended.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

21. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

22. That as more fully appears supra the parties hereto had a contractual relationship.

23. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay wages due and failing and refusing to timely pay wages due.

24. That the defendant acted with fraudulent intent in breaching the aforesaid contracts.

25. That the Defendant's breach of the aforesaid contracts were accompanied by fraudulent acts, including but not limited to misrepresenting to Plaintiffs when their wages were due, misrepresenting to Plaintiffs the amount and legitimacy of any deductions therefrom, and misrepresenting to Plaintiffs the status of payments on purchase agreements by customers.

26. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant in the amount of their actual damages plus punitive damages in an amount deemed appropriate by this Honorable Court.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

27. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

28. That as more fully appears above the parties hereto had a contractual relationship.

29. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay lawful wages due and failing and refusing to timely pay wages due.

30. That the Defendant breached the contract of employment between the parties.

31. That Plaintiffs bring this cause of action for actual contract for breach of contract for pre-judgment interest and for attorney's fees.

WHEREFORE, Plaintiffs pray as follows:

A. That the Court issue its order requiring a full, fair, complete and candid accounting.

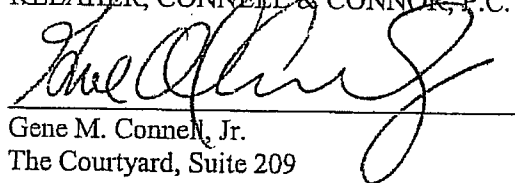
B. That the Court issue a Declaratory Judgment finding the Defendant's practices regarding payment of wages to be in derogation of statutory law as set forth above;

C. That the Plaintiffs have judgment against the Defendant individually and as a class for actual damages, treble damages, attorney's fees and costs;

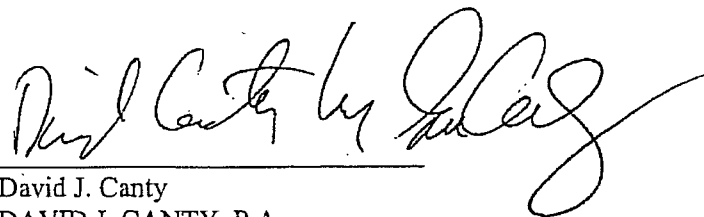
D. That the Plaintiff have judgment on breach of contract accompanied by a fraudulent act for actual damages, punitive damages and the costs of the action and for all members of the class similarly situated.

E. That the Plaintiffs have judgment against the Defendant for actual damages, prejudgment interest, attorney's fees and costs for breach of contract.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net



David J. Canty
DAVID J. CANTY, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-6304 (phone)
(843) 449-4249 (facsimile)
mbcounsel@verizon.net

Attorneys for Plaintiffs

December 15, 2008
Surfside Beach, South Carolina

COUNTY OF HORRY

Timothy A. Zinn, et al.,

Plaintiff(s)

CIVIL ACTION COVERSHEET

2008-CP-26-0043

vs.

CFI Sales & Marketing, Ltd, d/b/a Westgate
Resorts,

Defendant(s)

Submitted By: Gene M. Connell, Jr.

SC Bar #: 1358

Address: Kelaher, Connell & Connor, P.C.

Telephone #: (843) 238-5648

Post Office Drawer 14547

Fax #: (843) 238-5050

Surfside Beach, South Carolina 29587-4547

Other:

E-mail: gconnell@classactlaw.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☒ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)			
☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650)			

Submitting Party Signature:

Date: December 15, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR.**
 Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-26- 0043
9

Timothy A. Zinn, Robert Adams, Laura)
Arrington, Stephen C. Black, Bradley)
Kirk Bray, Mark D'Amico, Thomas A.)
DeVitis, Rodney Eddie Haynes, Jimmy)
Kelly, Whitney Renee Knox, Lynn C.)
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Parker, Matthew W. Reed, Cynthia G.)
Reilly, Gerald Ryba, Sherry Singleton,)
Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)

Defendants.)

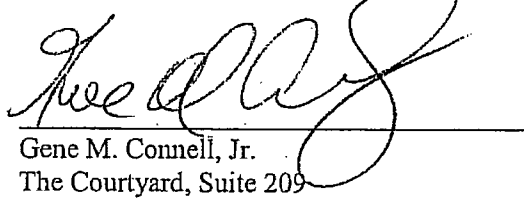
SUMMONS

HORRY COUNTY
CLERK OF COURT
JAN -5 AM 10:54
SHIGGINS

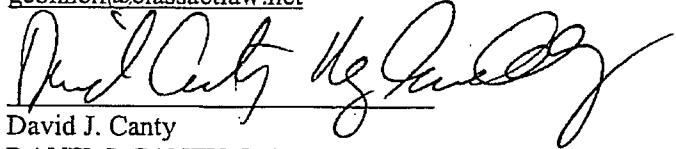
TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
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David J. Canty
DAVID J. CANTY, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-6304 (phone)
(843) 449-4249 (facsimile)
mbcounsel@verizon.net

Attorneys for Plaintiffs

December 15, 2008
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington,
Stephen C. Black, Bradley Kirk Bray, Mark
D/Amico, Thomas A. DeVitis, Rodney Eddie
Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn
C. Lanpher, Holly Levasseur, John Martin
Loughlin, Joe Maranville, Khalif Middleton,
Chelscie Oxentine, Judith A. Parker, Matthew W.
Reed, Cynthia G. Reilly, Gerald Ryba, Sherry
Singleton, Steven G. Thoni, Stratton Vitikos,
Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a Westgate
Resorts,

Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-Plaintiff;

v.

Robert Adams, Laura Arrington, Stephen C. Black,
Jimmy Kelly, Whitney Renee Knox, Joe
Maranville, Judith A. Parker, and Michael H.
Willis,

Counter-Defendants.

2009 MAY -5 AM 10:57
CLERK OF COURT
HORRY COUNTY

**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES
AGAINST PLAINTIFFS' COMPLAINT AND COUNTERCLAIM**

Defendant, CFI Sales & Marketing, Ltd.¹, ("CFI") by and through undersigned counsel
hereby files its answer and affirmative defenses to Plaintiffs' Complaint and states as follows:

¹ CFI Sales & Marketing, Ltd. merged into CFI Sales & Marketing, LLC on January 1, 2006. Therefore, all
pleadings will be answered by CFI Sales & Marketing, LLC.

1. CFI is without knowledge as to the County and State of residency of the Plaintiffs and denies this allegation accordingly. CFI admits that it is a Florida limited liability company but denies the rest of the allegations contained in paragraph 1 of the Complaint.

2. CFI denies that it was Plaintiffs' employer but admits that Plaintiffs worked as timeshare sales representatives at Westgate Myrtle Beach Oceanfront Resort.

3. CFI denies the allegations contained in paragraph 3 of the Complaint.

For A First Cause of Action
(Accounting)

4. CFI denies the allegations contained in paragraph 4 of the Complaint.

5. CFI denies the allegations contained in paragraph 5 of the Complaint.

For A Second Cause of Action
(Declaratory Judgment)

6. CFI reiterates and realleges its responses to paragraphs 1 through 5 above.

7. CFI denies the allegations contained in paragraph 7 of the Complaint.

8. CFI admits that commissions are considered wages but denies that any are due.

9. CFI denies the allegations contained in paragraph 9 of the Complaint.

10. CFI denies the allegations contained in paragraph 10 of the Complaint.

11. CFI denies the allegations contained in paragraph 11 of the Complaint.

12. CFI denies the allegations contained in paragraph 12 of the Complaint.

13. CFI denies the allegations contained in paragraph 13 of the Complaint.

14. CFI denies the allegations contained in paragraph 14 of the Complaint.

15. CFI denies the allegations contained in paragraph 15 of the Complaint.

16. CFI denies the allegations contained in paragraph 16 of the Complaint.

For A Third Cause of Action
(Wages, Penalties and Attorney's Fees)

17. CFI reiterates and realleges its responses to paragraph 1-16 above.
18. CFI denies the allegations contained in paragraph 18 of the Complaint.
19. CFI denies the allegations contained in paragraph 19 of the Complaint.
20. CFI denies the allegations contained in paragraph 20 of the Complaint.

For A Fourth Cause of Action
(Breach of Contract Accompanied by Fraudulent Act)

21. CFI reiterates and realleges its responses to paragraph 1-16 above.
22. CFI denies the allegations contained in paragraph 22 of the Complaint. CFI admits that Plaintiffs entered into a contract with Westgate Myrtle Beach, LLC.

23. CFI denies the allegations contained in paragraph 23 of the Complaint.
24. CFI denies the allegations contained in paragraph 24 of the Complaint.
25. CFI denies the allegations contained in paragraph 25 of the Complaint.
26. CFI denies the allegations contained in paragraph 26 of the Complaint.

For A Fifth Cause of Action
(Breach of Contract)

27. CFI reiterates and realleges its responses to paragraph 1-16 above.
28. CFI denies the allegations contained in paragraph 28. CFI admits that Plaintiffs entered into an agreement with Westgate Myrtle Beach, LLC.
29. CFI denies the allegations contained in paragraph 29.
30. CFI denies the allegations contained in paragraph 30.
31. CFI admits that Plaintiffs seek relief for the alleged breach of contract but deny that they are entitled to any relief.

DEFENSES AND AFFIRMATIVE DEFENSES

First Affirmative Defense

32. Plaintiffs' Complaint, and each cause of action therein, fails to state a claim for which relief can be granted.

Second Affirmative Defense

(Payment - Accounting Claim)

33. Plaintiffs cannot state an actionable claim for accounting.

34. Plaintiffs have been provided detailed written accountings of all wages earned and payable to them.

35. All wages earned and due to Plaintiffs have been paid.

36. The South Carolina Payment of Wages Act ("Wage Act") does not permit civil relief for alleged violations of the accounting requirements. S.C. Code Ann. § 41-10-80.

Third Affirmative Defense

(Declaratory Judgment)

37. Plaintiffs cannot state an actionable claim for Declaratory Judgment.

38. No justiciable controversy exists here.

39. The contracts entered into by Plaintiffs are binding, legal and compliant with all applicable laws.

Fourth Affirmative Defense

(Wages, Penalties and Attorney's Fees)

40. Plaintiffs cannot state an actionable claim for wages, penalties, or attorney's fees.

41. All wages earned and due to Plaintiffs have been timely paid.

Fifth Affirmative Defense

(Breach of Contract Accompanied by Fraudulent Act)

42. Plaintiffs cannot state a claim for breach of contract accompanied by a fraudulent act.

43. This claim is barred in whole or in part by Plaintiffs' non-performance.
44. Commissions and retained reserve monies were not earned, as defined by the agreements Plaintiffs entered into, and thus are not due or payable to Plaintiffs.
45. Plaintiffs cannot show fraud as no breach has occurred and all monies legally owed to Plaintiffs have been paid.
46. Plaintiffs failed to adequately plead their cause of action for fraud with particularity.

Sixth Affirmative Defense
(Payment - Breach of Contract)

47. Plaintiffs cannot state an actionable claim for breach of contract.
48. Disputed wages were not earned as defined by the agreements Plaintiffs entered into.
49. Plaintiffs have been paid for all wages earned.

Seventh Affirmative Defense
(Not Employer)

50. Defendant is not an employer as defined by applicable law.
51. Defendant did not enter into a contract with Plaintiffs.

Eight Affirmative Defense
(Set Off and Unclean Hands)

52. Defendant is entitled to a set off.
53. The claims are barred by the doctrine of unclean hands.

WHEREFORE, CFI SALES & MARKETING, LLC respectfully requests this Court to:

- (a) Grant Judgment for Defendant and against Plaintiffs in this action;
- (b) To award Defendant all costs associated with this action, including but not limited to, attorneys' fees and costs; and
- (c) To award any other relief which it might consider reasonable.

COUNTERCLAIM

Counter-Plaintiff, CFI SALES AND MARKETING, LLC, and Additional Counter-Plaintiff, WESTGATE MYRTLE BEACH LLC (collectively "Counter-Plaintiffs") file their Counterclaim against Counter-Defendants, Robert Adams, Laura Arrington, Stephen C. Black, Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Judith A. Parker, and Michael H. Willis (collectively "Counter-Defendants") and state as follows:

Parties

1. Counter-Plaintiff, CFI SALES AND MARKETING, LLC, and Additional Counter-Plaintiff, WESTGATE MYRTLE BEACH, LLC, are Florida limited liability companies whose principal offices are located at located in Orlando, Florida. CFI SALES & MARKETING, LLC is the successor by conversion of CFI Sales and Marketing, Ltd.

2. In January 2009, Counter-Defendants filed their Complaint in this Court seeking relief under a number of legal theories against CFI Sales & Marketing, Ltd., and CFI SALES and MARKETING, LLC as its successor by conversion. In particular, Counter-Defendants allege that CFI SALES & MARKETING, LLC breached the contract entered by the parties.

Jurisdiction and Venue

3. This is an action for breach of contract against the Counter-Defendants.

4. Jurisdiction and venue are proper as the original action giving rise to this Counterclaim was filed with this Court and the alleged breach of contract occurred within Horry County, South Carolina.

5. The Counterclaim asserted here involves the same contract which Counter-Defendants allege to have been breached in support of their Complaint against CFI Sales & Marketing, Ltd. Hence, the Counterclaim is a compulsory counterclaim.

Count I
Breach of Contract

6. Counter-Plaintiffs reallege the allegations stated in paragraphs 1 through 5 above.

7. Each Counter-Defendant, when first commencing work with Westgate Myrtle Beach LLC, entered into near identical written agreements ("Agreement") which, among other things, detailed the terms and compensation for their position as Timeshare Sales Representative. The Counter-Defendants named herein no longer work as Timeshare Sales Representatives with Westgate Myrtle Beach, LLC.

8. The Agreement each Counter-Defendant signed consisted of the following parts: Employee Agreement; Commission Schedule Agreement ("Commission Schedule"), and Confidentiality and Non-Competition Agreement.

9. The Commission Schedule detailed the compensation each Counter-Defendant was to receive. The Commission Schedule afforded Additional Counter-Plaintiff the right to recoup compensation that had been paid but, for one or more reasons stated in the Commission Schedule, had not been or was not earned and, further, established a "reserve" account as security for the repayment of such overpayments. Each Counter-Defendant's reserve account was, by agreement with each Counter-Defendant and as per the Commission Schedule, funded with portions of the commissions earned during the time Counter-Defendants worked for Counter-Plaintiff. The pertinent portions of the Commission Schedule, contained, in near identical form in each Counter-Defendant's Agreement, are:

VI. CHARGE BACK ON CANCELED DEALS

A. During the term that Employee is engaged by Employer, no sales originated by Employee for which Employee has been paid a commission will be subject to charge back except as otherwise set forth herein.

B. In the event Employee is no longer engaged by Employer, irrespective of the reason for the termination of engagement, Employee shall be charged back for all sales upon which commissions have been paid in the event the purchaser(s) has/have not made six (6) timely and consecutive monthly payments as well as the ten percent (10%) minimum down payment.

and

VII. RESERVE

As Security for Employee's liability for charge backs, a reserve account will be established in the amount of \$3500.00. Ten percent (10%) of commission due on sale will be retained by Employer to establish and maintain the reserve fund. At such time as Employee is no longer engaged by the Employer for any reason whatsoever, the funds remaining in the reserve account will be reimbursed to the Employee only after the Employer has determined that six (6) consecutive and timely monthly payments have been made on each sale made by Employee for which Employee has been paid a commission.

10. Virtually every sale made by a Counter-Defendant resulted in the purchaser's execution of a purchase money promissory note obligating the purchaser for the deferred payment over time of a portion of the purchase price, and a purchase money mortgage securing payment of the deferred purchase price. Per the Commission Schedule, commissions for such sales made by Counter-Defendants became earned and payable only when "six (6) consecutive and timely payments have been made."

11. While they worked for Additional Counter-Plaintiff, Counter-Defendants received pre-payments or advances upon commissions generated by such sales, even though such commissions had not, per the terms of the Commission Schedule, been earned and were not, accordingly, payable. Such advance payments are reconciled against commissions earned for which payment had become due as per the terms of the Commission Schedule. Once a Counter-Defendant ceases work with Additional Counter-Plaintiff, it is entitled to recover all payments

made to and received by such Counter-Defendant in excess of the amount of commissions actually earned and payable.

12. Counter-Plaintiffs paid to each Counter-Defendant amounts which exceeded the total amount of commissions actually earned by and payable to each Counter-Defendant. When each Counter-Defendant ceased work with Additional Counter-Plaintiff, it first charged-back such excess and unearned commissions against the reserve account balance, as contemplated by the Commission Schedule. However, as to all Counter-Defendants, the respective amounts of excess and unearned commissions exceeded the amounts funded into each respective reserve account, exhausting each reserve account. Accordingly, each Counter-Defendant was overpaid, having received payments that exceeded the amount of commissions actually earned and payable. And, despite Counter-Plaintiff's recoupment of some, but not all, of such excess and unearned commissions from each Counter-Defendant's reserve account, each Counter-Defendant still owes excess and unearned commissions to Counter-Plaintiffs.

13. Counter-Plaintiffs fully performed their duties and obligations under each Agreement with each Counter-Defendant and, in particular, under the Commission Schedule.

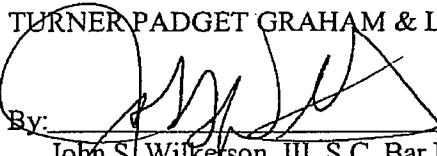
14. Counter-Defendants breached their duties under the Agreement, and, in particular, the Commission Schedule, by failing to repay excess and unearned commissions, even after application of their respective reserve accounts.

15. Counter-Plaintiffs have suffered damages as it has overpaid Counter-Defendants, who received advances on commissions that were not earned. Counter-Defendants are liable for such overpayments.

16. Counter-Plaintiffs employ the undersigned to recover the overpayment of wages received by Counter-Defendants. Counter-Plaintiffs are entitled to recover their attorneys' fees under the agreement.

Wherefore, Counter-Plaintiff, CFI SALES & MARKETING, LLC and Additional Counter-Plaintiff, WESTGATE MYRTLE BEACH, LLC, demand judgment against each Counter-Defendant for all damages caused by each of their respective breaches of contract, together with pre-judgment interest, attorneys' fees, and costs associated with prosecuting this Counterclaim, and all other relief deemed appropriate by this Court.

TURNER PADGET GRAHAM & LANEY P.A.

By: 

John S. Wilkerson, III, S.C. Bar No.: 6105
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2801
Facsimile: 843-577-1649
Email: JWilkerson@TurnerPadget.com

ATTORNEY FOR DEFENDANT CFI Sales &
Marketing, LTD., d/b/a Westgate Resorts

Charleston, South Carolina
May 4, 2009

Chas 580322v1

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington,
Stephen C. Black, Bradley Kirk Bray, Mark D/Amico,
Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly
Levasseur, John Martin Loughlin, Joe Maranville,
Khalif Middleton, Chelscie Oxentine, Judith A.
Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald
Ryba, Sherry Singleton, Steven G. Thoni, Stratton
Vitikos, Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,
Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-Plaintiff,

v.

Robert Adams, Laura Arrington, Stephen C. Black,
Jimmy Kelly, Whitney Renee Knox, Joe Maranville,
Judith A. Parker, and Michael H. Willis,

Counter-Defendants.

2009 MAY -5 AM 10:51
CLERK OF COURT
HARRIS COUNTY

CERTIFICATE OF SERVICE

I hereby certify that this 4th day of May, 2009, a copy of the *Defendant's Answer and Affirmative Defenses Against Plaintiffs' Complaint and Counterclaim* has been served upon other counsel of record by placing same in the United States Mail, postage prepaid, to:

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, SC 29587-4547

David J. Canty
David J. Canty, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577

April D. Hager
April D. Hager

Chas 580322v1

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D/Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,

Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-Plaintiff,

v.

Robert Adams, Laura Arrington, Stephen C. Black, Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Judith A. Parker, and Michael H. Willis,

Counter-Defendants.

FILED
HORRY COUNTY
12 JAN -9 AM 9:03
MELANIE HUGGINS-WARD
CLERK OF COURT

**DEFENDANT'S SUPPLEMENTAL ANSWER AND AFFIRMATIVE DEFENSES
AGAINST PLAINTIFFS' COMPLAINT AND COUNTERCLAIM**

Defendant, CFI Sales & Marketing, Ltd.¹, ("CFI") by and through undersigned counsel hereby files its supplemental answer and affirmative defenses to Plaintiffs' Complaint and states as follows:

CFI reiterates and realleges its responses to paragraphs 1 through 53 of its Answer and Affirmative Defenses Against Plaintiffs' Complaint.

Ninth Affirmative Defense
(Res Judicata and Collateral Estoppel)

54. Plaintiffs are prevented from raising issues involving commissions that were placed in their reserve accounts or were part of their reserve accounts under the doctrines of *res judicata* and collateral estoppel in light of the judgment entered in *Judith Parker, et al. v. CFI Sales & Marketing, Ltd., et al.*, C/A Number 2007-CP-26-5478. All of the Plaintiffs in this action are also subject to the judgment in the *Parker* action and there is an issue preclusion as it relates to Plaintiffs' reserve accounts.

WHEREFORE, CFI SALES & MARKETING, LLC respectfully requests this Court to:

- (a) Grant Judgment for Defendant and against Plaintiffs in this action;
- (b) To award Defendant all costs associated with this action, including but not limited to, attorneys' fees and costs; and
- (c) To award any other relief which it might consider reasonable.

COUNTERCLAIM

Counter-Plaintiff, CFI SALES AND MARKETING, LLC, and Additional Counter-Plaintiff, WESTGATE MYRTLE BEACH LLC (collectively "Counter-Plaintiffs") reiterate and reallege paragraphs 1 through 16 of their Counterclaim.

¹ CFI Sales & Marketing, Ltd. merged into CFI Sales & Marketing, LLC on January 1, 2006. Therefore, all pleadings will be answered by CFI Sales & Marketing, LLC.

Wherefore, Counter-Plaintiff, CFI SALES & MARKETING, LLC and Additional Counter-Plaintiff, WESTGATE MYRTLE BEACH, LLC, demand judgment against each Counter-Defendant for all damages caused by each of their respective breaches of contract, together with pre-judgment interest, attorneys' fees, and costs associated with prosecuting this Counterclaim, and all other relief deemed appropriate by this Court.

TURNER PADGET GRAHAM & LANEY P.A.

By: 

John S. Wilkerson, III, S.C. Bar No.: 6105
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: 843-576-2801
Facsimile: 843-577-1649
Email: JWilkerson@TurnerPadget.com

RICHARD W. EPSTEIN

(Admitted *pro hac vice*)

Fla. Bar No: 229091

MYRNA L. MAYSONET

(Admitted *pro hac vice*)

Fla. Bar. No: 0429650

GREENSPOON MARDER, P.A.

201 East Pine Street, Suite 500

Orlando, Florida 32801

Telephone No. 407.425.6559

Facsimile No. 407.422.6583

myrna.maysonet@gmlaw.com

richard.epstein@gmlaw.com

ATTORNEYS FOR DEFENDANT CFI SALES &
MARKETING, LTD., D/B/A WESTGATE
RESORTS

December 22, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D/Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,

Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-Plaintiff,

v.

Robert Adams, Laura Arrington, Stephen C. Black, Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Judith A. Parker, and Michael H. Willis,

Counter-Defendants.

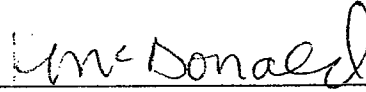
FILED
HORRY COUNTY
12 JAN -9 AM 9:03
MELANIE HUGGINS-WARD
CLERK OF COURT

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of December, 2011, a copy of the *Defendants' Supplemental Answer and Counterclaim* has been served upon other counsel of record by placing same in the United States Mail, postage prepaid, to:

Mr. Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, SC 29587-4547

Mr. David J. Canty
David J. Canty, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577

A handwritten signature in cursive script, appearing to read "Kristen McDonald", written over a horizontal line.

Kristen M. McDonald

STATE OF SOUTH CAROLINA

COUNTY OF **HORRY**

Timothy A. Zinn, et al,

Plaintiff,

vs.

CFI Sales & Marketing, et al,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-26-0043

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiffs' Attorney: Gene M. Connell The Courtyard, Suite 209 1500 U.S. Highway 17 North Surfside Beach, SC 29587-4547 Phone: (843) 288-5648 E-mail: gconnell@classactlaw.com		Defendants' Attorney: John S. Wilkerson, III, SC Bar# 6105 Turner Padgett Graham & Laney, PA P. O. Box 22129, Charleston, SC 29401 Phone: (843) 576-2801 Fax (843) 577-1649 E-mail: jwilkerson@turnerpadgett.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion for Summary Judgment</u> Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. _____ Signature of Attorney for ☐ Plaintiff ☒ Defendants December 30, 2011 Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☒ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

FIFTEENTH JUDICIAL CIRCUIT

Timothy A. Zinn, Robert Adams,
Laura Arrington, Stephen C.
Black, Bradley Kirk Bray, Mark
D/Amico, Thomas A. DeVitis,
Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn
C. Lanpher, Holly Levasseur, John
Martin Loughlin, Joe Maranville,
Khalif Middleton, Chelscie
Oxentine, Judith A. Parker,
Matthew W. Reed, Cynthia G.
Reilly, Gerald Ryba, Sherry
Singleton, Steven G. Thoni,
Stratton Vitikos, Michael H. Wills,
Michael J. Zanardo,

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a
Westgate Resorts,
Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-
Plaintiff,

v.

Robert Adams, Laura Arrington,
Stephen C. Black, Jimmy Kelly,
Whitney Renee Knox, Joe
Maranville, Judith A. Parker, and
Michael H. Willis,

Counter-Defendants.

C/A NO. 2009-CP-26-0043

HORRY COUNTY
11 DEC 30 PM 2:06
CLERK OF COURT

DEFENDANT'S NOTICE AND MOTION FOR SUMMARY JUDGMENT

Defendant, CFI Sales & Marketing, Ltd.¹ ("CFI"), by and through undersigned counsel hereby files its Notice and Motion for Summary Judgment for the reasons stated below:

1. On September 4, 2007, Judith Parker, Caroline Jordan, Christopher DeCaro, and Charles Walker Jr., as plaintiffs in the matter styled *Parker et al. v. CFI Sales & Marketing, Ltd.*, Case No. 2007-CP-26-5478 (S.C. Fifteenth Judicial Circuit]) ("*Parker*") filed a proposed class action pursuant to SCRCP 23 against CFI seeking payment of allegedly unpaid wages that they claim to have earned while they were timeshare sales representatives at Westgate Myrtle Beach Oceanfront Resort in Myrtle Beach, South Carolina ("Myrtle Beach"). See Exhibit A for *Parker* Complaint.

2. The *Parker* plaintiffs were compensated by CFI on a commission basis for each sale of a timeshare interest. The commission due to each *Parker* plaintiff was paid within a prescribed period after each sale, less a contractually agreed percentage of such commission that was allocated to a "reserve account." Such commissions, net of the reserve allocation, were paid to the *Parker* plaintiffs shortly after the sale even though the timeshare purchaser paid only a small percentage of the total purchase price at closing, often financing, through a purchase money promissory note and mortgage held by the seller, as much as 95% of the purchase price. The unpaid wages that the *Parker* plaintiffs sought to recover were the contractually agreed percentage of those sales commissions, in other words, the monies that the *Parker* plaintiffs had paid into their respective reserve accounts.

3. The reserve account each of the *Parker* plaintiffs contractually agreed to fund with a portion of the commissions they earned was designed to provide a measure of protection

¹ CFI Sales & Marketing, Ltd. merged into CFI Sales & Marketing, LLC on January 1, 2006. Therefore, all pleadings will be answered by CFI Sales & Marketing, LLC.

to CFI against defaults by the timeshare purchasers in the purchase money promissory notes and mortgages through which the lion's share of the purchase price is paid. Each *Parker* plaintiff agreed that the reserve portion of its commissions would be retained in reserve until the timeshare purchaser made six timely consecutive monthly payments on the purchase money promissory note and mortgage. If that occurs, the reserve is "released" as to that sale. After each of the *Parker* plaintiffs terminated as timeshare salespersons for CFI, each sale they have made is so evaluated for the timeliness and frequency of the payments of the purchase money mortgage and the reserve account appropriately reconciled. Should a timeshare purchaser default – fail or refuse to make the required payments on the purchase money mortgage – than the amount of the commission *already paid and received by the Parker* plaintiffs was charged against the balance of the reserve (commonly referred to as a "chargeback"). Each such defaulted sale resulted in a chargeback until the reserve balance was exhausted. In this fashion, CFI is able to recoup a portion of the commissions paid to the *Parker* plaintiffs on sales on which the seller did not receive the purchase price the timeshare purchaser agreed to pay and upon which the commission has already been paid to the *Parker* plaintiffs. This reserve provision and the portion of the *Parker* plaintiffs' commissions that were paid into their respective reserve accounts was the sole issue litigated in the *Parker* case.

4. The *Parker* case was certified as a class action by order dated January 6, 2009, a copy of which is attached as Exhibit B. The class so certified was comprised of approximately 364 former commissioned timeshare sales representatives employed by CFI in Myrtle Beach from 2005 to January 2009. Each of the plaintiffs, with the exception of a single individual, in

this case is a member of the class certified in the Parker case.² See Exhibit C for Parker class list agreed by the parties.

5. On January 11, 2010, the parties to the *Parker* action entered into a memorandum of understanding (“MOU”) resolving all claims made by the *Parker* plaintiffs relating to CFI’s commission reserve system and for payment of allegedly unpaid commissions that had been paid into the reserve. Such claims, which comprised all the claims made by the *Parker* plaintiffs in the *Parker* action, were premised upon South Carolina’s Payment of Wages law and South Carolina common law. The MOU was later incorporated into a Final Judgment on January 29, 2010, which finally terminated all litigation in the *Parker* action. The MOU and Final Judgment in the *Parker* action are attached hereto as Exhibit D.

6. On January 5, 2009, this action (“*Zinn*”) was filed against CFI Sales & Marketing, Ltd., the exact same defendant as was sued in the *Parker* action. The Plaintiffs in *Zinn* are all members of the *Parker* class, and thus are parties to the *Parker* action which has been finally and fully resolved with the entry of the *Parker* Final Judgment. The *Zinn* plaintiffs in fact filed a complaint in this case that is virtually verbatim identical to the complaint in the *Parker* action and seeks the very same relief based upon the very same factual allegations and legal authority, with the sole exception of the *Parker* plaintiffs’ request for the certification of a Rule 23 class. The *Zinn* complaint is attached hereto as Exhibit E.

7. The *Zinn* Complaint provides no greater detail or specifics about the nature of the allegedly “unpaid wages” sought to be collected in the *Zinn* action than did the complaint in the *Parker* case. It is, nonetheless, clear and undisputed that there is a complete identity of parties –

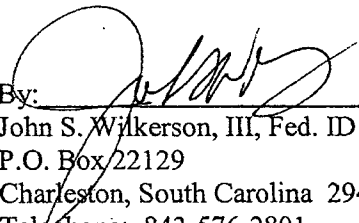
² Jim Kelly was not part of the Parker class as he has never worked in South Carolina. CFI’s records indicate that Jim Kelley worked for CFI as a timeshare sales representative in Las Vegas, Nevada; therefore, he would not have standing to collect wages under the South Carolina Wage Payment Act.

all of the *Zinn* plaintiffs are plaintiffs and/or class members in the *Parker* case and CFI is the only defendant in each case – in the two cases.

8. As the *Parker* case evolved, it became clear that the primary issue of allegedly unpaid wages involved the commission reserve system and the portions of the *Parker* plaintiffs' commissions paid into it. All claims of all of the *Parker* class plaintiffs (which includes the Plaintiffs in this case) relating to the commission reserve system have been fully and finally resolved and determined in the *Parker* case by virtue of the Final Judgment entered in the *Parker* case. So, to the extent that the Plaintiffs in the *Zinn* action seek to recover the payment of "unpaid wages" involving their reserve accounts or commissions which were paid into the reserve accounts during and after their employment, such claims have already been reduced to final judgment in the *Parker* action.

9. Because the same parties to this case have already been reduced to final judgment in the *Parker* case the same issues that the *Zinn* plaintiffs want to litigate here, this action is barred under the doctrine of *res judicata* as all claims made in this case have already been fully and finalized resolved by the Final Judgment in the *Parker* action. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (S.C. 1992)(To establish *res judicata*, the following elements must be shown: (1) identities of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.) Consequently, CFI is entitled to Judgment on this issue as a matter of law.

TURNER PADGET GRAHAM & LANEY P.A.

By: 

John S. Wilkerson, III, Fed. ID # 4657

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: 843-576-2801

Facsimile: 843-577-1649

Email: JWilkerson@TurnerPadget.com

OF COUNSEL:

Richard W. Epstein

Rebecca F. Bratter

GREENSPOON MARDER, P.A.

100 West Cypress Creek Road, Suite 700

Fort Lauderdale, Florida 33309

Telephone: 954-491-1120

Facsimile: 954-343-6952

Email: Richard.epstein@gmlaw.com

Rebecca.bratter@gmlaw.com

ATTORNEYS FOR DEFENDANTS

December 28 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D/Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Plaintiffs,
v.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,
Defendant.

CFI Sales & Marketing, Ltd.,

Counter-Plaintiff, and

Westgate Myrtle Beach, LLC,

Additional Counter-Plaintiff,

v.

Robert Adams, Laura Arrington, Stephen C. Black, Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Judith A. Parker, and Michael H. Willis,

Counter-Defendants.

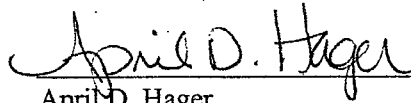
HORRY COUNTY
11 DEC 30 PM 2:06
CLERK OF COURT

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of December, 2011, a copy of the ***Defendant's Notice and Motion for Summary Judgment*** has been served upon other counsel of record by placing same in the United States Mail, postage prepaid, to:

Mr. Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, SC 29587-4547

Mr. David J. Canty
David J. Canty, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577



April D. Hager

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26- 5478

Judith A. Parker, Caroline Jordan,
Christopher J. DeCaro and Charles S.
Walker, Jr., individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a West Gate Resorts,

Defendants.

Class Action Pursuant
to SCRCP 23

COMPLAINT

FILED
2007 SEP -4 PM 12:39
CLERK OF COURT
Horry County

The Plaintiffs, Complaining of the Defendant would respectfully show unto this Honorable Court as follows:

1. The Plaintiffs are citizens and residents of the County and State aforesaid, the Defendant is a Florida limited partnership domesticated in South Carolina, employment of the Plaintiffs by the Defendant occurred in the County and State aforesaid and this Honorable Court has jurisdiction in this matter.

2. That at various times between December, 2004 and the present the Plaintiffs were employed by the Defendant as time share sales personnel at Defendant's development in the County and State aforesaid.

3. That Plaintiffs bring this case as a class action pursuant to South Carolina Rule of Civil Procedure 23 which provides in pertinent part that a class may be brought against any Defendant if the class is so numerous that joinder of all members is impractical, that there are questions of law or fact which are common to the class, the claims of the representative parties



are typical of the claims of the class, the representative parties will fairly and adequately protect the class, and that the amount in controversy exceeds \$100.00.

4. That the Complaint alleges that the Plaintiffs and any other individuals were employees of the Defendant and at all times alleged herein there were so many employees who were not paid properly that the class is numerous.

5. That the class also common issues of law or fact as to each Plaintiff.

6. That the damages are in excess of \$100.00 and that each of the class representatives can fairly and adequately represent the class.

7. That Plaintiffs request this Court issue an Order certifying this class and requiring the Defendants to provide the names of all potential class members pursuant to SCRPC 23.

FOR A FIRST CAUSE OF ACTION
(Accounting)

8. That the Defendant has engaged in and presently employs various improper techniques for the purpose of understating to the Plaintiffs the amount of compensation they are due for their services.

9. That the Plaintiffs are informed and believe that they are entitled to this Honorable Court's Order compelling the Defendant to render a full and complete accounting to the Plaintiffs and the Court of all monies due to Plaintiffs as wages.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

10. That all of the material allegations of the foregoing cause of action are hereby reiterated and realleged as if fully set forth verbatim.

11. That the Defendant herein is an "Employer" within the meaning of S.C. Code Ann. Section 41-10-10(1) (1976), as amended.

12. That the monies due the Plaintiffs herein are "Wages" within the meaning of S.C. Code Ann. Section 41-10-10(2) (1976), as amended.
13. That the Defendant's practices with regard to notice to employees required by S.C. Code Ann. Section 41-10-30(A) (1976), as amended do not comply with the said statute.
14. That the Defendant's practices with regard to notice to employees of gross pay and itemized deductions therefrom required by S.C. Code Ann. Section 41-10-30(C) (1976), as amended do not comply with the said statute.
15. That the Defendant's practices with regard to withholding or diverting portions of Plaintiff's wages do not comply with S.C. Code Ann. Section 41-10-40(C) (1976) as amended.
16. That the Defendant's practices with regard to time and place of payment of wages do not comply with S.C. Code Ann. Section 41-10-40(D) (1976) as amended.
17. That the Defendant's practices with regard to payment of wages to discharged employees do not comply with S.C. Code Ann. Section 41-10-50 (1976) as amended.
18. That the Defendant has failed and refused to timely pay wages due within the meaning of S.C. Code Ann. Section 41-10-80(C) (1976) as amended.
19. That numerous provisions of documents which Defendant requires Plaintiffs to endorse in contravention of Chapter 10 of Title 41 of the Code of Laws of South Carolina are void ab initio and utterly without legal force or effect.
20. That Plaintiffs are informed and believe that they are entitled to this Honorable Court's Declaratory Judgment as set forth supra.

FOR A THIRD CAUSE OF ACTION
(Wages, Penalties and Attorney's Fees)

21. That all of the material allegations of the foregoing causes of action are hereby reiterated and realleged as if fully set forth verbatim.

22. That the Plaintiffs herein are due wages from the Defendant which the Defendant has failed and refused to timely pay.

23. That the Defendant's persistent and pervasive pattern of unlawful conduct towards Plaintiffs precludes any finding of good faith on the part of Defendant.

24. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant for three (3) times the amount of wages due plus the costs of this action and a reasonable attorney's fee pursuant to S.C. Code Ann. Section 41-10-80(C) (1976), as amended.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

25. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

26. That as more fully appears supra the parties hereto had a contractual relationship.

27. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay wages due and failing and refusing to timely pay wages due.

28. That the defendant acted with fraudulent intent in breaching the aforesaid contracts.

29. That the Defendant's breach of the aforesaid contracts were accompanied by fraudulent acts, including but not limited to misrepresenting to Plaintiffs when their wages were due, misrepresenting to Plaintiffs the amount and legitimacy of any deductions therefrom, and misrepresenting to Plaintiffs the status of payments on purchase agreements by customers.

30. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant in the amount of their actual damages plus punitive damages in an amount deemed appropriate by this Honorable Court.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

31. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

32. That as more fully appears above the parties hereto had a contractual relationship.

33. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay lawful wages due and failing and refusing to timely pay wages due.

34. That the Defendant breached the contract of employment between the parties.

35. That Plaintiffs bring this cause of action for actual contract for breach of contract for pre-judgment interest and for attorney's fees.

WHEREFORE, Plaintiffs pray as follows:

A. That a class be certified of all employees in the same or similar circumstances;

B. That the Court issue its order requiring a full, fair, complete and candid accounting.

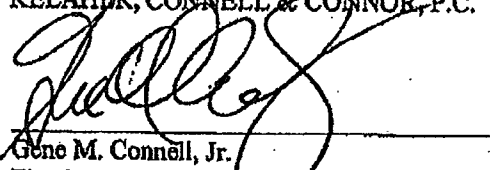
C. That the Court issue a Declaratory Judgment finding the Defendant's practices regarding payment of wages to be in derogation of statutory law as set forth above;

D. That the Plaintiffs have judgment against the Defendant individually and as a class for actual damages, treble damages, attorney's fees and costs;

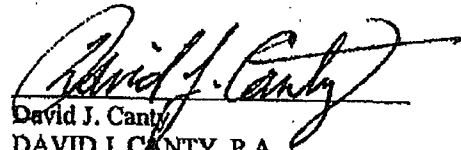
E. That the Plaintiff have judgment on breach of contract accompanied by a fraudulent act for actual damages, punitive damages and the costs of the action and for all members of the class similarly situated.

F. That the Plaintiffs have judgment against the Defendant for actual damages, prejudgment interest, attorney's fees and costs for breach of contract.

KELAHFER, CONNELL & CONNOR, P.C.



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(843) 449-4249 (facsimile)
mbcounsel@verizon.com

Attorneys for Plaintiffs

June 27, 2007
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-5478

Judith A. Parker, Caroline Jordan,
Christopher J. DeCaro and Charles S.
Walker, Jr., individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a West Gate Resorts,

Defendants.

ORDER CERTIFYING CLASS
AND SENDING NOTICE
TO CLASS MEMBERS

This matter is before the Court based on a Motion for Class Certification filed by Plaintiffs and heard on November 19, 2008. The Court has heard arguments of the parties and herein renders its written opinion.

JLB
I. PROCEDURAL HISTORY.

The Plaintiffs brought this case as a putative class action. After a status conference, the Court agreed to hear Defendant's Motion for Summary Judgment and Plaintiff's Motion for Class Certification at the same time. The Court has reviewed the Plaintiffs' Brief in Support of Motion for Class Certification and Defendant's Brief in Opposition to the Motion for Class Certification. Plaintiffs are former employees of the Defendant who allege that Defendant has not paid wages to them for work performed while timeshare sales representatives at Defendant's resort. Each of the Plaintiffs alleges that when they left employment there were wages due and owing to them and that Defendant has refused to make payments owed to them from a reserve account held by the Defendant. Defendant denies these claims.



II. THIS COURT'S DECISION

The Court has carefully considered all the arguments, briefs, and exhibits provided to the Court at the hearing. The Court grants Plaintiffs' Motion for Class Certification pursuant to SCRPC 23 with the caveat that the Court also has the authority pursuant to SCRPC 23 to amend this Order as it deems appropriate. With this in mind, the Court defines the class as follows:

A. CLASS DEFINITION

General Class Definition. All persons previously employed at any Westgate Resort located in South Carolina who have wages withheld by Defendants in a reserve account.

B. SCRPC 23 IS THE APPLICABLE RULE.

As the parties are aware, the Court is bound by SCRPC 23 which provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable; (2) There are questions of law or fact common to the class; (3) The claims of the representative parties are typical of the claims of the class; (4) The representative parties will fairly and adequately protect the interests of the class; (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

1. Numerosity

The first prerequisite is that a class is so numerous that joinder of all members of the class as Petitioners herein is impracticable. No definite standard exists as to what size class satisfies the requirements of Rule 23(a)(1). Haywood v. Barnes, 109 F.R.D. 568, 576 (E.D.N.C. 1986). However, where the class numbers at least 40, joinder is usually impracticable, and where the class numbers in the hundreds, joinder is clearly impracticable. See, e.g., Swanson v. American Consumer Industries, 415 F.2d 1326, 1333 (7th Cir. 1969) (reversing denial of class certification in a securities case involving 151 class members). Here, Defendant's agent, Connie

Sharp, testified in her deposition there are 237 individuals who had worked at Defendant Westgate Resort in Myrtle Beach and have open reserve accounts.¹ Each of these individuals are class members because they present the same claim regarding the reserve account and payment of back wages as do the named Plaintiffs. Based on this testimony, the Court finds that numerosity has been met by the Plaintiffs.

2. Commonality

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Common questions of law and fact exist as to all members of the class and predominate over any questions affecting solely individual members of the class. The commonality requirement is liberally construed and given permissive application so that common questions have been found to exist in a wide range of contexts. See Haywood v. Barnes, 109 F.R.D. 568, 577 (E.D.N.C. 1986); McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 54, 157-58 (Ct. App. 1986). Here, the named Plaintiffs and all of the former employees have the same claim. They allege to the Court that they are entitled to monies held in a reserve account which they earned as wages. Plaintiffs allege that Defendant has uniformly refused to make payments from the reserve account to all Plaintiffs and that Defendant's rules have been uniformly applied to the named Plaintiffs and all members of the class. Thus, a common issue is present in that each Plaintiff was provided the same commission schedule and each Plaintiff has been denied the monies allegedly due them in their reserve account. Also, all Plaintiffs have the same legal issue regarding the South Carolina Payment of Wages statute. Further, ascertaining damages is simplified by the fact that Defendant has admitted that there are 237 individuals who have the same claim and that the reserve account of all potential class members equals \$522,340.88.

¹A class action may proceed upon estimates as to the size of the proposed class. In re Alcoholic Beverages Litigation, 95 F.R.D. 321 (E.D.N.Y. 1982); Leist v. Shawano Cty., 91 F.R.D. 64 (D. Wis. 1981); Amswiss Int'l Corp. V. Heublein, Inc., 69 F.R.D. 663 (N.D. Ga. 1975).

Those common questions are more than enough to satisfy the requirement of SCRCP 23. In fact, only one common question is necessary for class certification. As the South Carolina Court of Appeals has held:

It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. **In fact, a single common issue will suffice if it is important enough.**

McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 54, 157-58 (Ct. App. 1986). (emphasis added).

To summarize, the commonality requirement of Rule 23, SCRCP, has been satisfied. Furthermore, the nature of this case makes class certification appropriate. See, Kennedy v. S.C. Retirement System, 24 Employee Benefits Cas. (BNA) 2859 (S.C. 2000), *withdrawn on unrelated grounds and superseded by substitute opinion*, 345 S.C. 339, 549 S.E.2d 243, *rehearing denied*, 349 S.C. 339, 534 S.E.2d 322 (2001); Littlefield v. South Carolina Forestry Commission, 337 S.C. 348, 523 S.E.2d 81 (1999). In both Littlefield and Kennedy, the Court noted:

We believe the current case especially appropriate for class treatment. The number of potential plaintiffs is very large, there is one main issue of law, that issue is identical for each plaintiff, all injuries result from the same misapplication of the statute by the Retirement System, and individual calculation of damages would be simple. Littlefield, 523 S.E.2d 81 (1999).

The threshold common issue in this case is whether the Plaintiffs are entitled to payment of wages for an alleged breach of contract by the Defendant. Further, the same commission agreements and statutory law applies to each of the Plaintiffs. Thus, common questions of law and fact are present in this case.

3. Typicality

The tenets of commonality and typicality most often are considered as one in terms of class certification. See Gardner v. SCDOR, 353 S.C. 1, 20-21, 577 S.E.2d 190 (2003); General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 158 (1982). (The commonality and typicality requirements of Rule 23(a) tend to merge.). The typicality requirement of Rule 23(a)(3), SCRPC, requires that the claims or defenses of the class be typical. To satisfy the typicality requirement, the named representatives' claims must be similar enough to those of the class to assure that the class interests are vigorously prosecuted. 7A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 1764 (2d. Ed. 1986).

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Here, the claims and defenses of the representative parties are typical of the claims and defenses of the class because the breach of contract and failure to pay wages claims apply to all members of the class; therefore, individual members of the class will not present any unique claims. Indeed, all of the named Plaintiffs' and class members' claims derive from a common set of facts. Thus, their claims are uniquely typical and ideal for disposition by class action. Further, there is no individual advantage to proceeding separately; in fact, there is a distinct disadvantage as the individual damages of any one class member may be relatively small when compared with potential costs of bringing this action, making the expense and burden of this litigation unjustifiable for individual actions. Also, judicial economy dictates that the Court not try each undecided case since to do so could take years. Thus, the Court finds that the typicality element of SCRPC 23 has been met.

4. Adequacy of Representation

SCRPC 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. That protection involves two factors: (1) counsel must be qualified,

experienced, and generally able to conduct the proposed litigation; and (2) plaintiffs' claims must be sufficiently interrelated and not antagonistic to the class claims. Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539 561 (D.S.C. 2000).

Here, petitioners will fairly and adequately protect the interests of the class and are well qualified to do so because they are in the same situation as absent class members. They are former employees who seek payment of wages. The claims of Plaintiffs who are class representatives are claims typical of the class in that the petitioners and all members of the class sustained the same damages arising out of Defendant's alleged conduct towards the Plaintiffs as well as all members of the class. Plaintiffs' claims are typical of the class in that Plaintiffs' and the absent class members' claims arise from the same circumstances. The named Plaintiffs will continue to fairly and adequately protect the interests of the class because their interests are one with the absent class members. Also, Plaintiffs' counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation. Furthermore, Plaintiffs' attorneys have extensive experience in complex litigation and class actions. Further, it should be noted Defendant's counsel does not challenge the adequacy of class counsel.

5. Amount in Controversy

The amount in controversy has been met for each class member because each class member claims wages in excess of One Hundred Dollars (\$100.00). As stated previously, the evidence presently before the Court reveals that there are 237 former employees and the total amount held in the reserve account is \$522,340.88. Accordingly, the amount in controversy provision of SCRCF 23 has been met.

III. CONCLUSION

SCRCP 23 is unlike FRCP 23 regarding class actions. As the Supreme Court noted in Littlefield v. South Carolina Forestry Commission, 337 S.C. 348, 523 S.E.2d 781 (1999):

"Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23 SCRCP intentionally omitted from our state rule the additional requirements found in Rule 23(b) FRCP. By admitting the additional requirements, Rule 23 SCRCP endorses a more expansive view of class action availability than its federal counterpart."

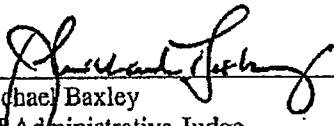
It should be noted Littlefield relied on McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (1986) which held that a class action in South Carolina can be certified on a single issue. (See also Salmonsens v. CGD Inc., Opinion 26475, heard October 17, 2007, filed April 28, 2008 reaffirming that South Carolina has adopted an expansive view of class actions and holding South Carolina has adopted opt out notices for absent class members.)

Accordingly,

 **IT IS ORDERED** that the above-named class is certified. Further, Defendant's counsel shall provide names and last known addresses of all absent class members that are former employees who worked in South Carolina within the past three years of the date of filing of this lawsuit (September 4, 2007) and whose monies are held by Defendant in the reserve account, within twenty (20) days of the date of this Order. Class counsel shall then cause to be mailed to all absent class members a notice (Exhibit A) affording each class member the opportunity to opt out within thirty (30) days thereafter. All absent class members who fail to affirmatively opt out within thirty (30) days of the mailing shall be included as class members in this case. The notice shall state that if a class member opts out then he shall not be a member of the class nor shall he be entitled to the relief afforded by this action. Those individuals desiring to opt out must do so in writing to Class

Counsel: Gene M. Connell, Jr., Esquire, Kelaher, Connell & Connor, P.C., P. O. Drawer 14547,
Surfside Beach, SC 29587.

IT IS SO ORDERED.



J. Michael Baxley
Chief Administrative Judge
Fifteenth Judicial Circuit

January 6, 2009
Conway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-5478

Judith A. Parker, Caroline Jordan,
Christopher J. DeCaro and Charles S.
Walker, Jr., individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a West Gate Resorts,

Defendants.

NOTICE OF CLASS ACTION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

**TO: ALL FORMER EMPLOYEES OF ANY WESTGATE RESORTS LOCATED IN
SOUTH CAROLINA WHO WORKED IN SOUTH CAROLINA AND WHO
HAVE HAD WAGES WITHHELD BY DEFENDANTS IN A RESERVE
ACCOUNT:**

TAKE NOTE: Pursuant to an Order of the Court of Common Pleas, Horry County, South Carolina, a hearing was held November 19, 2008 before the Honorable J. Michael Baxley, at the Horry County Courthouse, Conway, South Carolina. At that time, the Court certified a Class.

SUMMARY OF THE LAWSUIT

This matter is before the Court because the Plaintiffs, who are former employees of Westgate Resorts, allege that they are entitled to back wages which are currently held by Westgate in a reserve account. The Plaintiffs all worked at the Westgate Resort located in Myrtle Beach, South Carolina. The Plaintiffs further allege that Westgate and its officers, agents and/or employees breached its contract of employment with them regarding payment of wages and that they are entitled to statutory relief. Plaintiffs allege that the Court should issue an Order

requiring Westgate to refund those back wages to them along with treble and punitive damages. Westgate denies that it engaged in any wrongdoing or that Plaintiffs are entitled to the relief sought. The Court has certified a Class which shall include:

All persons previously employed at any Westgate Resort located in South Carolina who have wages withheld by Defendants in a reserve account.

The Circuit Court has determined that this case should proceed as a Class action. The Court has not made a determination of the merits of Plaintiffs' claims or your claim. Because this action will proceed as a class action, you will automatically be included in this case unless you opt out by written letter. Your right to opt out is described below. If you have any question, you may contact either of class counsel listed below.

RIGHT TO OPT OUT

If you do not wish to be a member of the class, you have the right to choose to be excluded from this lawsuit and from the Class of persons entitled to participate in the lawsuit. If you decide not to participate in this lawsuit and you give proper and timely notice (within thirty (30) days of the date of this mailing), you will not be able to participate in the benefits of the case and the Court's Order Certifying Class will have no effect on any legal claim that you may have against the Defendants.

IF YOU WISH TO PARTICIPATE IN THIS CLASS ACTION LAWSUIT, YOU NEED DO NOTHING. You will automatically be a member. Further, being a Class member will cost you nothing since Class Counsel is serving on a contingency basis and will not be paid unless a settlement is reached. If you have any questions, please contact Class Counsel:

Gene M. Connell, Jr., Esquire
Kelaheer, Connell & Connor, P.C.
P. O. Drawer 14547
Surfside Beach, SC 29587
gconnell@classactlaw.net
Phone: (843) 238-5648
Fax: (843) 238-5050

David J. Canty
David J. Canty, P.A.
4612 Oleander Drive
Myrtle Beach, SC 29577
mibcounsel@verizon.net
Phone: (843) 449-6304
Fax: (843) 449-4249

If you wish to exclude yourself from the lawsuit, you must send a written request for such exclusion, postmarked within thirty (30) days of the date of this notice, and indicate that you do not wish to participate. Notice should be sent to:

Gene M. Connell, Jr., Esquire
Kelaher, Connell & Connor, P.C.
P. O. Drawer 14547
Surfside Beach, SC 29587

_____, 2009
Surfside Beach, South Carolina.

PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE FOR ADVICE OR INFORMATION. PLEASE CONTACT CLASS COUNSEL.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-5478

Judith A. Parker, Caroline Jordan,
Christopher J. DeCaro and Charles S.
Walker, Jr., individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a West Gate Resorts,

Defendants.

AFFIDAVIT OF SERVICE
BY MAIL

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

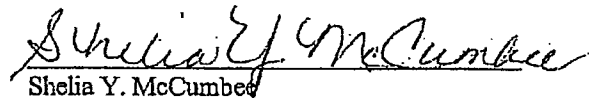
John S. Wilkerson, III, Esq.
Turner Padgett Graham & Laney, PA
P.O. Box 22129
Charleston, SC 29413-2129

William E. Lawson, Esq.
Turner Padgett Graham & Laney, PA
P. O. Box 2116
Myrtle Beach, SC 29578

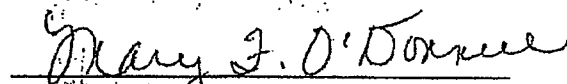
Myma L. Maysonet
Greenspoon Marder, P.A.
201 East Pine Street, Suite 500
Orlando, FL 32801

DOCUMENTS: Order Certifying Class and Sending Notice to Class Members

DATE OF MAILING: January 9, 2009

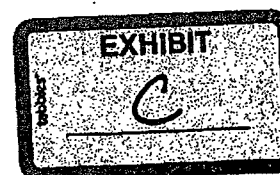

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 9th day of January, 2009.


Notary Public for South Carolina
My Commission Expires: 6/1/16

Parker et al. v. CFI Sales Marketing, LLC
FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE COMPLAINT

LAST NAME	FIRST NAME
ADAMS	MATTHEW
ADAMS	DAVID
ADAMS	ROBERT
ALDRICH	RICHARD
ALEGRE	ANADELFA
ALLEN	MARVENE
ANDERSON	RAYMOND
ARMSTRONG	AMANDA
ARRINGTON	LAURA
AYRES	KIMBERLY
BALDERA	JOHNNY
BALLENGER	JOAN
BARBIERI	JEFF
BASS	GENE
BATCHELDER	JANET
BATTISTELLI	MICHELLE
BECKER	SHAWN
BELARBI	MOHAMED
BERNHEISEL	GLEN
BETTS	GEORGE
BLACK	STEPHEN
BLOSSER	MICHAEL
BLYE	TERRELL
BONE	TRISHA
BRITTNER	VIOLA
BROADT	DANNY
BROCKMANN	STEPHANIE
BROTHERS	DANIEL
BROWN	ADAM
BROWN	CHEQUANA
BROWN	REGINALD
BURDISS	ERIC
BURNEY	TONYA
BURNS	CHARMAINE
BUTLER	DAVID
BYNUM	JASON
BYRD	MICHAEL
CALDWELL	JASON
CALLICUTT	SABIAN
CALVIERA	VICKI
CAMLIN	CHRIS
CAMPBELL	RICHARD
CAMPBELL	EDWARD
CANTELMO III	ALBERT
CAPRICI	CONTESSA
CARDENNIS	NEISHA
CARON	MICHAEL
CARTEE	DEBORAH
CARTRETTE	PHYLLISS
CHAN	LEON



Parker et al. v. CFI Sales Marketing, LLC
FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE COMPLAINT

LASTNAME	FIRSTNAME
CHRISTY	CYNTHIA
CINALLI	MICHAEL
CLARK	TAMMY
COBBETT	JOSEPH
COHEN	HARRIS
COLEMAN	KEIRNON
CONROY	THOMAS
COOKE	ANTHONY
COPLEY	RICHARD
CORCIONE	CHRISTOPHER
CORELL	JASON
COTTINGHAM	ELIZABETH
COUCH	THEODORE
COUCH	DARLENE
COURTOIS	THOMAS
COUSINS JR	CLIFTON
COX	RUSSELL
COX	VONDA
CRANDALL	TIMOTHY
CRAWLEY	LEANNE
CRICHTON	ANNA
DAILEY	KEITH
DALTON	JERRY
DAMICO	MARK
DANILEWICZ	DOUGLAS
DANKO	BRENDA
DARE	NOVY
DARROW	RYAN
DAVIDSON	BLANCHE
DAVIS	SHANNON
DAVIS	NICOLE
DAVIS JR	BEJAMIN
DECARO	CHRISTOPHER
DEEB	JESSICA
DENNING	CHARLES
DENTLEY	RANDALL
DEPALMA	KEITH
DEVITIS	THOMAS
DIAZ	FRANCISCO
DICKERSON	JAY
DIGILDO	CLELIA
DIGNEO	ROBERT
DOCKINS JR	DANIEL
DODRIDGE	SHANACY
DONALSON	RANDY
EMERSON	VINCENT
FAILE	HAZEL
FARLOW	STEEN
FEATHER	KEVIN
FEICHTEL	CHAD

Parker et al. v. CFI Sales Marketing, LLC
FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE COMPLAINT

LAST NAME	FIRST NAME
FERGUSON	BRENDA
FIORA	SOLINA
IORELLI	RONALD
FLEMING	KRISTIN
FLETCHER	RENEE
FLETCHER	KATHLEEN
FLOWERS	LINDA
FLOYD III	ROBERT
FOLEY	BRIDGET
FORD	JENNIFER
FORGY	STEVEN
FORNAL	JEFFREY
FORNAL	BRENTEN
FULLEX	CHRISTINA
GAGNON	CHANTAL
GEORGE	KENNETH
GEORGE	WANDA
GERALD	CHRISTOPHER
GIANUCA	DORIS
GIDYCZ	MITCHELL
GOODMAN	ASHLEY
GOODWYN	CARSON
GORE	CHRISTOPHER
GRAJALES	DONNA
GREGORY	ALEXIS
GROOMES	GRACIE
HALLY	MARK
HARDEE	SAMUEL
HARDY	AMBERLEE
HARRELL	JEROME
HARRIS	DEBORAH
HARTWELL	JAMES
HASWELL	RODNEY
HAWKINBERRY	AMANDA
HAWKINS	LEONARD
HAYNES	RODNEY
HAYNES	TIMOTHY
HELMS	ASHLEY
HELTSLEY	PENNIE
HENDRICK	THERESA
HENNES	RICHARD
HENNIGH	GREGORY
HENOCQ	ALEXANDRE
HEYL	ASHLEY
HIRSCHEY	NEIL
HOFFMAN	JOHN
HOUGHTALING	KATHERINE
HOUGHTALING	ANDREW
HUBER	LANCE
HUGGINS	MARQUIS

Parker et al. v. CFI Sales Marketing, LLC
 FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE
 COMPLAINT

LAST NAME	FIRST NAME
HUNNICUTT	MARGARET
HUNT	JOHN
HYATT II	RANDY
JACKSON	DONNA
JACKSON	NICKY
JENKINS	STEPHAINE
JENKINS	CYNTHIA
JOHNSON	PAULETTE
JONES	CHRISTOPHER
JONES	RICHARD
JORDAN	CAROLINE
KADYK	MARC
KEFFER	ELIZABETH
KELLER	RICHARD
KELM	JENNIFER
KEOMANIDETH	KIMBERLY
KING	MICHAEL
KISER	JAIME
KITTRELL	CHERIE
KNOX	WHITNEY
KRASNAY	MICHAEL
KREYER	SEATON
LAMBERT	NILS
LANPHER	LYNN
LAVACCA	CYNTHIA
LAWRENCE	JEFFREY
LAWRENCE	ERICA
LEE	ZACK
LEE	BENJAMIN
LEE	GORDON
LEVASSEUR	HOLLY
LEWIS	LISA
LEWIS	CASEY
LISAK	JEAN
LISBON	GARY
LIVINGSTON II	ERNEST
LOUGHLIN	JOHN
MACAULAY	CASEY
MAJOR	TIMOTHY
MARANVILLE	JOSEPH
MARKHAM	JEFFREY
MATSUMOTO	SEANA
MAYAN	AVI
MCCABE	RICHARD
MCGUIRE	CHERYL
MCINTYRE	JERRY
MCKEE	DALE
MCQUEEN	CHRISTOPHER
MERCER	MARK
MEROLLE	DONNA

Parker et al. v. CFI Sales Marketing, LLC
FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE COMPLAINT

LAST NAME	FIRST NAME
MIDDLETON	KHALIF
MIDDLETON	AMY
MIRACLE	CHRISTOPHER
MIRELES	EDWARD
MOORE	CINDY
MORGAN	WILLIAM
MOSCOSO	ROBERT
MUEHLHANS	HOLGER
MUIRHEAD	THOMAS
MURPHY	EDWARD
MURPHY	NANETTE
MURRAY	JOSHUA
MUSTER	ADAM
NAVARRETE BAEZ	CARLOS
NICHOLS	MARK
NIRENBERG	DAVID
NOACK	SANDRA
NOWACKI	JACQUELINE
OLASO	JESUS
OLIVIERI SR	GERARDO
ORNER	NANCY
OROURKE	ROBERT
OSBORNE	KEVIN
OSIS	JOANNE
OSIS	JULIANA
OWENS	TIMOTHY
OXENTINE	CHELCE
PAPSON	JOHN
PARKER	JUDITH
PARKS	KIMBERLY
PARRISH	EARL
PASZKIEWICZ	BRIAN
PATTON JR II	SAMAD
PAYNE	MICHAEL
PENNY	PAMELA
PETERS	WILLIAM
PETERSON	JEFFERY
PEYTON	MATTHEW
PHILLIPS	CHRIS
PIERRO	GREGORY
PINEDA	KENNY
PIRET	JAMES
POWELL	CATHERINE
PUGH	KITRE
QUINN	THOMAS
QUINN	GEORGE
QUINN	DANNA
QUINONES	RAFAEL
RAFFERTY	PAUL
RAIL	ANDREW

Parker et al. v. CFI Sales Marketing, LLC
 FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE
 COMPLAINT

LASTNAME	FIRSTNAME
RAY	LESLIE
REED	MATTHEW
REILLY	CYNTHIA
REXROAD	BRIAN
REYES	VALERIE
RICHARD	KEVIN
RIFKIN	DANIEL
RIFKIN	JESSICA
RILEY	SEAN
ROBERTS	MELODY
ROBERTS	VICTORIA
ROBERTS JR	JOSEPH
ROBINSON	TIMOTHY
RODRIGUEZ	CAMILO
ROGERS	KATIMA
ROSE	SHERRELL
ROSE	CATHY
ROWE	KENNETH
ROZEN	DANIEL
RUSSELL	JAMES
RUTH	ROBIN
RYBA	GERALD
SALAMANCA	JAMIE
SALEEBY	HELEN
SCHMIDT	WENDY
SCHMIDT-MACK	TAMMY
SEABOCH	SALLIE
SEBREE	DEJAYNA
SECCARECCIO	LISA
SHAW	LOUISE
SHAWVER	STEVEN
SHEPARD	TINA
SHONK	AMANDA
SHOPTAW	SAMUEL
SILVERSTEIN	ANGELA
SIMOTICS	CARRIE
SIMPSON III	JOHN
SIMS	SCOTT
SINCLAIR	DANNY
SINGLETON	TWANESHIA
SINGLETON	ROBBIE
SINGLETON	SHERRY
SKINNER	JOSEPH
SMITH	SUSAN
SMITH	GARY
SMITH	CHARLES
SMITH	DOUGLAS
SMITH	FRANK
SOLANO	WALTER
SPENCER	LANCE

Parker et al. v. CFI Sales Marketing, LLC
 FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE
 COMPLAINT

LASTNAME	FIRSTNAME
STAPLES	CARLTON
STARK	ROXANNE
STEGALL	JOSEPH
STIMELING	KATHERINE
STOKES II	CARL
STONE	ALLAN
STUMP	JULIE
SULLIVAN	CARA
SULLIVAN JR.	CHARLES
SUMMERS	JOSEPH
SYMONDS	DEAN
SYRETT	WENDY
TABET	RACHEL
TAYFEL	HOLLY
TAYLOR	ALBERT
TAYLOR	FRANK
TEW	LORNA
THONI	STEVEN
THRASHER JR	THOMAS
TICKLE	TINA
TOWNSEND	DONALD
TREMBLE	TANYA
TRIMBACH JR	PATRICK
TUITE	FRANCIS
TURCOTTE III	EDWARD
TURNER	REBECCA
TURNER	CANDICE
TURNER	DEBERA
TUTTEROW	LLOYD
TUTTLE	CYNTHIA
TUTTLE	RANDALL
TUTTLE	RYAN
VAN VLAKE	RICHARD
VENETTE	DONNA
VISCONTI	TIMOTHY
VISCONTI	CYNTHIA
VITIKOS	STRATTON
WAGNER	GREGORY
WALKER	JOSEPH
WALKER	CHARLES
WALL-CLARK	NANCY
WALLER	DEBRA
WALSH	TIMOTHY
WALSH	JANE
WARD	MICHAEL
WARD	ROBIN
WAY	HURLEY
WEBER	DENNIS
WHIPPLE	KEVIN
WIESMORE	BRET

Parker et al. v. CFI Sales Marketing, LLC
FORMER EMPLOYEES WHO WORKED IN SOUTH CAROLINA WITHIN 3 YEARS OF THE FILING OF THE
COMPLAINT

LAST NAME	FIRST NAME
WILLS	MICHAEL
WILSON III	JAMES
WNUK	CHESTER
WOLFE	ROBERT
WOODLEY	DAVID
YAGER	RENEE
YOUNGBLOOD	ROBERT
YUSKO	KENNETH
ZANARDO	MICHAEL
ZINN	TIMOTHY
ZMICH	MARILYN

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2007-CP-26-5478**

Judith A. Parker, Caroline Jordan,
Christopher J. DeCaro and Charles S.
Walker, Jr., individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd, and its
Successor in Interest by Merger,
CFI Sales & Marketing, LLC d/b/a
West Gate Resorts,

Defendants.

**ORDER APPROVING
CLASS SETTLEMENT
AND GRANTING JUDGMENT
TO PLAINTIFF CLASS**

This matter came before the Court for trial on Monday, January 11, 2010, in the Horry County Government and Justice Center, having been previously set for trial pursuant to the Order of Chief Administrative Judge Steven H. John. This Court held a pretrial with all counsel on Friday, January 8, 2010, to become familiar with the case and discuss the issues with the parties.

Briefly stated, this case had previously been certified as a class action in January 2009. The Plaintiffs allege that the Defendants failed to make payment of wages to Plaintiffs while they were commission timeshare salesmen at the Westgate Resort in Myrtle Beach, South Carolina. Previous to the trial, both Plaintiffs and Defendant had moved for summary judgment. Both summary judgment motions were heard before the Honorable Larry B. Hyman and were denied, except for Judge Hyman's ruling establishing the law of the case that the commissions in question were "wages" under the South Carolina Wage Payment Act.

At the start of the trial, the Court was advised by class counsel that the Defendants had offered a Six Hundred Fifty Thousand and 00/100 (\$650,000.00) Dollars judgment to be entered



against them as settlement of this case. Because this is a class action, the Court is required to review the settlement offer and determine whether or not it is reasonable and fair to the class members.

I. APPLICABLE LAW

South Carolina Rule of Civil Procedure 23(c) states in pertinent part:

Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

There is no case law which interprets SCRCP 23(c); however, the Court is guided by one decision. *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992). In that case, the South Carolina Supreme Court held that SCRCP 23 gives the Court broad discretion in the handling of class actions.

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The Court has been advised by class counsel that all class members were informed of the trial, that there were initially 363 class members, and that previously nine individuals had opted out. Further, three other individuals do not qualify as class members. They are Dana Quinn, Lisa Lewis and Kevin Whipple. Records from the Defendant indicate that Lisa Lewis and Dana Quinn had previously brought civil actions over monies in their reserve accounts and had signed confidential releases. As to Kevin Whipple, he is a current employee of the Defendant and does not qualify under the class definition to be a class member. Thus, as of the date of the trial, there were 351 class members. The Court finds that all class members have received proper notice of this claim pursuant to SCRCP 23(d) *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 381, 585 S.E.2d 292 (2003). As a result, this Court now considers the proposed settlement offer by the Defendant.

II. THE SETTLEMENT OFFER.

The parties at the hearing presented to the Court a document entitled Memorandum of Understanding, dated the 11th day of January, 2010, which the Court attaches to this Order and

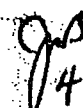
incorporates by reference as Exhibit A. The Memorandum of Understanding provided that the Plaintiff Class shall have judgment against the Defendant in the amount of Six Hundred Fifty Thousand and 00/100 (\$650,000.00) Dollars. Further, the settlement provides that Plaintiff Class shall not take any steps to enforce or collect the Judgment for 180 days from the date of this Order. The Plaintiff Class is authorized to file a Transcript of Judgment in any state in which the Defendants are doing business, provided that no execution efforts take place until after July 11, 2010. Also, the Defendant is to use its best efforts to make interim payments in partial satisfaction of the Judgment in the amount of Twenty-five Thousand and 00/100 (\$25,000.00) Dollars to be paid on February 10, 2010, and a second payment to be made on March 10, 2010 in the amount of Twenty-five Thousand and 00/100 (\$25,000.00) Dollars. These payments shall be paid to Kelaher, Connell & Connor, P.C. Trust Account, and shall be used in part to satisfy reimbursement of Plaintiffs' litigation costs to class counsel.

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Further, as part of the settlement, Plaintiff Class and Class Counsel inquired as to the ability of the Defendant to pay the Judgment. The Court took testimony in chambers of a corporate restructure official who is aware of all pertinent financial matters relating to CFI Sales & Marketing, Ltd./CFI Sales & Marketing, LLC. The testimony taken in chambers included a review by the Court of the financial ability of the company to pay, along with other confidential information relating to the ownership, operation, and viability of the company. This testimony was taken in-camera pursuant to South Carolina Rule of Civil Procedure 41.1. This Court believes it appropriate and reasonable to keep this testimony confidential and the Court considered this testimony under seal to protect both the Defendant and the Plaintiff Class. In accordance with SCRCP 41.1, this Court makes a specific factual finding that release of any testimony of the corporate restructure official would damage the local business operations of the Defendant and could affect the ability of

the Defendant to make payment on the judgment. Further, it would be harmful to both the Plaintiff Class and Defendant should this information be released to the public. Accordingly, it is in the best interest of the parties and of the public for the Plaintiff Class to be paid their wages and this Court finds that the testimony of the corporate restructure officer should be sealed. *See Ex parte Capital You Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006).

Finally, Class Counsel inquired of the Plaintiff Class members who were present to testify on the first day of the trial as to whether anyone objected to the proposed settlement. At the hearing, no one objected to the proposed settlement as offered pursuant to the Memorandum of Understanding attached hereto.

 The Court then took a brief recess and returned and advised Class Counsel that a second hearing would be necessary to determine attorneys' fees, costs, as to how much each of the 351 class members would receive should the monies be paid by the Defendant. The Court directed Class Counsel to set a time and date for the hearing and to provide each member of the Plaintiff Class a letter indicating how much each individual class member would receive after attorneys' fees and costs. Those Plaintiff Class members who disagree with the calculation shall be notified as to the date and time of the proposed fairness hearing so that they may appear before the Court and make objection. Anyone who does not make an objection shall be bound by the calculation. However, the Court notes that if it grants any objection, the calculation for all class members may change since there is a limited amount of money to be paid in settlement of this case.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff class have judgment against Defendant CFI Sales & Marketing LLC, successor by merger to CFI Sales & Marketing

Ltd., in the sum of Six Hundred Fifty Thousand and 00/100 (\$650,000.00) Dollars and that judgment interest shall accrue at the rate prescribed by law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Memorandum of Understanding between the parties attached hereto as Exhibit A and offered in open court is incorporated hereto and is part and parcel of this Order and clearly and accurately represents the terms of the settlement between the Plaintiff Class and the Defendant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court received nine opt outs and that Dana Quinn and Lisa Lewis previously signed releases and settled their claims for the reserve account. Further, Kevin Whipple, a current employee of the company does not wish to be a member of the class. Accordingly,

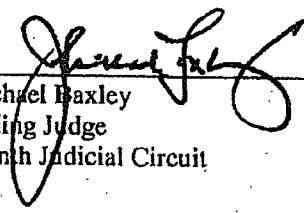
 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there are 351 class members and that Plaintiffs' counsel shall provide a notice of hearing and shall also advise each class member as to what he or she will receive as a prorata share of the settlement funds so that he or she may come before the Court and object if he or she wishes to be heard by the Court regarding each individual class member's payment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the notice shall also provide the amount of attorneys' fees sought by counsel and give the class members the right to object should they deem necessary at this fairness hearing.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all costs incurred by Plaintiffs' counsel in the amount of Thirty-two Thousand Four Hundred Forty-nine and 24/100 (\$32,449.24) Dollars (Exhibit B) shall be paid out of the first Twenty-five Thousand and 00/100 (\$25,000.00) Dollars settlement to be paid on February 10, 2010. The remaining costs balance shall be paid out of the second interim payment of Twenty-five Thousand and 00/100 (\$25,000.00)

Dollars due on March 10, 2010. Further, counsel may apply for other costs as necessary at the settlement hearing.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge
Fifteenth Judicial Circuit

January 29, 2010

Conway, South Carolina

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding made and entered into this 11th day of January, 2010, by and among Judith A. Parker, et al. ("Class Claimants") and CFI Sales & Marketing, LLC (successor by merger to CFI Sales & Marketing, Ltd.) ("CFI").

Recitals:

Class Claimants comprise 364 (give or take) former commissioned timeshare salespersons employed by CFI at the Westgate Myrtle Beach Oceanfront Resort in Myrtle Beach, South Carolina, between 2005 and January 31, 2009 (the "Class Period").

Class Claimants are plaintiffs in a class action lawsuit styled *Judith A. Parker et al. v. CFI Sales & Marketing, Ltd.*, Civil Action No. 2007-CP-26-5478 (S.C. Ct. Comm. Pleas, 15th Judicial Circuit, Horry Cty., S.C.) ("the Civil Action") pursuant to an Order Certifying Class dated January 9, 2009 ("Class Certification Order").

The Civil Action includes, *inter alia*, claims in connection with CFI's commission reserve system and claims for unpaid reserve commissions premised upon South Carolina's Payment of Wages laws and South Carolina common law.

This Memorandum of Understanding outlines the basic terms of the settlement of all claims made, or which could or should have been made, by the Class Claimants against CFI in connection with the commission reserve matters described in the Class Claimants' complaint in the Civil Action.

Class Claimants, by and through their undersigned class counsel appointed by the Class Certification Order, and CFI, by and through its counsel, agree as follows:

1. *Recitals.* The foregoing recitals are true and correct and are incorporated herein as material terms of this Memorandum of Understanding.

Page 1 of 6

"Exhibit A"

2. ***Stipulated Judgment.*** As payment for and satisfaction of all claims made or asserted by the Class Claimants or which could or should have been made or asserted by the Class Claimant for any and all matters occurring or arising during the Class Period in connections with commission reserves alleged to be due to Class Claimants and owed by CFI, including all claims for enhanced (double or treble) or punitive damages and pre-judgment interest and all claims for future payments of commission reserves, and inclusive of attorneys' fees and recoverable litigation costs (for which there shall be no separate award or recovery), a stipulated judgment shall be entered, in behalf of all Class Claimants (other than those who have opted-out) and Class Counsel (to the extent of their entitlement to payment of attorneys' fees and reimbursement of litigation costs) and against CFI in the amount of **Six Hundred Fifty Thousand (\$650,000) Dollars.** Judgment interest shall accrue at the rate prescribed by applicable South Carolina law.

3. ***Attorneys' Fees and Costs.*** For purposes of the Settlement of the Civil Action, Class Claimants shall be deemed the prevailing parties herein. There shall be no separate award of prevailing party attorneys' fees or recoverable litigation costs. Rather, the Stipulated Judgment already includes such amounts that are to be allocated for payment of Class Counsel and reimbursement of litigation costs they have incurred. In accordance with applicable South Carolina law, the Circuit Court shall determine the amount of reasonable attorneys' fees to be awarded Class Counsel and the amount of litigation costs which Class Counsel shall be reimbursed.

4. ***Entry and Stay of Execution of Stipulated Judgment.*** Upon the Circuit Court's conditional approval of the Settlement, the Stipulated Judgment shall be entered forthwith. CFI waives its right of rehearing, reconsideration and appeal in

connection with the Stipulated Judgment. For a period of one hundred eighty (180) days following the entry of the Stipulated Judgment, Class Claimants and Class Counsel agree that they shall not seek execution of the Stipulated Judgment or commence Supplementary Proceedings thereon in South Carolina and that there shall, likewise, be no execution or collection activities of or upon the Stipulated Judgment undertaken in any other state or jurisdiction. The Stipulated Judgment shall specifically incorporate the 180 day stay of execution and collection by inclusion of the following language (or words of like effect): "NO EXECUTION SHALL ISSUE AND NO SUPPLEMENTARY OR COLLECTION PROCEEDINGS SHALL BE COMMENCED UPON THIS JUDGMENT UNTIL JULY , 2010"

(180 days following the date of entry of the Stipulated Judgment). During such stay of execution period, CFI shall use and exercise its best efforts to make interim payments in partial satisfaction of the Stipulated Judgment, as follows:

- On or before February 10, 2010: \$25,000
- On or before March 10, 2010: \$25,000

All such payments if and when made shall be credited in full as partial satisfaction of the principal amount of the Stipulated Judgment.

5. *Prior and Future Payments.* During the Class Period, CFI has disbursed payments of reserve commissions via checks which certain of the payee Class Claimant have not cashed. CFI shall ascertain which checks have not been negotiated and, when the Class Claimant executes and delivers to CFI a release and indemnity in regard to the uncashed item, CFI will replace uncashed checks. Such replacement checks shall be delivered to Class Counsel and shall not be considered partial payment or satisfaction of

the Stipulated Judgment. The Stipulated Judgment settles and resolves all of Class Claimants' claims against CFI in connection with all commission reserves during the Class Period. There shall be no further reconciliation or payment of reserves following the entry of the Stipulated Judgment. This Settlement shall not dispose of the claims for unpaid wages (not commission reserves) set forth in the matter styled *Timothy Zinn et al. v. CFI Sales & Marketing, Ltd.*, Civil Action No. 2009-CP-26-0043 (S.C. Ct. Comm. Pleas, 15th Judicial Circuit, Horry Cty., S.C.), which shall continue unaffected by the Settlement of the Civil Action.

6. **Court Approval.** This Settlement of the Civil Action is subject to approval by the Circuit Court in accordance with S.C.R.Civ.P. 23. The Stipulated Judgment may be entered following the Circuit Court's conditional approval of this Settlement.

7. **Financial Information.** Class Counsel have been generally made aware of CFI's present financial condition and such information has informed the deliberations of the Class Claimants and Class Counsel which has resulted in this Settlement. CFI agrees to provide its confidential financial information to Class Counsel, if needed, subject to an agreed protective order limiting disclosure, dissemination and publication of such information. CFI further agrees to provide its confidential financial information under seal to the Circuit Court, if needed, for *in camera* inspection in connection with proceedings for approval of this Settlement of the Civil Action.

8. **Comprehensive Settlement Agreement.** This Memorandum of Understanding is intended to preliminarily memorialize the terms of the parties' agreement to settle the Civil Action. It is intended to be an interim agreement which is

expected to be replaced and superseded by a comprehensive Settlement Agreement to be submitted to the Circuit Court in connection with the anticipated fairness hearing and other proceedings for final approval of this Settlement.

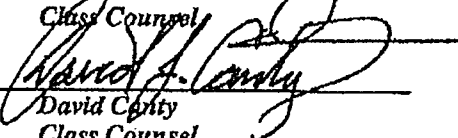
9. *Counterparts and Facsimile/Imaged Signatures.* This Memorandum of Understanding may be signed in counterparts, which shall collectively be deemed to constitute a complete agreement. Facsimile or imaged signatures shall be deemed the equivalent of an original signature.

Dated this 11th day of January, 2010.

Class Claimants:

Judith A. Parker, et al.

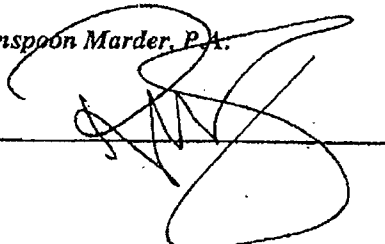
By: 
Gene Connell
Class Counsel

By: 
David Carty
Class Counsel

CFI:

By its counsel:

Greenspoon Marder, P.A.

By: 

KELAHHER, CONNELL & CONNOR, P.C.
Attorneys at Law
The Courtyard, Suite 209
1500 U.S. Highway 17 North
P.O. Drawer 14547
Surfside Beach, SC 29587
843/238-5648
TAX ID: 57-1012972

JUDITH A. PARKER ET AL
705 - 64th Avenue North #3
Myrtle Beach SC 29572

Page
January 27, 20
Account No: 20070276-0
Statement No: 119

vs. CFI Sales & Marketing, Ltd., et al

Interim Statement

EXPENSES

10/31/2009	PHOTOCOPIES OF DOCUMENTS PROVIDED BY DEFENDANTS ON DISK	9,500.
01/27/2010	PHOTOCOPIES & POSTAGE	2,988.
01/27/2010	PHOTOCOPIES & POSTAGE FOR FUTURE MAILING OF NOTICE OF HEARING	1,000.
	Total Expenses	13,488

ADVANCES

08/27/2007	CLERK OF COURT FOR FILING FEE	150
08/28/2007	CLERK OF COURT FOR FILING MOTION	25
10/22/2007	SHERIFF OF RICHLAND COUNTY FOR SERVICE	15
08/25/2008	STENO TYPE REPORTING SERVICE, LLC FOR DEPOSITIONS	823
10/02/2008	CLERK OF COURT FOR FILING FEE	25
11/11/2008	ZACCO & ASSOCIATES/DEPOSITION	663
03/30/2009	CLERK OF COURT FOR FILING FEE	25
04/20/2009	CLERK OF COURT FOR FILING FEE	25
06/30/2009	CLERK OF COURT FOR FILING FEE	25
09/03/2009	CLERK OF COURT FOR FILING FEE	25
09/18/2009	CLERK OF COURT FOR FILING FEE	25
10/26/2009	REIMBURSE GENE M. CONNELL JR. FOR DEPOSITION EXPENSE	28
10/28/2009	US AIRWAYS FOR AIRFARE TO ORLANDO FOR DEPOSITIONS	317
10/28/2009	HOTEL ACCOMMODATIONS AND TRANSPORTATION TO AND FROM AIRPORT IN ORLANDO FOR DEPOSITIONS	324
11/03/2009	ZACCO & ASSOCIATES REPORTING SERVICES FOR DEPOSITION	1,132
12/22/2009	MARY R. FRANKS COURT REPORTING FOR DEPOSITIONS	487
12/30/2009	FEDERAL EXPRESS TO MYRNA MAYSONET, ESQUIRE	77
12/30/2009	FEDERAL EXPRESS TO MYRNA MAYSONET, ESQUIRE	73
01/06/2010	MYRTLE BEACH CONVENTION CENTER/VIDEO CONFERENCE	500
01/10/2010	STENO REPORTING SERVICE FOR DEPOSITIONS	433
01/10/2010	KT CONSULTANTS, INC. FOR SERVICE	60
01/10/2010	SECRETARY OF STATE FOR CORPORATE INFORMATION	5
01/10/2010	RICHARD E. HEATH, CPA, CVA, PC FOR EXPERT	4,086
01/12/2010	ORANGE REPORTING/DEPOSITION OF JOHN WILLMAN	2,222
01/12/2010	FEDERAL EXPRESS TO MYRNA MAYSONET, ESQUIRE	23

E. P. 1112

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2008-CP-26-6043
4

Timothy A. Zinn, Robert Adams, Laura
Arrington, Stephen C. Black, Bradley
Kirk Bray, Mark D'Amico, Thomas A.
DeVitis, Rodney Eddie Haynes, Jimmy
Kelly, Whitney Renee Knox, Lynn C.
Lanpher, Holly Levasseur, John Martin
Loughlin, Joe Maranville, Khalif
Middleton, Chelscie Oxentine, Judith A.
Parker, Matthew W. Reed, Cynthia G.
Reilly, Gerald Ryba, Sherry Singleton,
Steven G. Thoni, Stratton Vitikos,
Michael H. Wills, Michael J. Zanardo,

Plaintiffs,

vs.

CFI Sales & Marketing, Ltd,
d/b/a Westgate Resorts,

Defendants.

COMPLAINT
(Breach of Contract)
JURY TRIAL DEMANDED

HORRY COUNTY
09 JAN -5 AM 10:54
MELANIE HUGGINS
CLERK OF COURT

The Plaintiffs, Complaining of the Defendant would respectfully show unto this
Honorable Court as follows:

1. The Plaintiffs are citizens and residents of the County and State aforesaid, the
Defendant is a Florida limited partnership domesticated in South Carolina, employment of the
Plaintiffs by the Defendant occurred in the County and State aforesaid, and this Honorable Court
has jurisdiction in this matter.

2. That at various times between December, 2004 and the present the Plaintiffs were
employed by the Defendant as timeshare sales personnel at Defendant's development in the
County and State aforesaid.



3. That Plaintiffs are owed wages and were not paid wages which were due when they were terminated pursuant to the commission sales agreement.

FOR A FIRST CAUSE OF ACTION
(Accounting)

4. That the Defendant has engaged in and presently employs various improper techniques for the purpose of understating to the Plaintiffs the amount of compensation they are due for their services.

5. That the Plaintiffs are informed and believe that they are entitled to this Honorable Court's Order compelling the Defendant to render a full and complete accounting to the Plaintiffs and the Court of all monies due to Plaintiffs as wages.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

6. That all of the material allegations of the foregoing cause of action are hereby reiterated and realleged as if fully set forth verbatim.

7. That the Defendant herein is an "Employer" within the meaning of S.C. Code Ann. Section 41-10-10(1) (1976), as amended.

8. That the monies due the Plaintiffs herein are "Wages" within the meaning of S.C. Code Ann. Section 41-10-10(2) (1976), as amended.

9. That the Defendant's practices with regard to notice to employees required by S.C. Code Ann. Section 41-10-30(A) (1976), as amended do not comply with the said statute.

10. That the Defendant's practices with regard to notice to employees of gross pay and itemized deductions therefrom required by S.C. Code Ann. Section 41-10-30(C) (1976), as amended do not comply with the said statute.

11. That the Defendant's practices with regard to withholding or diverting portions of Plaintiff's wages do not comply with S.C. Code Ann. Section 41-10-40(C) (1976) as amended.
12. That the Defendant's practices with regard to time and place of payment of wages do not comply with S.C. Code Ann. Section 41-10-40(D) (1976) as amended.
13. That the Defendant's practices with regard to payment of wages to discharged employees do not comply with S.C. Code Ann. Section 41-10-50 (1976) as amended.
14. That the Defendant has failed and refused to timely pay wages due within the meaning of S.C. Code Ann. Section 41-10-80(C) (1976) as amended.
15. That numerous provisions of documents which Defendant requires Plaintiffs to endorse in contravention of Chapter 10 of Title 41 of the Code of Laws of South Carolina are void ab initio and utterly without legal force or effect.
16. That Plaintiffs are informed and believe that they are entitled to this Honorable Court's Declaratory Judgment as set forth supra.

FOR A THIRD CAUSE OF ACTION
(Wages, Penalties and Attorney's Fees)

17. That all of the material allegations of the foregoing causes of action are hereby reiterated and realleged as if fully set forth verbatim.
18. That the Plaintiffs herein are due wages from the Defendant which the Defendant has failed and refused to timely pay.
19. That the Defendant's persistent and pervasive pattern of unlawful conduct towards Plaintiffs precludes any finding of good faith on the part of Defendant.
20. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant for three (3) times the amount of wages due plus the costs of this action

and a reasonable attorney's fee pursuant to S.C. Code Ann. Section 41-10-80(C) (1976), as amended.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

21. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

22. That as more fully appears supra the parties hereto had a contractual relationship.

23. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay wages due and failing and refusing to timely pay wages due.

24. That the defendant acted with fraudulent intent in breaching the aforesaid contracts.

25. That the Defendant's breach of the aforesaid contracts were accompanied by fraudulent acts, including but not limited to misrepresenting to Plaintiffs when their wages were due, misrepresenting to Plaintiffs the amount and legitimacy of any deductions therefrom, and misrepresenting to Plaintiffs the status of payments on purchase agreements by customers.

26. That the Plaintiffs are informed and believe that they are entitled to Judgment against the Defendant in the amount of their actual damages plus punitive damages in an amount deemed appropriate by this Honorable Court.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

27. That all of the material allegations of the foregoing causes of action are hereby realleged and retained as if full set forth verbatim.

28. That as more fully appears above the parties hereto had a contractual relationship.

29. That the Defendant herein breached the aforesaid contracts by failing and refusing to pay lawful wages due and failing and refusing to timely pay wages due.

30. That the Defendant breached the contract of employment between the parties.

31. That Plaintiffs bring this cause of action for actual contract for breach of contract for pre-judgment interest and for attorney's fees.

WHEREFORE, Plaintiffs pray as follows:

A. That the Court issue its order requiring a full, fair, complete and candid accounting.

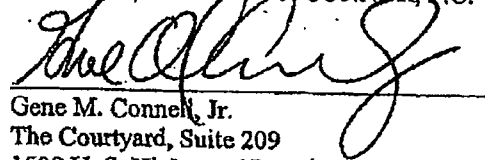
B. That the Court issue a Declaratory Judgment finding the Defendant's practices regarding payment of wages to be in derogation of statutory law as set forth above;

C. That the Plaintiffs have judgment against the Defendant individually and as a class for actual damages, treble damages, attorney's fees and costs;

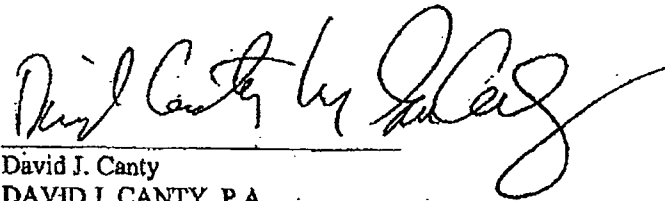
D. That the Plaintiff have judgment on breach of contract accompanied by a fraudulent act for actual damages, punitive damages and the costs of the action and for all members of the class similarly situated.

E. That the Plaintiffs have judgment against the Defendant for actual damages, prejudgment interest, attorney's fees and costs for breach of contract.

KELAHER, CONNELL & CONNOR, P.C.



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Attorneys for Plaintiffs

December 15, 2008
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Timothy A. Zinn, et al.

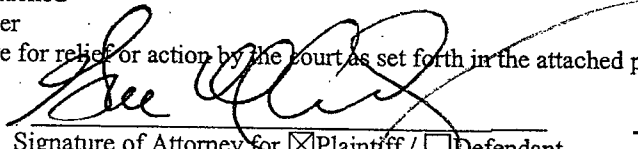
v.

CFI Sales & Marketing Ltd. d/b/a Westgate Resorts
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-26-0043

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Gene M. Connell, Jr., Bar No. 1358 KELAHER, CONNELL & CONNOR, P.C. Post Office Drawer 14547 Surfside Beach, South Carolina 29587-4547 phone: (843) 238-5648 fax: (843) 238-5050 email: gconnell@classactlaw.net	Defendant's Attorney: John S. Wilkerson, III, Esq. Turner Padget Graham & Laney, PA P.O. Box 22129 Charleston, SC 29413-2129 phone: (843) 576-2801; fax: (843) 577-1649 email: JWilkerson@TurnerPadget.com
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: for New Trial Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  _____ Signature of Attorney for ☒ Plaintiff / ☐ Defendant	
February 27, 2012 _____ Date submitted	
SECTION III: Motion Fee	
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
Arrington, Stephen C. Black, Bradley)
Kirk Bray, Mark D'Amico, Thomas A.)
DeVitis, Rodney Eddie Haynes, Jimmy)
Kelly, Whitney Renee Knox, Lynn C.)
Lanpher, Holly Levasseur, John Martin)
Loughlin, Joe Maranville, Khalif)
Middleton, Chelcie Oxentine, Judith A.)
Parker, Matthew W. Reed, Cynthia G.)
Reilly, Gerald Ryba, Sherry Singleton,)
Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)
Defendants.)

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR NEW TRIAL,
FOR DECLARATORY JUDGMENT
AS TO CONTRACT BEING IN
VIOLATION OF THE PAYMENT OF
WAGES ACT, FOR TREBLE
DAMAGES AND
FOR ATTORNEYS' FEES**

TO: JOHN S. WILKERSON, III, ATTORNEY FOR DEFFENDANT:

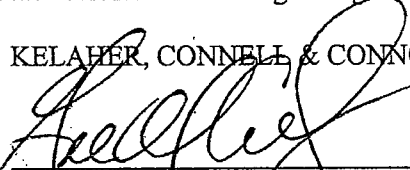
YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiff,
move the Court as follows:

1. For a new trial based on the grounds in the attached Memorandum of Law and those stated at the directed verdict stage;
2. For a declaratory judgment holding Defendant's contract regarding the payment of wages violates the South Carolina Payment of Wages Act and *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 (2006) (consistent with the court's comments at trial);
3. For attorneys' fees for successful prosecution of the declaratory judgment;
4. For attorneys' fees and the trebling of the award of Arrington;

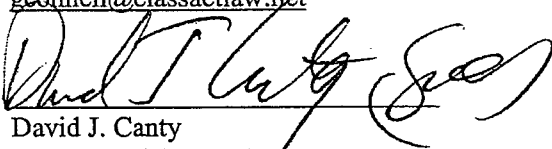
5. For an Order granting a new trial to all Plaintiffs;
6. For an Order granting a new trial because the payment of wages cause of action should have been submitted to the jury.

WHEREFORE, Plaintiff requests that the court issue its order granting a new trial.

KELAHER, CONNELL & CONNOR, P.C.



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Attorneys for Plaintiffs

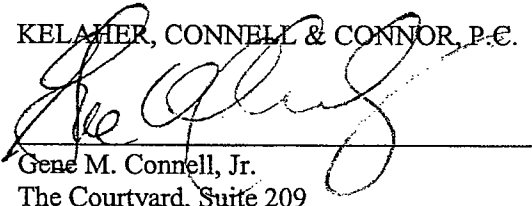
February 27, 2012
Surfside Beach, South Carolina

RULE 11 CERTIFICATION

The attorney(s) below hereby certifies that either:

- ___ A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or
- ___ B. Such consultation would serve no useful purpose or could not be timely held; or
- ___ C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:
- ___ a. To Dismiss
- ___ b. For Summary Judgment
- X c. For New Trial
- ___ d. For Judgment NOV

KELAHER, CONNELL & CONNOR, P.C.


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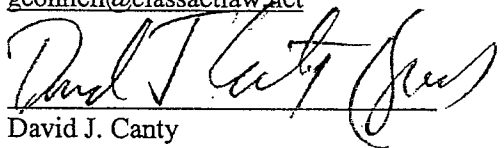
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Attorneys for Plaintiffs

February 27, 2012

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
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Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)
Plaintiffs,)
vs.)
CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)
Defendants.)

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR NEW
TRIAL, FOR DECLARATORY
JUDGMENT AS TO CONTRACT
BEING IN VIOLATION OF THE
PAYMENT OF WAGES ACT, FOR
TREBLE DAMAGES, AND FOR
ATTORNEYS' FEES**

FACTS

The Plaintiffs sold timeshare units for Defendant as commissioned salespersons. Each of them signed a sales agreement. Plaintiffs tried this case before a jury the week of February 13, 2012. The jury returned a verdict for Plaintiff as to Laura Arrington, only in the amount of \$2,974.00. Plaintiffs seek a new trial as to all Plaintiffs. Plaintiffs further seek, in the alternative, treble damages as to the claim of Laura Arrington, attorneys' fees under the Payment of Wages Statute and attorneys' fees under the South Carolina Declaratory Judgment Act (S.C. Code Ann. § 15-53-100) for prevailing on that cause of action regarding the employment contract with all the Plaintiffs. Further, Plaintiffs request any claim for attorneys' fees of the Defendants be denied because the employment agreement violates the Payment of Wages Statute § 41-10-10, *et seq.*

At the trial of this case, the Court directed a verdict as to Laura Arrington only and found under the South Carolina Payment of Wages Act that the contract between the Plaintiffs and the Defendant violated the Act. The court indicated it would handle the violation of the Payment of Wages Act through a separate order after the trial. The court did not submit the Payment of Wages cause of action to the jury for consideration.

I. PLAINTIFFS' MOTION FOR A NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT.

Plaintiffs moved for a new trial pursuant to SCRCP 50(b) which provides in pertinent part:

A party who has moved for a directed verdict may move to have the verdict and any judgment entered therein set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict...

The courts of this state have held "the test which guides this court and the exercise of its power and duty to set aside a verdict on the ground of inadequacy is whether the verdict is so shocking and outrageous as to manifestly show that the jury was actuated by considerations not founded on the evidence and/or instructions of the court." *Ravan v. Greenville Co.*, 315 S.C. 447, 434 S.E.2d 296 (Ct.App. 1993). Further, at the directed verdict stage, the court is concerned with evidence and not its weight. *Long v. Norris & Assoc.*, 342 S.C. 566, 538 S.E.2d 5 (2000) (If more than one inference, the case must be submitted to jury).

In this case, at the close of the evidence the Plaintiffs moved the court for a directed verdict on § 41-10-10 entitled the Payment of Wages Act as to all Plaintiffs. Plaintiffs also requested that the court find as a matter of law that wages due the Plaintiffs were not paid according to the Act and that Defendant violated numerous sections of the Act including § 41-10-10, et seq. The court indicated this issue was for the court and could not be submitted to the jury. Plaintiffs believe the

issue of payment of wages was an action at law thus a jury trial was mandatory. See *Mathis v. Brown* Payment of Wages is an action at law.

A. The court erred in directing a verdict as to Lanpher, Wills, Middleton, Thoni and Loughlin.

The court erred in directing verdicts against Plaintiffs who testified. The trial court is only concerned with the existence of the evidence, not its weight, when deciding a directed verdict motion. Here each Plaintiff testified as to what was owed thus there was sufficient evidence for the jury to consider. The question of weight of any evidence is for the jury not the court. (See *Long supra*).

B. The court made additional errors.

The court erred in determining that wages in excess of \$3,500 were in the "reserve account" as no contractual provision allowed for such characterization.

The court erred in determining that wages in excess of 10% of commissions were in the "reserve account" as no contractual provision allowed for such characterization.

C. The court erred in directing a verdict on breach of contract with a fraudulent act.

The Court erred in directing a verdict as to the cause of action for breach of contract accompanied by a fraudulent act, finding no evidence of fraud. To recover for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: breach of a contract, fraudulent intent relating to the breach, and a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct.App.1985).

There is ample evidence in the record of both fraudulent intent and fraudulent acts surrounding the breach:

1. The chargeback scheme: The evidence reflects that Defendant lured prospective employees with newspaper ads prominently displaying the phrase "No Chargebacks" with no

asterisk, footnote or other indicia that they really did not mean what they said. Further, the Defendant assured prospects during training that there were "No Chargebacks". Finally, Defendant orchestrated a scenario under which new salesmen were told to sign a stack of documents estimated at 120 pages, buried within which was a provision for chargebacks. Employees who asked for a copy of what they signed were assured they would receive one but did not. Employees did not learn that there was in fact a chargeback until after separation from the payroll.

2. The reserve fund scheme: The evidence reflects that the contract limited withholding to the reserve fund to 10% of commissions earned, up to \$3,500. Defendant's sole witness candidly admitted that the Defendant violated these provisions without any legal basis, merely as a matter of company policy.

3. Designating unpaid wages as reserve funds: The *Parker* case settled claims against wages held in the reserve fund. (See Exhibit 1 in evidence, Contract of Sherry Singleton) By contract these could not exceed \$3,500 per employee. After the fact Defendant came to court and testified that, in essence, any unpaid wages were "paid into the reserve fund". (Testimony of Connie Sharpe). Cross-examination revealed that there was no separate reserve account, no funds changed hands, and the "payment" was merely a bookkeeping characterization. Defendant does not pretend that there is any legal basis for this characterization in the parties' contract nor in the Parker settlement documents. (See testimony of Connie Sharpe).

4. The Down Payment scheme: Defendant would delay and/or divide into installments down payments on time share purchases, sometimes moving the payments to the end of a ten year note for the purpose of avoiding paying wages. Defendant's only witness testified that even if Defendant had received more than the down payment on the contract its

accounting system would reflect the commission as unearned for up to ten years. (See testimony of Connie Sharpe).

5. Upselling and Downselling; After employees had earned their commissions Defendant would contact buyers "in-house" after the sale to upsell them if more money could be gotten from them and to downsell them if they were having trouble affording the timeshare. In either case the sale by the Plaintiff would be characterized as "cancelled" and the sales commission denied. (See testimony of Michael Wills and testimony of Connie Sharpe).

Good faith is implied in every contract in South Carolina. Good Faith is defined as "honesty in fact". The record is clear that the Defendant's conduct was dishonest in every way. Thus, the payment of wages cause of action and the breach of contract accompanied by fraud should have been presented to the jury.

II. DEFENDANT DID NOT COMPLY WITH THE TIMELY PAYMENT PROVISION OF THE ACT.

Section 41-10-40(A) provides that "Every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday." Defendant's schedule A on page 2, paragraphs VI and VII, purports to establish a scheme whereby Plaintiffs' wages will not be paid on their regular payday but rather will be withheld in part until, following separation from the payroll:

"...the funds remaining in the reserve account will be reimbursed to the employee only after the [Defendant] has determined that six (6) timely and consecutive monthly payments have been made on each sale made by employee for which employee has been paid a commission."

Further, Section 41-10-50 provides that "When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days."

The final section violated is Section 41-10-40(C) which states "An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law of the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of Section 41-10-30."

The court held at the close of all evidence that the Defendant had violated these statutes in several respects. First, Plaintiffs' wages were reduced without notice. Second, wages were withheld after separation from the payroll. Third, the chargeback scheme is unenforceable and is contrary to the South Carolina Payment of Wages Statute in that an employee could sell a timeshare product and actually not be paid for ten years after the sale. *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 (2006) is applicable to this case (employment agreement violated § 40-10-30 because employees given no time certain when payment would occur).

The court, while acknowledging that Plaintiffs had met their burden for a directed verdict as to the Payment of Wages Statute, decided this was a matter for the court and not for the jury. (See directed verdict motion February 16, 2012).

Plaintiffs submitted several cases for the proposition that the verdict should be directed (and sent to the jury) including, *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 (2006). In *Ross*, the Court of Appeals held that the time for payment was entirely arbitrary and that as a result this defendant had violated the payment of Wages Statute. This court made the same determination after review of the *Ross* case but decided that issue should not be submitted to the jury. Plaintiffs respectfully submit to the court that the jury should have been told that the Payment of Wages Statute §§ 41-10-30, 41-10-40, and 41-10-50 had all been violated and that Plaintiffs were entitled to a directed verdict with the only issue being damages. Plaintiffs had requested a jury trial and Plaintiffs were entitled to such directed verdict under *Ross*. Further, Defendant's only witness

did not testify that a clear, legitimate economic purpose was necessary for the Defendant to withhold Plaintiffs' pay and that the time for payment of the commissions for the Plaintiffs was entirely arbitrary. (Such was required under *Ross*). (*Ross* 639 S.E.2d at 462). Indeed Defendant could have then argued to the jury they paid the wages into the reserve fund—an issue of fact for the jury.

This case is similar to *Rice v. Multimedia, Inc.*, 456 S.E.2d 381 (S.C. 1995). In *Rice*, the jury returned a verdict for Rice for violation of payment of the wages statutes. It also found Multimedia guilty of breach of contract but awarded no damages to Rice. (456 S.C.2d at 381). Here, Plaintiffs sought the same relief from the court, a directed verdict on the issue of the violation of the Payment of Wages Statute. The court, however, refused to direct a verdict and held the Payment of Wages Statute was an issue for the court. The Plaintiffs respectfully submit that this is error. See also, *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591 (S.C. 1999) (Payment of Wages Act claim presented to the jury not the court). *Mathis v. Brown & Brown of South Carolina, Inc.*, Opinion No. 26851 (S.C. Supreme Court) (filed August 9, 2010). (Actions seeking damages for breach of contract and actions for violations of the Payment of Wages Act are actions at law. *McColl v. Ikon*, 380 S.C. 649, 670 S.E. 695, 700 (2008) (any action at law is for the jury.)

Because the Payment of Wages Statute is a remedial Act to obtain working people their wages, the court should have found a violation and directed a verdict for the Plaintiffs. The only issue then would have been for the jury to decide the amount of damages to award the Plaintiffs. (At that point Defendant could have argued the reserve account issue to the jury.) However, the issue was for the jury since the Plaintiffs requested a jury trial. This view is in accord with S.C. Code § 40-10-100 which provides in pertinent part, "No provision of this chapter may be

contravened or set aside by a private agreement.” This court obviously felt that the private agreement contravened the Payment of Wages Act and said so during the trial. Accordingly, Plaintiffs were entitled to a directed verdict as a matter of law on the Payment of Wages Act claim and as such this court erred in failing to so find and let the jury decide.

III. THE COURT FURTHER FOUND THAT THE CONTRACT OF THE DEFENDANT DID NOT COMPLY WITH THE PAYMENT OF WAGES STATUTE.

The Plaintiffs had also brought a declaratory judgment cause of action for a ruling the employment contract does not comply with the law. The court agreed. Plaintiffs now seek costs and attorney’s fees pursuant to S.C. Code § 15-53-100 for successful prosecution. S.C. Code § 15-53-100 provides in pertinent part:

In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

In this case, the court in its rulings at the directed verdict stage of the trial stated it would handle any violations of the Payment of Wages Statute and found that the contract did not comply with the Payment of Wages Statute. Because the court made those rulings, Plaintiffs are entitled to costs which has been interpreted to mean attorney’s fees under South Carolina’s Declaratory Judgment Act. While the courts of this state have not ruled explicitly on attorney’s fees under this statute, at least one court has allowed for attorney’s fees under S.C. Code §15-53-100. In *S.C. Electric & Gas v. Hartough*, 375 S.C. 541, 654 S.E.2d 87 (S.C.App. 2007) the court mentions § 15-53-100 as a basis for awarding attorney’s fees. Further, *Cullen v. McNeal*, 390 S.C. 470, 702 S.E.2d 378 (S.C.App. 2010) specifically mentions § 15-53-100 as a basis for attorney’s fees. Accordingly, because Plaintiffs proved that the contract of employment violated the Payment of Wages Statute and the court ruled in a declaratory judgment that such was a violation, Plaintiffs are entitled to attorney’s fees as a matter of law.

The South Carolina Supreme Court has set out six factors in determining attorney's fees. In *Taylor v. Medenica*, 331 S.C. 575, 503 S.E. 458 (1998) the court considered six factors in determining a reasonable attorney's fee. They are: (1) The nature, extent and difficulty of the case; (2) The time necessarily devoted to the case; (3) The professional standing of counsel; (4) The contingency of compensation; (5) The beneficial results obtained; and (6) The customary legal fees for services in the area.

The affidavit of Plaintiffs' counsel addresses these issues in detail. Further, there was substantial time by counsel in handling this matter. Plaintiffs have attached to this brief a copy of the attorneys' fee order signed by John M. Milling in the case of *Bost v. General Motors*, Civil Action No. 2001-CP-16-724. In that case, the trial court ordered attorney's fees of \$49,575.00 despite the fact that a jury verdict of \$1,500.00 was entered on a violation of the Unfair Trade Practices Act. Plaintiffs' counsel received relief not only for Laura Arrington but through the declaratory judgment in declaring the type of contract in this case void and illegal as a matter of South Carolina law. This alone is a great benefit to timeshare sales personnel throughout the state and will not doubt require Westgate and other timeshare agencies to change their contracts to comply with the Payment of Wages Statute. Accordingly, because the contract offended public policy, attorney's fees are applicable under both the verdict for Arrington and the declaratory judgment relief the court indicated it would grant at the close of the trial.

Attorney's fees are also allowed under the Payment of Wages Act because the common law remedy was inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose. See *Spencer v. Barnwell County Hospital*, 314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct.App. 1984) ("in considering a remedial act designed to protect a class of persons or the public at large, the courts liberally construe the Act to carry out its purposes.") Remedial statutes must be

interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statutes purposes. *Duckworth v. Neely*, 319 S.C. 158, 459 S.E.2d 806 (Ct.App. 1995).

In this case, because Plaintiffs were successful in declaring the contract illegal and in obtaining a verdict, Plaintiffs attorneys' fees should be awarded because the Payment of Wages Statute is a remedial statute to protect working class people. *Rice* 318 S.C. at 98, 456 S.E.2d at 383).

IV. ARRINGTON'S AWARD SHOULD BE TREBLED.

Plaintiffs believe that Laura Arrington's award of \$2,971.00 should be trebled pursuant to the Payment of Wages Statute. As the court is aware, actions seeking damages for breach of contract and actions for violation of payment of wages are actions at law. See *McColl v. Ikon*, 380 S.C. 649, 670 S.E. 695, 700 (2008). The Payment of Wages Statute allows for treble damages and this court should treble especially in light of the fact that Plaintiffs proved the contract between Plaintiffs and Defendant was a clear violation of the Payment of Wages Statute. Plaintiffs litigated this case for three years and obtained a verdict for wages which were due Arrington. *Ross*, 371 S.C. at 471, 639 S.E.2d at 461 (treble damages may be awarded when the withholding of wages was unreasonable)

Treble damages are not appropriate only when there is a "bona fide" dispute as to the validity of the wage claim. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 675 S.E.2d 414 (S.C. 2009). "Bona fide" means "in or with good faith" (Black's Law Dictionary), and "good faith" has, in turn, been defined as "honesty in fact". Defendant's admissions that it routinely appropriated to itself its employee's wages through schemes undisclosed until after termination from the payroll preclude such a finding of "honesty in fact." (See testimony of Connie Sharpe).

V. DEFENDANT IS NOT ENTITLED TO ATTORNEY'S FEES UNDER THE CONTRACT BECAUSE IT VIOLATES PUBLIC POLICY.

Plaintiffs believe that Defendant is now claiming attorney's fees for their defense of this case under the contract that this court declared violated the Payment of Wages Statute. Plaintiffs believe that to allow attorney's fees under a contract that violates the law is offensive to public policy and should be denied. Our courts have held for almost eighty years that they will not lend aid to enforce a contract that is void against public policy. *Henderson v. Life Insurance Co. of Virginia*, 176 S.C. 100, 119 S.E.2d 680 (1935). See also *Ross*, 371 S.C. 464, 639 S.E.2d 460 (failure to provide time and place of payment of wages violates § 41-10-40). See also *Futch v. McAlister Towing of Georgetown, Inc.* "Our courts refuse to allow employers to ignore the statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages." 335 S.C. 598, 605, 518 S.E.2d 591 (1991).

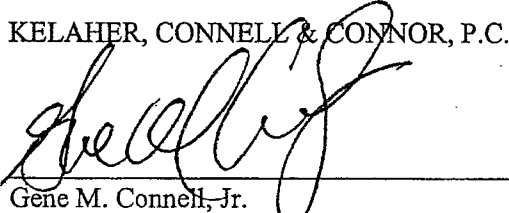
Because this court has held the contract violates South Carolina law. The Defendant cannot now use the same illegal contract to collect attorney's fees against the Plaintiffs. To hold otherwise would contravene the interest of society in seeing employees get payment of their wages timely.

CONCLUSION

In summary, Plaintiffs seek a new trial because actions seeking damages for breach of contract and actions for violation of the Payment of Wages Act are actions at law. *Mathis* Opinion No. 26851 (S.C. Supreme Court 2010). Payment of wages claims are actions at law thus Plaintiff entitled to a jury trial. The court in failing to charge and direct a verdict on the Payment of Wages Act erred and as such Plaintiffs are entitled to a new trial. See *McColl v. Ikon*, 380 S.C. 649, 657, 670 S.E. 695 (2008). See also *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 (Ct.App. 2006). (It was error to not let the jury decide this issue).

Further, Plaintiffs request attorneys' fees because the court found as a matter of law that Defendant's contract did not comply with the Payment of Wages Statute and in the alternative, Plaintiffs claim treble damages and attorneys' fees for the successful prosecution of the claim of Laura Arrington. (See attached attorney fee affidavit).

KELAHHER, CONNELL & CONNOR, P.C.



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David J. Canty
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(843) 449-6304 (phone)
(843) 449-4249 (facsimile)
mbcounsel@verizon.net

Attorneys for Plaintiffs

February 27, 2012
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
Arrington, Stephen C. Black, Bradley)
Kirk Bray, Mark D'Amico, Thomas A.)
DeVitis, Rodney Eddie Haynes, Jimmy)
Kelly, Whitney Renee Knox, Lynn C.)
Lanpher, Holly Levasseur, John Martin)
Loughlin, Joe Maranville, Khalif)
Middleton, Chelcie Oxentine, Judith A.)
Parker, Matthew W. Reed, Cynthia G.)
Reilly, Gerald Ryba, Sherry Singleton,)
Steven G. Thoni, Stratton Vitikos,)
Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)
Defendants.)

**AFFIDAVIT OF
GENE M. CONNELL, JR.**

PERSONALLY APPEARED BEFORE ME, Gene M. Connell, Jr., who first being duly sworn, deposes and states as follows:

1. My name is Gene M. Connell, Jr. I am a member of the firm of Kelaher, Connell & Connor, P.C. I am licensed to practice law in the United States District Court for South Carolina, the United States Fourth Circuit Court of Appeals, the United States Court of Appeals for the Federal Circuit, the United States Court of Claims, the United States Supreme Court, and the South Carolina Supreme Court. I graduated from the University of South Carolina Law School in 1983 and served as Law Clerk to the Honorable Ralph King Anderson, Jr. before I began a private practice in Surfside Beach, South Carolina. I practice almost exclusively in the area of complex civil litigation, with special emphasis on consumer class actions and class

actions in general. In my career, I have tried numerous jury cases, have argued countless motions, have filed and argued appeals before State Circuit Courts, Federal Courts, Federal Courts of Appeal, the South Carolina Court of Appeals, the South Carolina Supreme Court, and the United States Court of Federal Claims.

2. I have also had the opportunity to be involved in three separate cases which were filed in The United States Supreme Court. I participated in the preparation of the brief and argument before the United States Supreme Court in *Harper v. Virginia Department of Taxation*, 509 U.S. Sup. Ct. 86 (1993), a class action regarding taxation of retirement benefits by the State of South Carolina and Virginia on federal retirees. I have been a mediator in many cases filed in State and Federal Court. I have been appointed by the Circuit Court to be the Special Referee many times. I have been an Arbitrator in many cases filed in State and Federal Court, including complex civil cases such as construction litigation, real estate litigation declaratory judgments, insurance claims, and product liability claims.

3. I have also been involved in Class Actions in both State and Federal Court. I was principal trial attorney in the case of *Bass v. State of South Carolina*. 307 S.C. 13; 414 S.E.2d 110, vacated 113 S.Ct. 3025, 509 U.S. 916, 125 L.Ed. 2d 6714 (1994); Civil Action No. 89-CP-26-1136; a case involving 64,000 Federal retirees who brought an action against the South Carolina Department of Revenue for return of state taxes which had been collected on Federal pensions. This case went to the South Carolina Supreme Court on two occasions and the United States Supreme Court on two occasions. Eventually, a class action settlement was reached in 1994 in which approximately \$89 million was refunded to Federal retirees throughout South Carolina. I have been told this is the largest class action settlement ever against the State of South Carolina. The fee in *Bass* was 19.5% of the total amount of the settlement.

4. I have also been involved in other class actions, including the following:

(a) *Bronnie Bowen v. United States Capital Corporation*, 295 S.C. 201, 367 S.E.2d 474 (1985). This case involved purchasers of condominiums who did not receive interest on their presale deposits. It was certified by the Circuit Court after an appeal to the South Carolina Court of Appeals and later settled.

(b) *Mariners Point Homeowners Association v. UDC-Universal Development L.P. d/b/a UDC Homes Limited Partnership, v. Jon Guerrv Taylor. P.C. Professional Service Industries, Inc.: EDS A AIA: David Furman. d/b/a Furman Architecture: Sea Technology, Inc.: Joe Bogle Electric Company: Billy Hardee. d/b/a Hardee Concrete Construction: Aquarian Pools, Inc.: East Coast Construction of Myrtle Beach, Inc.: Mancill Electric Company, Inc.: Cedar Valley Shingle Systems: MAB Paints of Myrtle Beach: Acorn Building Components, Inc. kna Pemberton Group: Kinco Corporation: Jordan Companies, kna Jordan, a division of West Union Corporation; Civil Action No. 4:92-3097-21; a class action by homeowners for construction defects in which we were able to recover \$1.2 million for the homeowners and their association. A companion case was also certified as a class action by a State Circuit Court Judge.*

(c) *The Palace Homeowners' Association, Inc. v. Kathy James. Jeff Hand Phyllis Taylor; Civil Action No. 95-CP-26-1195; a class action involving all the homeowners at the Palace regarding improper telephone charges, construction defects, and the like. The class was settled and was certified at settlement by State Court. (The relief obtained was injunctive.)*

(d) *Timothy L. Phillips and Andrea L. Phillips v. Grand Strand Water and Sewer Authority; Civil Action No. 95-CP-26-1805; an action brought by the Plaintiff against Grand Strand Water and Sewer Authority for collection of improper water and sewer fees. Approximately 25,000 people were sent notices and Grand Strand Water and Sewer Authority was required to set up a new method of collection including placing of a computer system at the Horry County RMC Office to notify title searchers of liens on property.*

(e) *AT&T Optional Calling Plan Class Litigation: Bone, Schurman, Medley, et al. v. Horry Telephone Coop., Inc., AT&T Corp., AT&T Communications, Inc. AT&T Communications of the Southern States, Inc., and West Telemarketing Outbound Corporation;* Civil Action Nos. 4:96-3527-12, 4:97-2635-12 and 4:99-2712-12. A nationwide federal class action in which a settlement was reached wherein the Defendants agreed to pay up to \$40 Million for deceptive trade practices/ unreasonable billing practices in monetary and non-monetary benefits.

(f) *Darian Gregory, et al. v. TranSouth Financial Corp., et al.; Civil Action No. 98-CP-26-1581; a state court class action certified over illegal/unlawful charges made to debtors on their accounts. The settlement required defendants to*

set up a settlement administrator and send notices to over 40,000 class members. The Court approved a common fund fee of 25%.

(g) *Class Litigation: Chris Hall and Melody Hall; Douglas Edwards and Deborah Edwards; Harry S. Corbett and Diane D. Corbett; and Patsy L. Harper and Jeffrey P. Harper v. Elmer Stone and Truett & Associates, Inc.*; Civil Action Nos. 99-CP-26-1080, 99-CP-26-1074, 99-CP-26-1073C, and 99-CP-26-2332; a class action over insurance claims which was certified by the circuit court and has been settled. Approximately 400 class members received over \$1.5 Million. The Court approved a common fund fee of 33-1/3%.

(h) I have also been involved in several unsuccessful class actions including: *Davis v. Nationsbank*, appealed to the South Carolina Supreme Court and lost on the merits; *Sloan v. City of Conway*, also appealed to the South Carolina Supreme Court and lost on the merits.

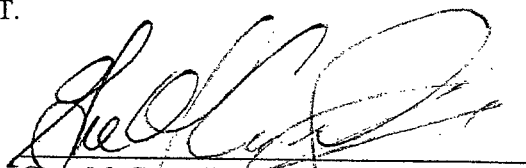
(i) I also was involved as principal counsel in the case of *William T. Fletcher, et al. v. Barefoot RV Resort, Inc., et al.*; Civil Action No. 2005-CP-26-2632; a class action involving approximately 350 individuals who had campsites at the Barefoot RV Resort Park. Those individuals had long-term leases and were told they had to leave the park. A class was brought and certified. Plaintiff class settled their claim for the sum of \$5.8 Million which was approved by the circuit court of Horry County

5. I charge \$350.00 an hour in complex cases and believe this is the market rate for experienced counsel in this state. Further, I am aware of other cases where counsel has charged a higher attorney's fee for similar type of work. It is my opinion that the fair market rate attorney fee for this type of case is \$350.00 per hour.

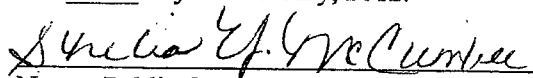
6. I spent 102 hours in preparing this case for trial including a five-day trial the week of February 12, 2012. I respectfully request attorney's fees of \$35,700.00. The 102 hours includes a trial of five days, about 11 hours a day, research and travel time. I also interviewed all the witnesses prior to the trial, reviewed voluminous documents, reviewed the law, prepared direct examination and met with co-counsel. This was over a two week period prior to the trial. Further, I reviewed depositions in the *Parker* case and prepared a complaint and answered

extensive discovery of the Defendant (about 30 pages). I estimate all of this preparation was 47.0 hours. I can provide a detailed, itemized list if the court request it on this issue.

FURTHER THE AFFIANT SAYETH NOT.


Gene M. Connell, Jr.

SWORN AND SUBSCRIBED before me,
this 27th day of February, 2012.


Notary Public for South Carolina
My Commission Expires: 5/12/20

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-26-0043

Timothy A. Zinn, et al.,)
Plaintiffs,)
v.)
CFI Sales & Marketing, et al.,)
Defendants.)

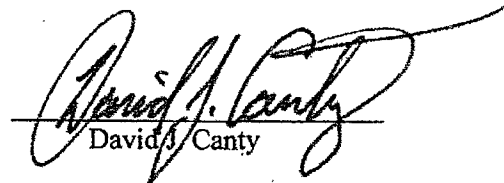
AFFIDAVIT OF ATTORNEY'S FEES

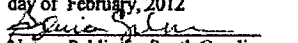
Personally Appeared before me David J. Canty who, being duly sworn, deposes and says:

1. That he is counsel for the Plaintiffs in this matter.
2. That he is a graduate of Phillips Academy Andover, Vanderbilt University and the University of South Carolina School of Law.
3. That he was admitted to practice in South Carolina in November 1981, in the United States District Court in December, 1981, in the Fourth Circuit Court of Appeals in February, 1982 and in the U.S. Supreme Court in November, 2011.
4. That he routinely charges and is paid at the rate of Two Hundred Forty and No/100 Dollars (\$240.00) per hour for his time.
5. The attached hereto is a detailed, itemized, chronological accounting of his time devoted to representation of the Plaintiff.

Further the Affiant Sayeth Not.

Myrtle Beach, S.C.
February 27, 2012


David J. Canty

Sworn to before me this 27th
day of February, 2012

Notary Public for South Carolina
My Commission Expires: 8/6/19

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2009-CP-26-0043

Timothy A. Zinn, et al.,)
 Plaintiffs,)
)
 v.)
)
 CFI Sales & Marketing, et al.,)
 Defendants.)

ATTORNEY'S FEES

05/07/09	Rev. Corresp./Wilkerson, Consent Order	.6
05/07/09	Rev. Answer	.2
01/02/11	Rev. Corresp./Wilkerson-John	.2
01/05/11	Rev. Corresp./Wilkerson-John	.2
01/06/11	Rev. Corresp./ John-Wilkerson	.2
02/03/11	Rev. corresp./Order Wilkerson protection	.2
02/08/11	Rev. Corresp.-Wilkerson-Connell	.2
02/25/11	Rev. RFP docs, Interrogs.	.3
12/01/11	Research Westgate	.5
12/22/11	Rev. corresp./Wilkerson	.2
12/27/11	Rev. Motion Am. Answer, Corresp. Wilkerson-Huggins	.5
12/28/11	Rev. Corresp./Wilkerson-Huggins Consent Order	.2
12/30/11	Rev. Def's. Motion/continuance	.2
12/30/11	Rev. Corresp. Wilkerson-Connell, Wilkerson-Ct.	.2
01/11/12	Rev. Corresp. Connell-Maysonet	.2
02/03/12	Research Westgate	.6
02/05/12	Research Westgate	.4

02/07/11	Call to Plaintiffs	1.9
02/10/12	Rev. Corresp. Connell-Wilkerson	.2
02/10/12	Rev. Pl's. Answers/Interrogs. (39pp.), Answers RFP(9)pp.	.8
02/10/12	Rev. Corresp. Connell-Wilkerson	.2
02/10/12	Prep. Pl's. Memorandum	2.1
02/10/12	Rev. Corresp./Connell, Lanpher docs.	.5
02/12/12	Edit Pl's. Memo	.5
02/12/12	Trial Prep	4.5
02/13/12	Trial, Conf./clts./Connell, Def's.	10.5
02/13/12	Trial Prep	1.5
02/14/12	Trial, Conf./clts./Connell, Def's.	11.0
02/14/12	Trial Prep	2.2
02/15/12	Trial, Conf./clts./Connell, Def's.	9.5
02/15/12	Trial Prep	1.1
02/16/12	Trial, Conf./clts./Connell, Def's.	10.5
02/16/12	Trial Prep	1.8
02/17/12	Trial, Conf./clts./Connell, Def's.	9
02/18/12	Rev. e-mail Connell	.2
02/23/12	Rev. Corresp./ Connell, draft memo	.3
02/23/12	Pl's. Motion (edit)	1.4
02/23/12	Conf./Connell, Edit Motion, research	2.5
02/27/12	Conf./Connell, Edit Motion	1.2
Total		77.40

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura)
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Michael H. Wills, Michael J. Zanardo,)

Plaintiffs,)

vs.)

CFI Sales & Marketing, Ltd,)
d/b/a Westgate Resorts,)
Defendants.)

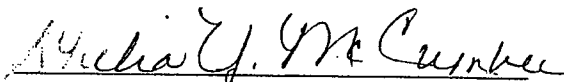
AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

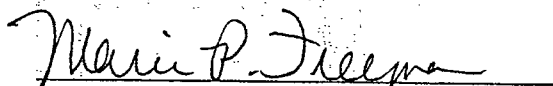
John S. Wilkerson, III, Esq.
Turner Padgett Graham & Laney, PA
P.O. Box 22129
Charleston, SC 29413-2129

DOCUMENTS: Notice of Motion and Motion for New Trial and Memorandum of Law

DATE OF MAILING: February 27, 2012


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 27th day of February, 2012.


Notary Public for South Carolina
My Commission Expires: 6/24/14

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2009-CP-26-0043

Timothy A. Zinn, *et. al*

Plaintiffs,

v.

CFI Sales & Marketing, Ltd, d/b/a Westgate
Resorts,

Defendant.

DEFENDANT'S RULE 59(E) MOTION

Pursuant to Rule 59(e), SCRPC, Defendant, CFI Sales & Marketing, Ltd. respectfully requests this Court to reconsider its July 19, 2012 Order because it is contrary to the Court's prior ruling that Plaintiffs were precluded from re-litigating the propriety of Defendant's reserve system and charge backs under the South Carolina Payment of Wages by virtue of the doctrine of *res judicata* and the *Parker* judgment as discussed below. The Defendant first received written notice of the entry of the Order on August 9, 2012.

Relevant Facts

1. This matter was tried by a jury on February 13 to February 17, 2012.
2. On the first day of trial, this Court heard extensive argument involving Defendant's Summary Judgment Motion. Specifically, Defendant argued that *res judicata* precluded Plaintiffs' attempt to re-litigate issues involving the propriety or validity of the Plaintiffs' reserve account funded by commissions based on an agreement entered by the parties because that issue was subject to a Judgment in another matter.
3. On September 4, 2007, Judith Parker, Caroline Jordan, Christopher DeCaro, and Charles Walker Jr., as plaintiffs in the matter styled *Parker et al. v. CFI Sales & Marketing, Ltd.*, Case No. 2007-CP-26-5478 (S.C. Fifteenth Judicial Circuit)) ("*Parker*") filed a proposed class

action pursuant to SCRCF 23 against CFI seeking payment of allegedly unpaid wages that they claim to have earned while they were timeshare sales representatives at Westgate Myrtle Beach Oceanfront Resort in Myrtle Beach, South Carolina ("Myrtle Beach").

4. The *Parker* plaintiffs were compensated by CFI on a commission basis for each sale of a timeshare interest. The commission due to each *Parker* plaintiff was paid within a prescribed period after each sale, less a contractually agreed percentage of such commission that was allocated to a "reserve account." Such commissions, net of the reserve allocation, were paid to the *Parker* plaintiffs shortly after the sale even though the timeshare purchaser paid only a small percentage of the total purchase price at closing, often financing, through a purchase money promissory note and mortgage held by the seller, as much as 95% of the purchase price.

5. While the *Parker* Complaint was rather vague. It became evident during discovery that the crux of the *Parker's* unpaid wages Complaint involved the plaintiff's "reserve accounts." The unpaid wages that the *Parker* plaintiffs sought to recover were the contractually agreed percentage of those sales commissions, in other words, the monies that the *Parker* plaintiffs had paid into their respective reserve accounts. Likewise, the "reserve system" was the lynch pin of the *Parker's* Plaintiff argument of violations to the Payment of Wage Act. Specifically, the *Parker* Plaintiffs argued that the contractually established system was a *per se* violation of the Act making the contract executed by the parties void.

6. On January 11, 2010, the parties to the *Parker* action entered into a memorandum of understanding ("MOU") resolving all claims made by the *Parker* plaintiffs relating to CFI's commission reserve system and for payment of allegedly unpaid commissions that had been paid into the reserve. Such claims, which comprised all the claims made by the *Parker* plaintiffs in the *Parker* action, were premised upon South Carolina's Payment of Wages law and South Carolina

common law. The MOU was later incorporated into a Final Judgment on January 29, 2010, which finally terminated all litigation in the *Parker* action.

7. Specifically, the MOU which was incorporated into the Final Judgment expressly stated as follows:

The Stipulated Judgment Settles and resolves all of Class Claimants' claims against CFI in connection with all commissions reserves during the Class Period [from September 4, 2007 to January 11, 2010]. There shall be no further reconciliation or payment of reserves following the entry of the Stipulated Judgment. This settlement shall not disposed of claims for unpaid wages (*not commissions reserves*) set forth in the matter styled *Timothy Zinn et. al v. CFI Sales & Marketing, Ltd.*, Civil Action No.: 2009-CP-26-0043 (S.C. Ct. Comm. Pleas 15th Judicial Circuit, Horry Cty., S.C.) which shall continue unaffected by the Settlement of this Civil Action.

(emphasis added).¹

8. On January 5, 2009, this action ("*Zinn*") was filed against CFI Sales & Marketing, Ltd., the exact same defendant as was sued in the *Parker* action. The Plaintiffs in *Zinn* are all members of the *Parker* class, and thus are parties to the *Parker* action which has been finally and fully resolved with the entry of the *Parker* Final Judgment. The *Zinn* Plaintiffs in fact filed a complaint in this case that is virtually verbatim identical to the complaint in the *Parker* action and seeks the very same relief based upon the very same factual allegations and legal authority, with the sole exception of the *Parker* plaintiffs' request for the certification of a Rule 23 class.

9. After hearing lengthy argument by both sides, the Court granted Defendant's summary judgment and ruled that all claims of all of the *Parker* class plaintiffs (which includes the Plaintiffs in the *Zinn* case) relating to the commission reserve system and charge backs have been fully and finally resolved and determined in the *Parker* case by virtue of the Final Judgment entered in the *Parker* case. So, to the extent that the Plaintiffs in the *Zinn* action seek to recover the payment of "unpaid wages" involving their reserve accounts or commissions which were paid

¹ A formal written Order was never entered to reflect the ruling of the Court. Enclosed we have attached a Proposed Order for your review and signature as Exhibit A.

into the reserve accounts during and after their employment, such claims have already been reduced to final judgment in the *Parker* action.

10. Indeed, at various times during the hearing, the Court reminded Plaintiffs' counsel that the validity of the reserve system or whether or not it was a "scheme" was not part of the *Zinn* action based on doctrine of *res judicata*. Plaintiffs were precluded from engaging in a collateral attack of the reserve system simply because they were displeased with the *Parker* judgment.

11. Defendant prevailed in 24 of the 25 claims. Plaintiffs filed a Motion for New Trial, for Declaratory Judgment as to Contract Being in Violation of the Payment of Wages Act, for Treble Damages and for Attorneys' fees. The Court granted a limited portion of Plaintiffs' post trial Motion specifically dealing with awarding fees and treble damages to the single successful *Zinn* Plaintiff.

12. The Court sent a letter to Plaintiffs' counsel asking the drafting of an Order memorializing the ruling as set forth in the Court's letter of June 5, 2012. *See* Exhibit B.

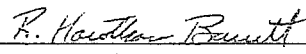
13. Without seeking input from opposing counsel, Plaintiffs' counsel submitted a proposed Order that while in principle memorialized the ruling of the Court, also improperly and effectively "reversed" the Court's ruling on Defendant's summary judgment by declaring that CFI's reserve system and the contract executed by the parties were in fact void as a violation of the S.C. Payment of Wages Act, issues that were not before this Court and that the Court had already rejected. There were other factually inaccurate statements in the Order.

14. Defendant's counsel learned of the proposed Order on July 19, 2012 and immediately contacted the Judge and opposing counsel with its concerns via electronic mail on that same day. However, the Order was signed on that same day and the Defendant did not learn about this until they were served with a copy of the Order on August 9, 2012. This is because the Order

was not actually filed until August 7, 2012.

15. It is Defendant's position that it will be a more productive use of this Court's judicial limited resources to resolve this issue at this time by excising the improper language from the Order or in the alternative by revoking the July 19, 2012 and approving a corrected one which does not contained factual and legal inaccuracies.

Respectfully submitted,


for John S. Wilkerson
Turner Padgett Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(843) 576-2800

Attorneys for the Defendant

August 20, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Respondents/Appellants

vs.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,

Appellant/Respondent

**MOTION TO BE RELIEVED
AS TO CYNTHIA REILLY**

YOU WILL PLEASE TAKE NOTICE that the undersigned moves the Court for an Order relieving counsel from representation of Cynthia Reilly in the captioned appeal. The basis of the Motion is as follows:

1. Cynthia Reilly has advised counsel that she no longer has faith in his legal ability and that she wishes to obtain new counsel.

2. Cynthia Reilly has advised counsel that she does not agree with the settlement which was reached in a collateral class action case in which she was a class member (*Judith A. Parker, et al. v. CFI Sales & Marketing, Ltd., et al.* Civil Action No.

2007-CP-26-5478) and which was approved by the Honorable J. Michael Baxley on February 28, 2012.

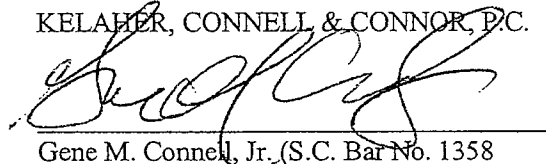
3. Counsel believe that it is in the best interest of Cynthia Reilly that they be relieved as counsel or Reilly and that Reilly be entitled to obtain new counsel within thirty days of the date of the Order.

4. Further basis of the motion is the attached Affidavit.

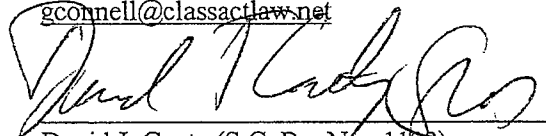
WHEREFORE, the undersigned counsel request the Court grant the Motion and for such other and further relief as the Court may deem just, necessary and proper.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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Attorneys for Respondents/Appellants

March 4, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Respondents/Appellants

vs.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,

Appellant/Respondent

AFFIDAVIT OF GENE M. CONNELL, JR.

PERSONALLY APPEARED BEFORE ME, Gene M. Connell, Jr., who first being duly sworn, deposes and states as follows:

1. My name is Gene M. Connell, Jr. and I am counsel in the above-captioned case along with David Canty.

2. Cynthia Reilly is one of the Appellants in this matter and was also a class member in a case entitled *Judith A. Parker, et al. v. CFI Sales & Marketing, Ltd., et al.* Civil Action No. 2007-CP-26-5478, which was settled as a class action on Thursday, February 28,

2013 pursuant to the Order of Final Approval for Class Settlement signed by The Honorable J. Michael Baxley.

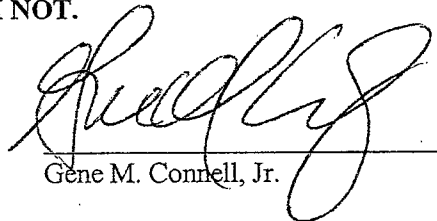
3. Counsel for Respondents/Appellants was advised by Cynthia Reilly that she no longer has confidence in counsel after the class action was approved over her objection as an absent class member.

4. Further, Cynthia Reilly advised counsel that she believed he had been paid by Defendants extra money to settle the class action and that despite her objection Judge Baxley approved the class action.

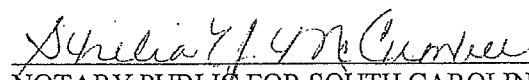
5. Cynthia Reilly further made additional slanderous comments about counsel for Respondents/Appellants all of which are unnecessary to the relief requested by counsel in this motion.

6. Counsel for Respondents/Appellants requests that this Court issue its Order relieving Gene M. Connell, Jr. and David Canty from prosecuting this appeal on behalf of Cynthia Reilly.

FURTHER AFFIANT SAYETH NOT.


Gene M. Connell, Jr.

SWORN AND SUBSCRIBED before me,
this 4th day of March, 2013


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 5/12/20

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2009-CP-26-0043

Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelscie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Wills, Michael J. Zanardo,

Respondents/Appellants

vs.

CFI Sales & Marketing, Ltd, d/b/a Westgate Resorts,

Appellant/Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served a **Motion to Be Relieved as Counsel** on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

John S. Wilkerson, III, Esq.
Turner Padget Graham & Laney, PA
P.O. Box 22129
Charleston, SC 29413-2129

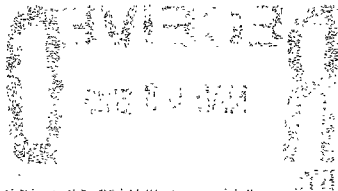
R. Hawthorne Barrett, Esq.
Turner Padget Graham & Laney, P.A.
P. O. Box 1473
Columbia, SC 29202

DATE OF MAILING: March 5, 2013

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 5th day of March, 2013

Sharon M. Tylee
Notary Public for South Carolina
My Commission Expires: 2-25-19



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2009-CP-26-43

Timothy A. Zinn, et al.,)

Plaintiffs,)

Transcript of Record

vs.)

Trial Transcript

CFI Sales and Marketing)

February 13-17, 2012

Ltd., et al.,)

Defendants.)

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Gene M. Connell, Jr., Esquire
David Canty, Esquire
Attorneys for Plaintiffs

John S. Wilkerson, III, Esquire
Richard W. Epstein, Esquire
Myrna Maysonet, Esquire
Attorneys for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(On the record, February 13, 2012.)

THE COURT: All right, this is case number 2009-CP-26-43, Timothy A. Zinn and others versus CFI Sales and Marketing Limited, d/b/a Westgate Resorts and CFI Sales and Marketing Limited and Westgate Myrtle Beach LLC versus Robert Adams and others. The matter is before the Court for trial. I understand we have some pretrial matters. Please stand and give the court reporter your name and who you represent.

MR. CANTY: My name is David Canty. I am here on behalf of the Plaintiffs.

MR. CONNELL: Gene Connell and I represent the Plaintiffs.

MR. WILKERSON: Your Honor, my name is John Wilkerson. I represent the Defendant and I would like to introduce to the Court, as I indicated to you, there had been a bit of a slip on our filing of our pro hac motions. I have a colleague or two colleagues actually, Mr. Richard Epstein and Ms. Myrna Maysonet of the Florida Bar. They have both appeared, they have both appeared by pro hac order in a companion case that we're going to get into in just a minute. We thought they had been admitted in this case. We have now as of this morning filed the appropriate filing fee with the Supreme Court. Somebody from our office actually is hand carrying that material down here to be filed here with the appropriate filing

fee for the court. I would ask that the Court allow them to speak under those circumstances.

THE COURT: If - once I see the order, I don't know that I can do it until they get an order that confirms that they've been admitted. I understand it's probably a formality but I don't want to allow an appearance and then find out for whatever reason the order was not permitted.

MR. WILKERSON: If, Your Honor, please the way the rule is currently written it is that the tribunal grants the motion.

THE COURT: Right.

MR. WILKERSON: And that all that's filed in the Supreme Court is the filing fee and a copy of the motion. So we did that in the Supreme Court and it's on its way down here right now.

THE COURT: All right, well I know there are some restrictions. I've got to look at the application, how many appearances have they made during the year in South Carolina.

MR. WILKERSON: I believe this is the ---

MR. EPSTEIN: This would only be the second case, Your Honor.

THE COURT: Second.

MR. EPSTEIN: The other one is the - sort of the related case of the Parker matter.

THE COURT: Okay, so there's no disqualifications or

exclusions? I think it's ---

MR. WILKERSON: I know of none, Your Honor, and I'm very confident ---

THE COURT: Yeah.

MR. WILKERSON: --- that they, that they would meet all of the criteria and ---

THE COURT: Okay.

MR. WILKERSON: --- the motion is actually being carried by my office right now.

THE COURT: Well, generally the ones that get them disqualified are the ones if you can only make so many appearances and then after a certain number of appearances you have to be licensed in the state and I just wanted to make sure if this is only their second then I know that they're still within that.

All right, Mr. Epstein and - your name again?

MS. MAYSONET: It's Maysonet, M-A-Y-S-O-N-E-T.

MR. WILKERSON: First name is Myrna, Your Honor, M-Y-R-N-A.

THE COURT: All right, and you all represent?

MR. WILKERSON: The Defendant.

MR. EPSTEIN: CFI Sales and Marketing.

THE COURT: All right, what about Westgate Myrtle Beach,

LLC? Who represents them?

MR. WILKERSON: To the extent that that, that that counterclaim and claim proceeds, we will also represent them as well, Your Honor. That will be determined by what happens with this motion for summary judgment.

THE COURT: All right, what about the Counter-Defendants, Robert Adams, Laura Arrington, Stephen Black?

MR. WILKERSON: Those are the Plaintiffs in the case.

THE COURT: Okay.

MR. WILKERSON: And an answer was filed by Mr. Connell.

THE COURT: All right, all right, what pretrial motions do we have?

MR. WILKERSON: I think the motion that's pending right now is our motion for summary judgment, Your Honor.

THE COURT: And that is by whom?

MR. WILKERSON: By CFI Sales and Marketing LLC, I guess is the name of the Defendant.

THE COURT: All right, and who wants to argue that motion?

MR. WILKERSON: I would request permission for Mr. Epstein to argue the motion under these circumstances, Your Honor.

THE COURT: All right, Mr. Epstein?

MR. EPSTEIN: Thank you, Your Honor, podium or from here?

THE COURT: Whichever makes you feel more comfortable.

MR. EPSTEIN: Madam Reporter, can hear me all right here. All right, thank you.

First of all, Your Honor, I believe I was told that you have a copy of the motion and the exhibits handy?

THE COURT: It would be, if it's in the file. When did you file the motion?

MR. EPSTEIN: In the end of December.

THE COURT: All right, yep, I have the motion here but -- yeah, and the exhibits attached to it. I've got it, all right.

MR. EPSTEIN: Very good, and for purposes of additional clarity I'd like to provide to the Court and there's one for counsel there the document that prescribes what the commission arrangements were between CFI Sales and Marketing Ltd. and the various Plaintiffs in this case. It is a standardized document. It is alleged in the complaint to be a standardized arrangement between the employer and the employee. This is the document and there are a couple of provisions in this document that are pertinent to this motion. There are other provisions, of course, that are pertinent to the other claims to which our motion is not directed and I'll be a little bit more clear in a moment but I wanted to get this in front of the Court as well.

Basically, Your Honor, there were two lawsuits that were filed in relatively proximate time to one another. This lawsuit, the Zinn versus CFI Sales and Marketing Ltd. lawsuit, which was filed in 2009, and then the - then an earlier action that was styled Judith Parker versus CFI Sales and Marketing, Ltd., the very same Defendant, that was filed as a punitive class action in 2007. The complaint in the Parker case, which is attached as an exhibit to our motion, is word for word verbatim identical to the complaint in the later filed Zinn case, the one that we're here on today. They are identical. They cite to the same contracts. They cite to the same unpaid wages. They cite to the same statutes within the South Carolina Payment of Wages Act. They cite to the very same common law causes of action, accounting, breach of contract, breach of contract accompanied by fraud, etcetera. They are identical, the same factual allegations, the same legal bases, the same counts or claims and the very same relief being sought.

The Parker case as the earlier filed case and we allude to all of this in the motion, but none of this is undisputed, was actively litigated, and during the course of that litigation, the case, let us say, evolved into a - essentially the focus became a single issue and that is the contractual agreement that CFI Sales and Marketing Ltd. reached with each of the salespeople, in that case the members

of a class that was certified and in this case the individual employees, each of whom are members of the class that was certified in the Parker case.

A contractual agreement between those parties that is found in paragraph VII of the commission agreement, the commission schedule that we just provided to the Court which allowed for the establishment of what was called a reserve account, it allowed for and agreed that a portion of the commission earnings that each salesperson, the Plaintiffs in this case, the members of the class in the Parker case received and were paid, a portion of that would be allocated and set aside and to be held by the employer, CFI Sales and Marketing Ltd., as a reserve, in other words, as a protective measure in the event that a sale which generated the payment of the commission did not for whatever reason perform as expected, whether there was a cancellation, whether there was a later default or nonpayment, whether there was the inability or refusal on the part of the purchaser to timely make their payments in an orderly fashion and the like. Those terms are spelled out in the commission schedule in the immediately preceding paragraph, paragraph six, which in paragraph or VI(B) allowed for a chargeback of commissions that had been previously paid to a commissioned salesperson after the termination of their employment and that chargeback would be against the money

that had been accumulated in the so-called reserve account. So, the Parker case evolved into a dispute solely over this reserve and chargeback structure that was contained in this commission schedule inasmuch as all of the agreements and all of the documents and all of the facts and all of the legal principles between the Parker case and this current Zinn case were identical.

Now, the Parker case ultimately resulted in the entry of a final judgment. The final judgment provided for a recovery by the class of Plaintiffs of \$650,000 and the terms of that final judgment were derived from the terms of the settlement agreement that had been reached by the parties. The final judgment and the settlement agreement, which I'll refer to in a bit more specificity, are also included within the exhibits to our motion but basically what the settlement agreement provided for in broad, general terms was the entry of a judgment in the amount of \$650,000 which was specifically designed as to settle the claims made by the class in connection with the reserve account, the establishment and the administration of the reserve account pursuant to the commission schedule that we just looked at, paragraphs VI and VII of the commission schedule.

Now, given the complete identity, verbatim identity of the language in the two complaints, the allegations of the two complaints, the legal theories and statutory bases between the two complaints,

it's fair to say that the very same issues in fact have been asserted in both of these cases. The Parker case did not involve ultimately a determination of unpaid wages, which this case does continue to seek, separate apart and distinct from the reserve. In other words, the only issue that was ultimately presented as a settled claim in the Parker case was the issue of the reserves and I, you know, to be entirely accurate here, the settlement agreement in the Parker case did in fact exclude the unpaid wage claims that had been articulated in this case as of the date of that settlement.

So let us turn to a little bit more in the way of specifics in the Parker case so that we can see that there was and is a complete identity of parties, both Plaintiffs and Defendants, complete identity of claims and issues that were in fact determined and finally adjudicated in the Parker case.

The first document that I would, of course, direct the Court's attention to is Exhibit A to the summary judgment motion which is the complaint in the Parker case. It is but for the Rule 23 allegations verbatim identical as I had said. It consists of, as does this case, five causes of action, first being an accounting, second being a declaratory judgment, third being the wage claim, fourth being a breach of contract accompanied by a fraudulent act and fifth being breach of contract. They are exactly the same causes

of action and the allegations contained in each of those counts are identical verbatim to the allegations here. As I said the only difference is the several allegations invoking Rule 23 for purposes of establishing the basis for a class action.

Ultimately, as we see in Exhibit B to the motion, a class was certified. Judge Baxley certified a class which he defines on page two as all persons previously employed at any Westgate Resort located in South Carolina who have wages withheld by Defendants in a reserve account. That's the class definition. That is further amplified by the second to last sentence on the first page of the order where Judge Baxley defines the nature of the claims, each of the Plaintiffs alleges that when they left employment there were wages due and owing to them and that Defendants refused to make payments owed to them from a reserve account held by Defendants. So that's the contour of the case that Judge Baxley was presented for which he certified the class that we just addressed.

He then goes on to explain on page three up at the top that the class essentially consisted of 237 individuals. This is right at the very top of page three, who have worked at the Westgate Resort at Myrtle Beach and have open reserve accounts. So that ultimately became the composition of the class. Each of the Plaintiffs in this class, save one who didn't work at Westgate Myrtle Beach at

all, were amongst those 237 people. There is one Plaintiff who didn't work in Myrtle Beach and I believe at some point during these proceedings we've been informed that the Plaintiffs will dismiss the claim because they don't - they're not subject to the South Carolina Payment of Wages Act if they didn't actually work in South Carolina and also just one other point as a matter of clarity, Westgate, the definition of the class is fairly broad, all Westgate employees who worked at a Westgate Resort in South Carolina. There is, in fact, only one. It is the Westgate Resort in Myrtle Beach. There are no other South Carolina resort properties. So we're dealing only with, with the one property.

Now, the next sentence, also at the top of page three, is the basis for Judge Baxley's Rule 23(A) analysis that there was sufficient commonality and focality of claims, each of these individuals or class members because they present the same claim regarding the reserve account and payment of back wages as do the named Plaintiffs. In the middle of the same page, the first word of the sentence is they, it's the one, two, three, four, five, sixth line down under the commonality paragraph. They allege to the Court that they are entitled to monies held in a reserve account which they earned as wages and then go on to say that there was the uniform nonpayment of those amounts and then an analysis of the commonality requirement

of 23(A), and then it goes on in the fourth line up, all Plaintiffs have the same legal issue regarding the South Carolina Payment of Wages Statute, the very same legal issue that is involved in this case as well. Ascertaining damages is simplified by the fact that Defendant has admitted that there are 237 individuals who have the same claim and that the reserve account for all potential class members equals \$522,340.88.

So, we have a very well-defined class in the Parker case of which each of the Plaintiffs in this case was a member involving the monies that had been deposited into the reserve account, which totaled as of the time of Judge Baxley's writing of this order, \$522,000.

The case then proceeded to implement all of the procedures contemplated by the Rule 23 class certification order. For instance, as part of our exhibits there was a notice that was sent to each of the class members, and of course the notice contained the same class definition that we have just looked at, all former employees of any Westgate Resort located in South Carolina who worked in South Carolina and who have had wages withheld by Defendants in a reserve account and that, of course, then is further amplified by the first sentence under the summary of the lawsuit where it recites this matter is before the Court because the Plaintiffs who

are former employees of Westgate Resorts allege that they are entitled to back wages which are currently held by Westgate in a reserve account. On page two of the notice it, of course, recites the very same class definition as Judge Baxley's order.

What is next contained within our motion is the list of those people who comprise the class of which the Plaintiffs in this case are, are named. This was the list that was compiled at the time contemporaneously with the order certifying the class, which order is, of course, dated January 6th of 2009. So, these are the individuals that comprise the class.

THE COURT: That's Exhibit C?

MR. EPSTEIN: Yes, sir.

THE COURT: Okay.

MR. EPSTEIN: Yes, sir. Eventually, on essentially the eve of trial in the Parker case before Judge Baxley, the parties conferred after, you know, the usual and customary efforts had been made, but ultimately the parties conferred and were able to achieve a settlement of the case which resulted in the entry of a final judgment in the amount of \$650,000, an amount, as you can see, well in excess of the \$522,000 that had been the cited amount in Judge Baxley's order certifying the class, which had several conditions, one of which that there would be a couple of interim payments that were

made totaling \$50,000 and also that there would be a deferral of any effort to execute upon the judgment for a period of six months, which did, in fact, occur.

Now, that settlement was memorialized by a memorandum of understanding which is part of the record in the Parker case, was an exhibit to the order that Judge Baxley entered approving the settlement, and it is significant that the memorandum of understanding spoke very expansively about what the nature of the claims were that were being settled. In the recitals on page one, the third recital defines what the claims in the case consisted of, claims in connection with CFI's commission reserve system and claims for unpaid reserve commissions premised upon South Carolina's Payment of Wages Laws and South Carolina common law, the same legal bases for the claims that have been asserted in this case.

Then it goes on to the say and sort of typical language intended to, you know, ensure the broad scope of the settlement, that the settlement of claims, of all claims made or which could or should have been made by the class claimants against CFI in connection with the commission reserve matters described in the class claimants' complaint in the civil action, which I point out, perhaps unnecessarily, is verbatim identical to the complaint in this case. So, it is clear that the language that is referred to in that last

recital is, the complaint that's referred to in the last recital is the very same language in the complaint that this case is predicated upon.

Paragraph two provides for what the ultimate relief in the settlement was, as payment for and satisfaction of all claims made or asserted by the class claimants or which could or should have been made or asserted by the class claimants for any and all matters occurring or arising during the class period in connection with commission reserves alleged to be due to the class claimants and owed by CFI, including all claims for enhanced, double or treble, or period of damages and prejudgment interest and all claims for future payments of commission reserves inclusive of attorneys' fees and recoverable litigation costs, so very expansive definition of everything that relates to the reserve.

Turning to page four of the memorandum of understanding it again reinforces starting with the very first line, the stipulated judgment settles and resolves all of class claimants' claims against CFI in connection with all commission reserves during the class period. There shall be no further reconciliation or payment of reserves following the entry of the stipulated judgment and then it goes on to exclude in part the claims made in this case. This settlement shall not dispose of the claims for unpaid wages and

then parenthetical, not commission reserves, end parenthetical set forth in the matter styled Timothy Zinn, et al. versus CFI Sales and Marketing.

So, yes, we expressly excluded the unpaid wages component of this case which was at that time the best we could do because the exact nature of the claims in this case had not yet gone through the evolutionary process that the Parker case had where we were able to identify specific items of allegedly unpaid wages or compensation. The Zinn case at that point had really not progressed at all, but given that the complaints were identical it was clear that there was - well, at least at the outset of each case, identical cases. They were both going to be seeking exactly the same relief. So, it is clear that the memorandum of understanding and we'll turn and spend a moment looking at the order approving it in the final judgment were both parallel cases seeking identical relief. So, if the settlement, the resolution, the adjudication in the Parker case resolves certain issues those issues would then be extracted from the Zinn case leaving presumably the claims for unpaid wages, whatever they were, we didn't have any better definition at that time, but the one thing that was clear and made very clear that the claims for commission reserves were now excluded from the Zinn case because of the adjudication in the Parker case, and Judge Baxley,

when he approved the settlement under Rule 23(C), said essentially much the same thing.

On page four at the bottom he enters judgment. The Plaintiff class shall have judgment against CFI Sales and Marketing in the amount of \$650,000 and then goes on into the second of - the second and further ordered and adjudged to provide, again, a little clarity as to the scope of this where he refers to the opt outs and two individuals who would have been class members, having, then I'll quote, "previously signed releases and settled their claims for the reserve account," so that there's no question that this judgment settled, resolved, adjudicated all claims relating to the reserve accounts that existed as of the date, the date being January 29, 2010.

So, what brings us basically full circle to where we are today, we have the same complaint, we have the same claims, same statutes, same common law claims, same factual allegations, same legal allegations, but we now know that at least part of the claims that could be encompassed within all of those identical allegations have been fully and finally adjudicated between the very same Plaintiffs and the very same Defendant. The classic application of the principle of res judicata. We cite, because there's really no meaningful dispute as to what the law is in South Carolina, we cite

a South Carolina Supreme Court decision in Riedman, R-I-E-D-M-A-N, Corporation versus Greenville Steel Structures cited at 419 S.E.2d 217, a 1992 Supreme Court decision, which in very simple terms sets forth the elements for the application of res judicata, and I quote, "To establish res judicata three elements must be shown: identity of the parties, identity of the subject matter and adjudication of the issue in the former suit." We clearly have that, same parties, same causes of action, prior adjudication by the entry of a final judgment.

Now, what is also clear here but it is more a matter of proof than law is that the unpaid wages that the Plaintiffs seek in this case are comprised of commissions. All of these people were being paid on the basis of commissions generated through the sale of a variety of different types of timeshare interests and it's all laid out in the commission schedule which was uniform across the board for not only all the Plaintiffs in this case, but for each member of the class that Judge Baxley certified. Each of these Plaintiffs were former employees of Westgate. So, they fit within the class definition and they're all making a claim for wages arising out of this contract. The commissions are the starting point. Each one of them, and this is not at all disputed and so it's a fairly simple, they were paid a commission or they earned a commission

when they made a sale, whether it be a sale of a timeshare, whether an upgrade, in other words, sell bigger timeshare to an existing customer, and there are other kinds of products that are related but they all generate the payment of commissions. They were not paid for instance, a salary. They earned what they, what they killed, if you will. So they all fall in exactly the same category in this case as well as in the Parker case.

Under paragraph VII, the commissions that the Plaintiffs earned were in part paid to them, 90 percent was paid to them; ten percent went into the reserve where it was held. Now there are other conditions to the payment of - the full payment of a commission that are contained in this agreement, and in many instances those are the matters that are in dispute in this case. So, those are live, for instance, paragraph II talks about the payment of a commission when there is a purchase accompanied by a ten percent minimum down payment. So there were things of that nature that until such time as a ten percent down payment had been made by the purchaser the full commission was not yet paid, and we agree, those are the matters that we're going to be talking about in this case but during this period of time, during the period of time that these Plaintiffs worked for Westgate a portion of those very same commissions that they're now complaining were not paid in full were

paid into the reserve and we have all the records that relate to that. So, our position very simply, Your Honor, is that as a matter of law any claim relating to amounts that had been deposited or transferred into the reserve as of January 29, 2010, the date of the final judgment, have been fully and finally adjudicated. If there were monies that were unpaid, commissions that ultimately were determined to become due and payable but had not been paid for whatever reason, again, an issue to be determined in this case and were not at that point, January 29th, 2010, paid into or transferred into reserve, then they're not precluded by this judgment. So, we're essentially asking the Court to draw a very bright line on January 29, 2010, and say that whatever evidence is elicited in this case that shows that portions of commissions per paragraph VII and paragraph VI of the commission agreement were paid into the reserve prior to January 29, 2010, any recovery on those reserve commissions has already been adjudicated and those claims cannot be asserted here, in other words, cannot go, you know, to the court and to the jury for final adjudication, and that if in fact there were monies that were owed subsequent to January 29th of 2010 that either were not paid into the reserve or paid into the reserve after that date, they would not be precluded. So, you know, we're using Judge Baxley's time schedule, the timeline that he set to say that

before a particular date these reserve claims are - while they may be a matter of evidentiary import, they are no longer legally a claim that can be asserted here and recovered on here while everything else, wages that became earned but not paid because of the satisfaction of other conditions precedent that are relevant to the earning of a commission, not relevant to the reserve or, you know, reserve issues that followed that date, those clearly would not have been adjudicated. So, essentially it's a, to sort of characterize this, we're asking for a partial summary judgment on the legal - a legal determination of the claims that are asserted in this case, that those claims for unpaid wages that do not relate to monies that were paid or transferred into the reserve following January 29, 2010, or any claim for unpaid wages that for - that were not transferred into the reserve that predate that can go forward, but that any claims that relate to monies that were transferred into the reserve on or before January 29, 2010, are barred as res judicata. It is, unfortunately, going to be a matter of demonstrating this via the records during the course of this trial and we're, of course, prepared to do that. So, we're anticipating that evidence is going to be presented to show the flow of the commissions that are in controversy here. Some went into reserve, some did not. The ones that went into reserve we

say are precluded. The ones that did not go into reserve would not be precluded and whatever other explanations or testimony or whatever that would explain why those have not been paid would then go to the jury, but the issue of the disposition of the money that went into the reserve prior to January 29, 2010, would be taken back from the jury based upon the partial summary judgment we're asking the Court to enter now on this particular issue, but we do acknowledge that it's a matter that we're going to have to put some evidence on so that we can identify those particular items that fall within this category, using the very same documents, the very same information, the very same reports that Judge Baxley accepted when he entered the order certifying the class, where he concluded that there were \$522,000 that had been allocated in the reserve. So, we're not looking to do anything new or different here. We're looking to track precisely what was done before Judge Baxley, bringing it up to date, of course, because the class certification order predated that, bringing it up to date as the order approving the settlement, the final judgment did, up to January 29, 2010. So, that's the essence of our motion.

Thank you.

THE COURT: All right, thank you.

Mr. Canty or Mr. Connell, who wants to argue?

MR. CANTY: May it please the Court, Your Honor, we interpreted the motion to be one for summary judgment as opposed to partial summary judgment. As we have indicated in our return, we bargained for and got specifically included in that memorandum of understanding that this case would not be affected, and the difference is in the Parker case there were ten percent of each sales commission put into a reserve account and those funds were what were settled in the previous case. Two years into the Parker case, in fact, following a motion hearing in this courtroom, a number of salespeople said, "They owe us a lot more money than that. There were unpaid commissions," and that was the basis for this lawsuit. It's a completely different critter.

Now, the issues that I foresee, first of all, the settlement of the Parker case had each Plaintiff named and the amount of their claim included. We do not seek a double recovery. The contract upon which they rely and there are serious issues as to whether or not portions of this are enforceable under the Payment of Wages Act recites a maximum of \$3500 to be placed into this reserve account. What we learned subsequently was that this Defendant has a tendency to change the characterization of monies as it goes along and what we are apprehensive of is that they will now claim that these unpaid commissions were somehow mysteriously transferred into the reserve

account and therefore we're not entitled to recover it. So, just to make the issue perfectly clear, we do not seek a double recovery. We do not seek to recover funds specifically enumerated in the settlement of the Parker case. These people are here for unpaid commissions that were not included in that action. That's why we asked for that provision in the memorandum and that's why it was included.

THE COURT: What provision are you referring to?

MR. CANTY: In the memorandum of understanding, in our return to their motion for summary judgment paragraph five, I handed to the clerk or your clerk earlier ---

THE COURT: Yeah, and I hadn't had a chance to look at that, but I've got the memorandum of understanding right here attached to the motion. So, it's number?

MR. CANTY: Paragraph five of the memorandum of understanding.

THE COURT: Prior future payments?

MR. CANTY: It starts this settlement shall not dispose of the claims for unpaid wages.

THE COURT: Okay, and I think you all, but you all are arguing that you're not seeking summary judgment on those funds; correct?

MR. EPSTEIN: Not on unpaid wages that were not transferred

into the reserve, remembering that the wages in general terms are what goes into the reserve as well. So, a portion of each commission goes into the reserve.

THE COURT: So, but you're not seeking summary judgment as to any, any wages that are not in the reserve fund or that were deposited into the reserve fund after that January 29th, 2010?

MR. EPSTEIN: That is correct, but we are seeking summary judgment for all amounts that were deposited into the reserve.

THE COURT: Prior to.

MR. EPSTEIN: Prior to January 29, 2010.

THE COURT: Are you seeking any of those funds?

MR. CANTY: Your Honor, again, the issue is the characterization. What counsel just said is wages in general terms or what goes into the reserve. Their contract says no more than \$3500.

THE COURT: Oh, okay, I see what you're saying. So, were there any excess funds placed in prior to January 29th that you're seeking protection for ---

MR. EPSTEIN: Well, Your Honor ---

THE COURT: --- that was over the 3500?

MR. EPSTEIN: --- there may or may not be depending on each individual. The answer is some yes, some no, but again these were

the very issues, factual issues that were before Judge Baxley in the Parker case. So, that very same issue of the ostensible cap of \$3500 was an issue that was definitely part of and adjudicated via the final judgment in the Parker case. So, this is not a new issue. This is just a reread of the same issue and an effort to circumvent the final judgment which adjudicated all issues regarding the reserve. That provision, if you'll turn to the commission schedule, the separate document, is the first sentence of paragraph seven of the reserve provision. It's part of the reserve, part of the reserve.

THE COURT: Where are you talking about?

MR. EPSTEIN: I'm looking at the commission schedule, the separate document that we had provided to the Court.

THE COURT: Oh, yeah, but I thought that was - oh, yeah, but I thought that was out the window because that is what said you were paying in \$3500 but then you all settled that.

MR. EPSTEIN: Correct, exactly right. Now they're trying to resurrect that by saying that to the extent that the reserve contained more than \$3500 they should still be given an opportunity in this case to seek that excess and I'm saying no, Your Honor, this was the very provision ---

THE COURT: I ---

MR. EPSTEIN: --- that was litigated and fully adjudicated in the Parker case in every respect.

THE COURT: Okay.

MR. EPSTEIN: There was no carve out from that and the fact that they claim ---

THE COURT: I understand. I understand your argument now. I understand that.

MR. EPSTEIN: Okay.

THE COURT: All right.

MR. CANTY: And Your Honor, again, our apprehension is the characterization. My friend just ---

THE COURT: Well, they're saying they put in more than 3500 per and you're saying you're entitled to it and they're saying you're not, that it was settled by the case.

MR. CANTY: Well, Your Honor, there ---

THE COURT: By the class action.

MR. CANTY: --- here's the thing, they say they would put ten percent of the commission in up to \$3500. Now, what we learned that they were in fact doing is putting more than ten percent in and putting in more than \$3500.

THE COURT: But when did you learn that?

MR. CANTY: In 2011.

THE COURT: So, after you settled the class action?

MR. CANTY: Correct. Now, there is a document attached to the settlement in the Judith Parker case that lists each individual Plaintiff, member of the class and it lists the amount of the claim, and Judge Baxley approved a settlement that disbursed the proceeds, and by the way, \$600,000 of that has never been paid, that approved the proration of the proceeds among the class members based on those numbers, and what these folks are here for today is unpaid commissions beyond that and what our apprehension is that the Defendant, based on past conduct, is going to now take the position that these unpaid commissions were somehow magically transferred to the reserve fund, and therefore, you cannot litigate for them in this case. That's what we want to avoid. Plaintiffs do not seek a double recovery. At the same time we do not want to be precluded from suing for wages that were never paid that were never in the reserve fund.

THE COURT: Okay, all right, I understand the argument. Let me hear - because my critical question is is if they think that there's a \$3500 cap and so they specifically state, "We're going to exclude everything not in the reserve fund from this class action," under the supposition that these other funds or wages that were due were not being put into the reserve fund, then how is that not

MR. WILKERSON: May I, may I comment on that, Your Honor?

THE COURT: Yeah.

MR. WILKERSON: It was very clear to them in discovery in that case that more than \$3500 ---

THE COURT: They're saying, they're saying they never knew about it until 2011, that's what I understand their argument.

MR. CANTY: There were, there ---

MR. WILKERSON: That's absolutely untrue.

MR. CANTY: There, there were ---

THE COURT: All right, well, then that's a disputed fact that we're going to have to get into.

MR. WILKERSON: No, sir, I don't believe they say that. I want to, I want to ask him to clarify that.

MR. CANTY: There were numbers included in the proration for purpose of Judge Baxley's approval of the settlement order that lists Plaintiffs and for each amount claimed by each Plaintiff and some of those figures do, in fact, exceed \$3500, and anything that was an issue in that case we do not seek to litigate here. What we seek to litigate is the unpaid commissions that were not included in that case.

MR. WILKERSON: Your Honor, if I may, I've got to address a couple of things. First of all, my friend says their tendency to

characterize monies as they go along, there's no basis for that. There's no, there's no, there's no proof that there's any sort of changing of the records, none whatsoever. Now, what we have here is we have a clear recordkeeping process that they went into in great depth in discovery in the Parker case, have not gone into at all in the Zinn case. Many of the issues in the Parker case and one of the bases upon which the case was settled was that this dispute as to whether or not CFI had placed more than was allowed by the contract into the reserve accounts, that was a hotly contested, disputed issue in that case, and, and that was - and also, Your Honor, some of the - one of the other contested issues was that in addition to the ten percent of each commission that was earned while they were employed, after the termination of the employment, commissions that were - that became due and payable after the date of termination were also placed in the reserve account and those items were all resolved by that case. So, so ---

THE COURT: They're saying they weren't and I don't know. I wasn't involved in that case. I don't know what Judge Baxley knew about. I don't know what the Plaintiffs knew about or what the Defendants knew about.

MR. WILKERSON: And we're not asking, we're not asking the Court to make any determination as to what the Court, what was known,

what was known at the time because the order itself is very clear, any monies in the reserve accounts were resolved.

THE COURT: Okay.

MR. WILKERSON: And so, so ---

THE COURT: Well, I'll have to take a look at it and see because I don't know.

MR. WILKERSON: And, and, and that's what we ask the Court to look at as we go through the trial of this case.

THE COURT: All right.

MR. CANTY: Your Honor, may I suggest that with regard to each Plaintiff, we have the records and they can be questioned as far as what ---

THE COURT: I'm going - the, the other case, it is what it is and I'm going to look and see what Judge Baxley's order said, whatever it settled and whatever it settled by the wording of that order is what we're going to go by and I don't know what it says. I haven't read it. So, I'm going to have to take a look at it and see what it says. So, if it said settled only the funds that were in the reserve account without any further definition as to what the funds in the reserve account were, then that's all I've - that's why you reduce it to writing and that's why the judge signs it so that we don't get into this situation as to what was there or what was done.

I'll just have to read the order and whatever Judge Baxley settled in the class action, that's res judicata. If it's, you know, and we'll just have to deal with that. All right?

MR. CANTY: I think Mr. Connell wants to be heard briefly.

THE COURT: All right.

MR. CONNELL: Your Honor, I'll, I'll provide to you a copy of the order with Judge Baxley's accounting on all of the claims.

THE COURT: I'm going to pull the clerk of court file.

MR. CONNELL: Okay.

THE COURT: And whatever it says, that is the official record and I'll go by what it says.

MR. CONNELL: I don't think you've heard part of what happened in the Parker case. I think we ought to brief you on and just so you know. After the, the settlement, it was the day before trial and the case was settled, judgment was entered. The Defendants had until July I want to say of that year to make a payment. They did not make payment. Judge Baxley then allowed us to file a motion to add the controlling members of the corporation as Defendants. That was done the following month I want to say thereafter. That part of the case was appealed or was removed to the U.S. District Court in Florence. Judge Harwell heard that and remanded it back. That was appealed to the Fourth Circuit. That was denied. It's

- that's back with Judge Baxley, again. So, we're still with Judge Baxley on the issue of whether or not, as Your Honor knows under these payment of wages cases there's a whole issue about who is liable if the corporation can't pay and Judge Baxley still has that issue with him. So, the Parker case is not ended. We're trying to get a hearing on that, piercing the corporal veil.

THE COURT: Well, let me hear that. If the Parker case hasn't ended then how can you claim res judicata?

MR. EPSTEIN: Because there's a final judgment. All they're doing now is trying ---

THE COURT: But if it's under appeal then ---

MR. EPSTEIN: No, no, it's not.

THE COURT: --- and it's - and it can be changed, can it be altered in any way, shape or form?

MR. EPSTEIN: No. The final judgment was not appealed. No one appealed the final judgment. So, it is final. What occurred is that post judgment they sought leave to amend the complaint, filed an amended complaint naming additional parties in an effort essentially to assess those parties with the liability of that judgment. So, it all revolves around the exact same judgment. As a matter of a fact, the amended complaint must as a matter of definitional terms reaffirm the final judgment.

THE COURT: So, the only, only thing still pending is whether or not there's additional Defendants added.

MR. EPSTEIN: Who could they collect from?

THE COURT: Okay.

MR. EPSTEIN: That's it.

THE COURT: Is that correct?

MR. EPSTEIN: It's all collection. It's not ---

THE COURT: Okay.

MR. CONNELL: And their, and their liability under the Payment of Wages Act, those ---

THE COURT: I got you.

MR. EPSTEIN: But again, for the same amount, there's no question as to the amount or the final judgment ---

MR. CONNELL: True.

MR. EPSTEIN: ---- or what was concluded in the final judgment. They're now just casting a broader net in trying to collect.

THE COURT: Okay, I understand, okay.

MR. EPSTEIN: So, it really has no bearing on this issue. It is factually accurate.

THE COURT: All right.

MR. EPSTEIN: I'm not disputing anything Mr. Connell has

said.

THE COURT: All right.

MR. CONNELL: Your Honor, one other issue and I'm going to let David speak to this but one issue that was not resolved in the Parker case because they agreed to a judgment the day before the trial is the efficacy of the contract and whether or not the contract in this case actually deals with and is appropriate under the Payment of Wages Statute. We've, we've got a number of issues that we think the contract is not appropriate under the Payment of Wages Statute we need Your Honor to hear about.

MR. CANTY: And that's set forth in the Plaintiffs' memorandum which I handed up to the clerk, the specific issues of the applicability of our statute to this contract.

THE COURT: Well, I don't think they're seeking summary judgment on any of that. They're just saying you can't touch anything that's in the reserve fund that was deposited prior to January 29th of 2010.

MR. EPSTEIN: 2010.

THE COURT: Yeah. That's what they're saying is they've got an accounting, it shows what was in the reserve fund on January 29th, 2010, and whatever is in there you can't touch is my understanding of your motion for summary judgment.

MR. EPSTEIN: Exactly right, Your Honor, and obviously, I mean, those issues as Mr. Canty says were not resolved because it was not necessary to resolve them.

THE COURT: Okay, yeah, all right, well, I'll have to take it under advisement because I'll have to read Judge Baxley's order and see, see what it says. Okay?

MR. CONNELL: Your Honor, one, one other issue, they, they have named Westgate Myrtle Beach LLC as a counter- Plaintiff and have brought suit against some of the individuals here arguing that they owe them some money back. In regard to them doing that, we would move to streamline the pleadings to add Westgate Myrtle Beach LLC as a - as a named Defendant in the action along with CFI, which is already a named Defendant in the action, and the basis of that is is that you're going to find out during the testimony that they're one in the same anyway. These people work there. That was the resort they were at and those are the people that - those are the people that are actually being counter suited for some overpayment is what we're understanding in the case.

MR. EPSTEIN: Your Honor, that counterclaim was asserted prior to the time that there was a resolution of the Parker case because this case was filed before that. That deals strictly with one issue, whether there are monies that are owed back to Westgate,

to CFI Sales and Marketing as a consequence of chargebacks that exceed the amount of the reserve. Our view is that, that those issues, if the Court agrees with us, that the Parker final judgment precludes any claims regarding the reserve. The counterclaim is mooted by that.

THE COURT: I got you.

MR. EPSTEIN: Okay, and so, we would oppose a trial day amendment to add an entirely different party who has never been sued, not been named, not been served, you know, not been involved in this litigation as a Defendant. That is wholly inappropriate and improper at this point.

THE COURT: Well, how are they postured at this time?

MR. EPSTEIN: Only as a counterclaim, as an additional counterclaimant.

THE COURT: Plaintiff.

MR. EPSTEIN: Only as an additional counterclaimant and only as to some of the Plaintiffs because only some ---

THE COURT: And that's only if I deny your motion for summary judgment.

MR. EPSTEIN: If you deny the motion for summary judgment then we ---

THE COURT: I mean, only if I - yeah, they're only involved

in the case if I deny your motion for summary judgment.

MR. EPSTEIN: Correct.

THE COURT: Yeah, okay.

MR. CANTY: Correct.

MR. CONNELL: Except they're still Plaintiffs in the main action.

MR. EPSTEIN: No.

MR. CONNELL: Yeah, I mean, they are, they are still ---

THE COURT: Oh, I see what you ---

MR. CONNELL: They can't - yes, sir.

MR. EPSTEIN: Well, no, Westgate ---

THE COURT: No, no.

MR. EPSTEIN: --- Westgate ---

THE COURT: Their only, as I understand, their only - all right, you all have got this thing ---

MR. EPSTEIN: CFI Sales and Marketing Limited would remain a Defendant.

THE COURT: D/B/A Westgate Resorts.

MR. CONNELL: Yes.

MR. EPSTEIN: But that's only because they don't ---

THE COURT: And Westgate Myrtle Beach LLC is who?

MR. EPSTEIN: Is ---

MR. CONNELL: That's them.

MR. EPSTEIN: --- is a different entity. It's a different legal entity in ---

THE COURT: But what is their - okay, I'm going to have to take time, read the file, because you all have got this thing so convoluted. What is the relationship between Westgate Myrtle Beach LLC and CFI Sales and Marketing Limited?

MR. EPSTEIN: Westgate Myrtle Beach LLC is the developer of the timeshare resort. It contracted with CFI Sales and Marketing Ltd. for CFI Sales and Marketing Ltd. to perform sales and marketing functions. The Plaintiffs have sued CFI Sales and Marketing for whom they worked for unpaid wages.

THE COURT: I got you and Westgate was the developer.

MR. EPSTEIN: It's just the developer.

THE COURT: Different principals, not ---

MR. EPSTEIN: Same principals.

THE COURT: Same principals, same members.

MR. EPSTEIN: The same principals, yes, sir.

THE COURT: So, you've got one ---

MR. EPSTEIN: But different legal entity.

THE COURT: Okay, so, you've got one or more persons that formed Westgate Myrtle Beach LLC to develop the property and then

they form CFI Sales and Marketing Limited to market it.

MR. EPSTEIN: No, CFI Sales and Marketing Limited was formed 20 years ago.

THE COURT: Okay.

MR. EPSTEIN: And it's been the marketing arm of Westgate Resorts for however long it is. The record is clear. Westgate Myrtle Beach is a much more recent entity. CFI Sales and Marketing Limited provided the same function for resort properties all over the country.

THE COURT: Okay.

MR. EPSTEIN: All right, so, it is an, it is a separated distinct entity that provided a very limited range of services on a contractual basis for resort developer entities. They're all part of the same, you know, organization, but the responsibilities were segregated into different, you know, legal entities for a variety of reasons.

THE COURT: But the principals are the same people.

MR. EPSTEIN: The principals are roughly the same people.

THE COURT: All right.

MR. EPSTEIN: They're corporations, but they all trace back to the same people.

THE COURT: All right.

MR. EPSTEIN: But it predates the existence of Westgate

Myrtle Beach by probably at least a decade ---

THE COURT: I understand.

MR. EPSTEIN: --- if not longer.

THE COURT: All right.

MR. EPSTEIN: So, it wasn't formed specifically for this property or it was not formed in any relationship to this property. It simply has been doing that function for years prior to this and continued to do it because that's the role within the corporate structure.

THE COURT: I understand.

MR. EPSTEIN: Okay, thank you, Your Honor.

THE COURT: All right, anything else pretrial?

MR. CONNELL: Your Honor, we'll, we'll show you that there's a map that shows the entire corporate structure. It all goes back to one person. Those Plaintiffs were working at Westgate Myrtle Beach. We'll get to that. I know you wanted to stop till we get back.

THE COURT: All right, yeah, we got to get this staff, they got to break for lunch. We've got the jury coming in at 3:30. So, let's go ahead - I guess we'll only be able to take about a - you are only going to be able to take about 15 minutes because I'm going to need you all to get me your witness lists, your proposed voir

dire and stuff like that and then we'll come back at 1:30 and pick the jury. Okay? All right.

OFF THE RECORD

(On the record.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Back on the record. I have reviewed Judge Baxley's order which incorporates the memorandum of understanding that was attached to the Defendant's Motion for Summary Judgment. It says and it - to me it seems pretty clear, "The stipulated judgment settles and resolves all of class claimants' claims against CFI in connection with all commission reserves during the class period. There shall be no further reconciliation or payment of reserves following the entry of the stipulated judgment. This settlement shall not dispose of the claims for unpaid wages, not commission reserves set forth in the matter styled Timothy Zinn and others versus CFI Sales and Marketing Limited, case number 2009-CP-26-43 which shall continue unaffected by the settlement of the civil action." So, to me I'm going to grant the motion for summary judgment. I don't think you can get any of the reserve funds that were deposited prior to January 29th, 2010, because this says that the only - well, it, it cuts off any recovery from that. It just excludes any claims

for unpaid wages that are not part of the commission reserves in this case. That's the way I read the sentence, "This settlement shall not dispose of the claims for unpaid wages not commission reserves set forth in this action." So, to me it does seem to make res judicata any claims for funds in the reserve but now you can still - I don't know what your unpaid wages are. It's still seeking judgment for unpaid wages. It's just saying they can't claim any of those, that they're entitled to any of those funds pursuant to whatever other employment or whatever they're relying on for that, but if there is outstanding unpaid wages that they can proceed on that is my understanding. All right.

So, I don't know how that affects your case one way or the other or the witness list or anything. Anything further from the Plaintiffs on that regard?

MR. CONNELL: Your Honor, could we ask - you said you have the file on the Parker case. Did you have that brought up here?

THE COURT: No, I'm going by the order, the copy of the order that was attached to the motion.

MR. CONNELL: Your Honor, we need to point out to you the order of distribution in the Parker case.

THE COURT: Okay.

MR. CONNELL: We could get your, we can get that file up here with the list of all the claimants. We're going to need that.

THE COURT: But I mean what is that going - how does that affect my ruling on this?

MR. CONNELL: It goes to the issue of this \$3500.

MR. CANTY: Of what's in the reserve, that's going to be an issue in this case.

THE COURT: Well, I mean, we've got a - and that's the reason you enter into this orders and it's signed by Judge Baxley and it's signed by both of you settling this case. So, tell me what does this term mean, this settlement shall not dispose of the claims for unpaid wages, not commission reserves set forth because this says the stipulated judgment settles and resolves all of the class claimants' claims against CFI in connection with all commission reserves during the class period. So, if you didn't release all entitlement to those reserves then what did you do by this?

MR. CANTY: But here is the issue, Your Honor, there was attached a list of the class members.

THE COURT: I don't see anywhere in here a referenced of attached. Now, I see in his order he says, "It is settled per the, per the memorandum of understanding attached to the order," but neither the order nor the memorandum references an attached list.

MR. CONNELL: You need to see the other order in the case, order authorizing disbursement. You need to look at that one.

MR. CANTY: Your Honor, here's the circumstances, if, for example, \$9,000 was shown in the reserve fund for a particular Plaintiff and that case was settled and then that Plaintiff takes the stand in this case and says, "They owed me 29,000," well, they can't recover the 9,000 twice. The Defendant then may say, "Well, it wasn't 9,000 in the reserve, it was really 29,000 in the reserve," and that's how the issue is going to arise.

THE COURT: Well, you all haven't panned out what's in the reserve account by the discovery or anything of that nature?

MR. CANTY: It was done in the last case.

MR. CONNELL: We've, we've had - we had depositions and all sorts of stuff on that.

THE COURT: I mean, you all are asking me to make a decision based upon something Judge Baxley put - I mean, you all are asking me to do the impossible. I don't know what was involved in this class action. So, therefore, all I can do is rely upon the order of Judge Baxley. I don't know what discovery was done in the prior action, what discovery has been done in this action. I don't know what the Plaintiffs are claiming and their testimony is going to

be. I don't know what the Defense is going to be. So, all I can do is go by what is in black and white and written in Judge Baxley's order and it says that all claims against the reserve account is settled and does not affect the claims for unpaid wages in this case but that are not part of the reserve account. I'm assuming that's what not commission reserve means because it says, what was it, it sounds - to me that's what it sounds like. I mean it's even a hard to understand order and if it's hard to understand when it's written in black and white I don't know how I can be expected to know what you all agreed to, what you all released, what you all settled and what Judge Baxley approved, but it seems pretty cut and dried to me that all claims to the reserve account were settled in the class action. "This settlement shall not dispose of the claims for unpaid wages not commission reserves set forth in this case." So, as I read paragraph five on the memorandum of understanding it seems like that it settled any claims that that class had against that reserve account. That's just the way I read it and there wasn't any limit to it. There wasn't any reference to an attachment that said to the extent, you know.

MR. CANTY: Again, our apprehension is that whatever was unpaid commissions at the time of that settlement the Defendant may now say, "Well, all of that has been magically moved into the

reserves. So, you can't recover it."

THE COURT: I don't know. They may say that. They may not. I don't know what they're going to say. We're going to have to wait and listen to the witnesses and see what they say and deal with it then; okay? All right.

(Whereupon, Juror Number 213 questioned and excused.)

THE COURT: All right, anything further from the Plaintiff before we bring the jury up?

MR. CONNELL: Your Honor, we gave you our memorandum. I assume you're going to look at that over the course of the testimony and ---

THE COURT: Well, I mean, I'm going to look over whatever I've got a chance to.

MR. CONNELL: All right.

THE COURT: But if I just got it the odds are pretty slim I'll be able to look over it at this point in time, but we'll, we'll see.

MR. CONNELL: Your Honor, can we get the, can we get the Parker? We're going to need the, the Parker case complaint.

THE COURT: They're wanting the clerk of court file and let me find it again, 2007-CP-26-5478, Judith A. Parker versus CFI Sales and Marketing Limited, can we get that clerk of court file?

THE CLERK: Yes, sir, I sure can.

THE COURT: All right, they'll bring it up.

All right, anything further from the Plaintiff?

MR. CONNELL: No, sir.

THE COURT: All right, anything from the Defense before we bring the jury panel up?

MR. WILKERSON: No, Your Honor.

THE COURT: All right, let's go ahead and bring the jury panel, too.

(Whereupon, voir dire and jury selection take place.)

THE COURT: All right, ladies and gentlemen, you will be the jury that will preside over this case. I'm going to excuse you back to the jury room for just a few minutes while I release the rest of the jury panel and it'll also show you the jury room where you will be during this case when it's time to deliberate and when we take recesses and things of that nature.

While you're in the jury room if I could get you to do me a favor and that would be to select a foreperson for this jury. Now, I understand you don't know each other and you may not be able to select a foreperson. If you can't don't worry about it. I can appoint someone to serve as foreperson. Many judges appoint their own foreperson. I like to give the jury the opportunity to select

one on their own if they're able to do so.

Now, the foreperson has absolutely no more authority, no more influence and no more importance than any other juror. The sole function of the foreperson is to act as a liaison between the Court and the jury. If the jury has a question the foreperson lets the Court know. If the jury has a need the foreperson lets the Court know. When it's time to deliberate the foreperson will preside over the deliberations but there's no more influence or importance or authority that a foreperson has than any other juror. The only restriction would be, let's see, it's our alternates, Ms. Carter and Mr. Custer, you would not be eligible to serve as forepersons because you are alternates at this point in time and it must be someone that is a member of the regular jury at this point in time to serve as foreperson. So, any other member can serve as foreperson.

Now, when you come back into the jury room [sic] the foreperson will always occupy this first permanent seat closest to the witness stand. The alternates will always occupy the two seats where you now sit. The rest of you are at liberty to sit in whichever seat you like. If you want to sit in the same seat throughout the trial of the case you can. If you want to alternate seats during the trial of the case you can, whatever makes you feel more comfortable.

The only requirement is that the alternates occupy the alternate seats and the foreperson sits closest to the witness.

I'm going to excuse you back to the jury room for just a few minutes. I'll bring you back out with some preliminary instructions when you come back out, and while you're back there if you can select a foreperson, just write the foreperson's name on a sheet of paper with the jury number and give it to the bailiff and we'll bring you back in then. Thank you very much.

Everyone else please remain seated while the jury is excused.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, any challenges to the selection or composition of the jury by the Plaintiff?

MR. CONNELL: No, sir.

THE COURT: Any by the Defense?

MR. WILKERSON: No Your Honor.

THE COURT: All right.

(Remaining jury panel excused by Court with call-back instructions.)

THE COURT: All right, if you want to get your clients back in you can do that. Let's take a little break, give them an opportunity to try to select a foreperson, we'll come back in. Now,

for scheduling, bring them back in, I'll give them my preliminary charges. That only takes about five or ten minutes, then I can let you all do your opening statements, with it being three o'clock are we going to get into any witnesses today or do you all know? I don't know how long your first one is.

MR. CONNELL: I'll put - we're just going to take them one by one, put them up. I'll take the first one and put them up and go from there.

THE COURT: Okay, one question I was wondering on this, this is not a class action.

MR. CONNELL: No, sir.

THE COURT: Okay, so, are we going to have a separate verdict form for each individual Plaintiff?

MR. CONNELL: Yes, sir.

THE COURT: Okay, so, it's going to - each individual Plaintiff against, okay. So, they're going to have to make - so, why did we bring this in one lawsuit or was it consolidated?

MR. CONNELL: No, it was one lawsuit.

MR. WILKERSON: Those filing fees are getting high, Your Honor.

THE COURT: I got you. I was fixing to say.

All right, so, we're going to have to have one, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 16,

17, 18, 19, 20, 21, 22, 23, 24, 25 verdict forms.

MR. CONNELL: Some will be out. I've told the Defendants that some people may not come and testify. If they are their case is over and ---

THE COURT: Okay.

MR. CONNELL: --- but ---

THE COURT: Well, I can tell with this number of people let's go ahead and get some pads and pencils for the jurors. I'm going to allow them to take notes because there's no way they're going to be able to keep 25 different claims separated. So, we're going to need to get some pads and I'll give them some preliminary instructions on note-taking. Yeah, let's go ahead and get the pads and pencils or pens or whatever you get them, give them to write with.

MR. CANTY: Your Honor, the statute does provide for treble damages and I read the law for that to be a matter for the Court. In other words, when a - if a jury brings back a verdict that it would then be up to the Court to treble it.

THE COURT: That's the way I've always operated under. Is that you all's understanding that that's a legal matter and not a factual issue?

MR. WILKERSON: That's my understanding, Your Honor.

THE COURT: Okay, all right.

MR. WILKERSON: Solely, solely for the Court.

THE COURT: Yeah, okay.

MR. CONNELL: Your Honor, in the other case Judge Hyman ruled that commissions were wages and we maintain that's the law of this case as it was in that one. Is that going to be - are you all going to argue with us about that?

MR. WILKERSON: I don't think so, but I couldn't find where Judge Hyman ruled that.

MR. CONNELL: It's in the file.

MR. WILKERSON: And I don't think it's going to be an issue but I'd like to look and see what Judge Hyman said. I looked ---

THE COURT: I haven't seen his order but I was reading some of that pretrial stuff and I don't know whether it was a memorandum or whether it was in Judge Baxley's order. Somebody made reference to Judge Hyman making that ruling but I didn't see the order either.

MR. WILKERSON: I think it was in Judge - it was in Judge Baxley's order, I believe.

THE COURT: Was that where I read it?

MR. WILKERSON: Yes, sir.

THE COURT: Okay.

MR. WILKERSON: It was and ---

MR. CANTY: Yeah, I believe it's in the statutory definition as well.

THE COURT: Okay.

MR. WILKERSON: It includes, it includes commissions, the statutory definition of wages does include commissions.

THE COURT: All right, well, I mean is the only issue to determine whether or not there's - it's treble damages or is there another legal distinction between that the Defense would be wanting to distinguish between the two?

MR. EPSTEIN: There's a contract, so, the contract is always the basis.

MR. WILKERSON: Right, we do get - one of the issues, Your Honor, is timeliness of payment of a, of some, of some of the commissions.

THE COURT: Right.

MR. WILKERSON: The commission contracts provide for when the commissions are due. Whereas, the statute says that you have to pay within seven days or 30 days or whatever it is upon termination of employment, and, and ---

THE COURT: I was thinking that ---

MR. WILKERSON: --- and there's a case directly on point there that says that if the contract, commission contract so provides then it can be enforced irrespective

of that, of that limitation. We cited that case to the Court.

MR. CANTY: And I think he's - you're thinking of Ross versus

MR. WILKERSON: Correct.

MR. CANTY:--- Ligand. We, we disagree with that interpretation and we've got cases cited in our memo that say you cannot make a contract that contravenes the statute and our position is that there are provisions in this contract which not only violate the statute but are against public policy, but that's, that's in our memo.

THE COURT: Well, I'll have to take a look at that. So, you're saying if you've got an employment contract that's - well, I mean, I know the statute states I think it's within 14 days or the next regular pay period whichever is later.

MR. CANTY: Correct.

THE COURT: And so, you're - now, the case that you're relying on is that a wage case where or was it just a general contract case?

MR. CANTY: They are seeking to distinguish. There, there are two cases that are relevant. They seek to distinguish one and rely upon the other.

MR. CONNELL: Krise is the other one, I think.

THE COURT: Okay, well, that's all right. I'll take a look at it. I'll see what it is.

MR. WILKERSON: We cited both cases, Your Honor.

THE COURT: I'll read them.

MR. WILKERSON: We relied on one. We distinguished the other one.

THE COURT: I'll read them.

MR. WILKERSON: Yes, sir.

THE COURT: I'll see it. It can't be a novel issue. So, I'll check and see.

MR. WILKERSON: No, it's ---

THE COURT: The law is what the law is, so. All right, anything else? All right, let's give them a little while longer to select a foreperson. Then we'll go forward; okay?

MR. CONNELL: Thank you, Your Honor.

THE COURT: All right, thank you very much. What is - just and I - what is that - the statute for the wage?

MR. CONNELL: It's in our memo, Your Honor.

MR. CANTY: 41-10-10.

THE COURT: You got it.

MR. CANTY: Et. Seq.

THE COURT: Okay, thank you.

OFF THE RECORD

(On the record.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, the jury sent out the name Debbie Monahan as the foreperson. I'm assuming that's Juror Number 254, Deborah A. Monahan, as the foreperson. I'm going to mark their sheet out as Court's Exhibit One.

(Whereupon, Court's Exhibit Number One [Foreperson Selection] appropriately marked.)

THE COURT: All right, have we got the pads and the pencil for the jury?

(Clerk indicates affirmatively.)

THE COURT: Okay, you've given them to the jurors, okay. All right anything from the Plaintiff before we bring the jury in?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MR. WILKERSON: No, Your Honor.

THE COURT: All right, let's go ahead and bring the jury in.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right, ladies and gentlemen, welcome back. I understand, Ms. Monahan, they've selected you as foreperson. Is that correct?

MS. MONAHAN: Yes, sir.

THE COURT: All right, if you'd please always occupy the seat where you now sit. Our alternates will always occupy their seats and the rest of you, as I said, are at liberty to sit in whichever seat you'd like during the trial of this case. I want to remind you if you have any cell phones or anything of that nature if you'd turn them off at this time. I do have some preliminary instructions, but before we get started, I do want to introduce you to the court personnel, the people you'll be working with during the trial of this case.

(Court personnel introduced by Court.)

THE COURT: All right, we're getting ready to begin the trial of this case and as I told you, there are a great number of attorneys - Plaintiffs in this case, Timothy A. Zinn and other similarly situated Plaintiffs versus CFI Sales and Marketing, Limited doing business as Westgate Resorts and other named Defendants, but before I give you the preliminary instructions, as I told you during

qualifications and voir dire, jurors are constantly taking oaths and it's no different. I'll need everyone to please stand and raise your right hand while our clerk of court administers the oath for you to serve as jurors in this particular case.

(Whereupon, jury sworn by clerk.)

THE CLERK: Thank you, please be seated.

THE COURT: All right, is there any member of the jury who did not respond to the oath by saying I do, if so please stand.

(No response.)

THE COURT: Good, thank you.

All right, before we begin this trial I want to let you know what you can expect and what is expected of you as jurors during the trial of this case. This trial will probably be different from what you're accustomed to seeing on TV or in the movies or reading in books. Usually those entertainment medias provide a lot of action, a lot of suspense in trials and while that might be the case in this trial, it probably won't be. The primary function of this trial is to find a truth, to determine what the truth was that existed between the Plaintiffs and the Defendants in this case. Search for the truth is often a deliberate, slow, repetitive process, the exact opposite of what you may be accustomed to from reading books or watching movies, but I hope that you do find this trial

educational and I want to thank you from the outset for your assistance and willingness to serve as jurors.

The attorneys appearing before you are advocates for the parties they represent, but first and foremost, they're officers of the court. They're sworn to uphold the integrity and the fairness of our judicial system. You can expect them to be competent, professional and ethical in the representation of their clients' interests. Likewise, they'll expect you to be professional, reasonable and ethical as you serve on this jury.

Now, some preliminary rules, as I told you earlier, if you have any cell phones or pager devices, if you would turn them off completely or leave them outside of the courtroom. I'll give you plenty of opportunities to check messages, return calls and things of that nature, although you are not allowed to talk about this case in any way, shape and form as you serve on jurors. You cannot even discuss the case among yourselves until I tell you to do so.

Next, when we break from time to time, please be prompt upon returning when I tell you to return. As I told you during qualifications, I know emergencies arise and if you have an emergency please call and let us know, but otherwise, I ask that you are prompt and return promptly when you're told to be back.

Last but certainly not least, I ask that you pay close attention

to the trial of this case. This trial is very important to the parties and it's the only way they can resolve their dispute between them.

Now I'll let you know why you're here. As the jury in this case you determine and are the sole judge of the facts of this case. Your job is to determine what the facts of this case are. You are to determine, you are to determine the facts only from the testimony you hear and any other evidence that is presented during this trial. You should not be influenced by any opinions or statements you may have heard outside of the courtroom. If at any time I make a comment which leads you to believe that I have an opinion as to what the facts of this case are, you're to disregard my comments. You and you alone must determine what the facts of this case are based upon the testimony and evidence presented at trial.

Now, the same law that makes you the judge of the facts of this case makes me the judge of the law. The law as I give it to you is the only law that you can consider. You must accept and follow the law as I give it to you even though you may disagree with the law. Just as I cannot tell you what the facts of this case are, you cannot disagree with me about the law to be applied in this case. Your job is to take the law as I give it to you and apply it to the facts as you find those facts to be.

Now, until I advise you to begin your deliberations, you must not discuss this case with anyone, including your fellow jurors, friends, family members or anyone of that nature. During the trial do not read or listen to or watch any news reports about the case should there be any. Do not conduct any independent investigation into this case. Do not go on the internet or read any newspaper accounts. Do not watch any television reports or listen to any radio reports or consider anything that you have heard or may hear about this case outside of the courtroom should there be any such reports. It's important that you keep an open mind and not decide any issue in this case until all of the evidence has been presented to you. Now, when you're instructed to start your deliberations you can then discuss the case only in the jury room with your fellow jurors.

In just a moment the attorneys will make what's called opening statements. These opening statements are not evidence in the case. It is simply the attorney's contention as to what they think the issues in this case are. After their opening statements evidence will be presented to you by way of testimony from sworn witnesses and/or by any other exhibits that may be introduced into evidence.

As the judge of the law, I determine what evidence is admissible at trial. As the judge of facts, you determine what evidence is

believable. Once testimony is admitted whether or not you believe it is solely for you to determine. In deciding whether to believe a witness, you have the right to consider whether the witness has an interest in the result of the trial, whether the witness is prejudiced towards either the Plaintiff or the Defendant, the opportunity for the witness to have seen the matters and things about which the witness may testify and the way the witness acts on the witness stand. You have the right to consider anything that is in the record that will help you evaluate the testimony of the witness. That means that it will be your duty to pay close attention to the witnesses, to observe the witnesses and to listen to them.

Now, each of you has been given a pad and a pencil or a pen so that you can take notes in this case. This case might get somewhat complicated because there are over 20 something claims by over 20 something different Plaintiffs against the Defendants. So, it might get a little confusing at times. That's why I have permitted you to take notes in this case, but I need to give you some instructions on note-taking and I'll give you some further instructions when I charge you on the law to be applied in this case, but for preliminary instructions on note-taking, number one, you are not required to take notes if you do not wish to take notes. Some people are better note-takers than others. Some people are better listeners and can

retain from memory better. So, you do not have to take notes if you do not wish to take notes, number one.

Number two, note-taking is for you personally. It is to remind you of an issue or a fact or a testimony that you think is important to you. So, therefore, your note-taking will not be shared with any other jurors. When you recess or when we leave the courtroom, you'll be directed to leave your notepads in your chair here in the courtroom. You'll need to write your name on the front of the notepad so that when you return you will get your same notepad back, but the sole purpose of note-taking is to refresh your memory or to keep or remind you of something that you think is important in the case. Now, having said that, that means that you're not to try - don't try to write down everything that is testified to because I don't want you to get so caught up in taking notes that you don't hear the testimony of the witness. So, when something is said during testimony that you think is important and that you want to remember, make a quick note of it so that it will refresh your memory when you deliberate with the other jurors.

All right, is there any challenges to the opening charges by the Plaintiff?

MR. CONNELL: No, sir.

THE COURT: Any by the Defense?

MR. WILKERSON: No, Your Honor.

THE COURT: All right, ladies and gentlemen, at this time we're going to begin the trial of this case with the opening statements from the attorneys. As I said, these opening statements are not evidence in the case. It is only their contention as to what they think the issues in this case are.

All right, who wants to make opening statements for the Plaintiff?

MR. CANTY: I will, Your Honor.

THE COURT: All right, Mr. Canty, you may proceed.

MR. CANTY: May it please the Court?

THE COURT: Yes, sir.

MR. CANTY: Ladies and gentlemen of the jury, my name is David Canty. I practice law in Myrtle Beach and I'm here today with Gene Connell on behalf of former salesmen at Westgate Myrtle Beach.

First, I'd like to thank you for your service. As the Judge has indicated, it is your presence that makes our judicial system work. There are many ways of resolving disputes. This is how we do it in a civilized, nonviolent way. We have impartial jurors who are chosen to hear the evidence, listen to the law and render a verdict.

I had the pleasure of serving on a jury not too long ago after

many years of practicing law and it gave me very valuable perspective. One thing that I became aware of is jurors do not appreciate time being wasted. We will not waste time.

The issues in this case between Westgate Myrtle Beach and the salesmen it's really very simple. These are people who worked for Westgate on a commission basis and they sold timeshares, that was their job. They were to receive a commission, a percentage of sales. They did not receive that commission and that is why they are here today. The Defense on the other hand contends that they are not entitled to receive the commissions and you'll have to listen to the evidence, to the proof to ascertain whether or not that is the case.

Each of these Plaintiffs has waited a long time, and if it seems as though we're going into too much detail or we are dragging things out, please keep in mind that for each of these individuals this is their only opportunity. This is their day in court to come and put on the record their testimony as to what they have earned, what they have been paid and what they have been owed, and I practice a lot of criminal law and I always tell the juries in criminal cases, if you remember the burden of proof in a civil case disabuse yourself of that notion and I would ask you, disabuse yourself of the notion of the standard of proof in a criminal case.

When a person is charged with a crime, the proof must be beyond a reasonable doubt, that is a doubt for which you can give a reason. In this court, in this case, there is a completely different standard of proof. It is called the preponderance of the evidence rule. If you think of the scales of justice, if the scales tip ever so slightly in favor of the Plaintiff, you may think of it as the 51 percent rule, if the scales of justice, the weight of the evidence tilts ever so slightly in favor of the Plaintiff, then under your oath you must bring back a verdict for the Plaintiff.

You will have your notepads for each of these individual Plaintiffs. You can make notes as to their testimony. You can hear their version of what they are entitled to and you'll hear from the Defense as well, and we believe that after all of the evidence is in that in your deliberation you will bring back verdicts for the Plaintiff. Thank you so much.

MR. WILKERSON: May it please the Court?

THE COURT: All right, Mr. Wilkerson.

MR. WILKERSON: Thank you, Your Honor.

Ladies and gentlemen, good afternoon. I'm John Wilkerson, lawyer practicing law in Charleston. I represent CFI Sales and Marketing.

CFI Sales and Marketing was responsible for the sale or the

management of the sale of timeshare interests at Westgate resort which is over here on Kings Highway. It's just south of Third Avenue. They bought the old Holiday Inn there and converted it into a timeshare property and built a nice additional building there. They sell those timeshares there and the Plaintiffs were some of the employees, some of the commission sales representatives who were responsible for selling these units.

Now, I want to get a little bit into the details of the claim just so that you'll know what you're about, what you're about to hear, but first of all, a few more introductions are in order. Again, my name is John Wilkerson and I am joined today by my colleague, Myrna Maysonet. She is a lawyer from Florida and she will be working with me in the trial of this case. Also sitting next to Myrna is Colleen O'Hagen. Colleen is the HR manager out at the property and she is here to represent my client. A couple of other faces over here, I'm sure everybody saw the wizard of oz and you heard the phrase pay no attention to the man behind the curtain, well that's my friend Steve Powers who's managing our, our presentation here. He is our technical support and also over here is Marilyn Perez who is going to be assisting us with managing the documents. As you can imagine, with this many claims, it's going to be difficult for us to keep up with what documents are relevant to an individual

Plaintiff. Seated back here, you were introduced earlier to Mr. Richard Epstein. He is, he is also a lawyer from Florida. He will most likely not be participating in the trial and may or may not be here during the entire trial.

Now, one thing that you will find through this trial is that Mr. Canty and Mr. Connell and I disagree on a lot of things. We may disagree on some facts. We may disagree on what the facts mean. We may disagree on the law. We may disagree on some of the rules. One thing that we do not disagree on and that is you, ladies and gentlemen, are the right people to decide this case for our clients. We went through this elaborate process to select you. The purpose of the process is to make sure that we seat jurors who are fair and impartial and we are very confident that that process has worked its, has worked its magic and we, therefore, have a fair and impartial juror - jury.

One thing I can also assure you that although the lawyers may disagree on certain things, we will always disagree professionally. I've known Gene Connell for 25 years, known Mr. Canty a shorter period of time, but I've found them both to be the consummate professionals and I think you will also agree at the end of the trial that's what happens.

Now, in this, in the trial of this case we're going to be talking

about the timeshare industry and primarily or essentially the sales of timeshares and how the sales representatives who sell these timeshares to individuals are paid. Now, timeshares, just basically, are interval ownerships of property. You get, you get to buy a week that you can stay in a property owned by Westgate in this situation or two weeks and you get to buy a particular level of unit and each level of unit would cost more or less than the others and each level of unit if it costs more would perhaps carry with it more or less commission for the sale of that unit.

Now, we're, we're dealing with multiple claims here. We have 25 named Plaintiffs. Each one has to be evaluated individually as to what their claim is and each of them is claiming that they are entitled to be paid certain commissions on individual transactions that occurred while they were serving as commission sales representatives at the Westgate property. Some of these people are claiming that they are entitled to be paid on as few as two or three transactions. Some are being - are claiming that they are being - that they are entitled to be paid on many more. There's one who is upwards of 130 transactions that is the subject of this dispute. Now, whether that - whether he or she comes in and presents that many to you will remain to be seen, but we've seen those being presented to us; and so, that's kind of the scope

of what we're talking about. Now, each one of the transactions, as I say, involves a claim for unpaid commissions, and the commissions are based upon a percentage of the sale and whether or not it was a sale that, in fact, warrants commissions and we'll talk about that in just a second, but the amounts of these commissions is anywhere from \$150 per sale to somewhere in the \$2500 range. That's kind of the basic range. One or two of them are as many as five or \$6,000 per transaction. So, that's kind of what we'll be talking about, hundreds of transactions involving individual - individually computed commissions, and the question that we're going to ask you, ladies and gentlemen, to focus on is whether or not these individuals are entitled to any commissions, whether they have been paid the commissions that they are owed, whether they - whether the contracts, in fact, justify the payment of a commission or any other facts that we'll present to you that relate to or impact the payment of a commission under these circumstances.

Now, we're guided by a written agreement. Each one of these individuals entered into a contract with my client that sets forth the terms of the agreement and sets forth the terms in great detail as to what they're supposed to do, how they're supposed to do it and when they do make a sale, what sales will give, what sales will generate a commission on their behalf, and if they do generate a

commission, how that commission will be computed.

Now, basically, there are two events that must occur before a commission sales representative is entitled to receive a commission for the sale of a timeshare. Number one is, and this is all spelled out in the contract, number one is that the purchaser that they have worked with, the purchaser of the timeshare that is buying the timeshare enters into a contract to purchase the timeshare and pays a full ten percent down payment, number one. They've got to pay - the purchaser has to pay a full ten percent down payment. If the purchaser does not pay the full ten percent down payment, the commission is not due, it's not owing, the commission sales representative does not get paid.

Now, sometimes people will buy a timeshare and pay the down payment on time. They're allowed to take 90 days to pay the down payment, two or \$300 a month to pay the down payment for three months. If they do pay that full down payment in the three months, then there is a full down payment that has been made and that portion of the contract has been satisfied. The other thing is that the customer must not cancel the contract. As with many consumer goods, the state and federal law - I think state law provides that a purchaser of a timeshare has a right of rescission within a few days. I think three, three or five days I think in South Carolina. If the, if

the customer exercises that right of rescission, of course there's no contract, there's been no sale and there's no commission due. So, we'll be asking you to look at each one of these transactions and ask whether the - whether there was a contract, whether it was canceled, and most importantly perhaps, whether or not the full ten percent down payment was made, and once the full ten percent down payment has been made by the customer, then the commission sales representative is entitled to receive a commission and generally those commissions are paid within 21 to 28 days after that event occurs. After the full down payment is received and paid, then the commission is paid 21 to 28 days and to complicate matters even further they sometimes receive an advance on the commissions. Sometimes they receive what they call a half check and they're entitled to get half of their commission up to \$500 immediately upon, upon a contract being good business, that is that a full down payment has been made. Sometimes they're entitled to get that advance on commission and then that gets set off when the full commission is paid in 21 or 28 days. It's - I'm sure I'm making it a whole lot more complicated than it really is, but it's quite simple that you can be looking for whether or not there was a contract, whether it had been canceled, whether or not the full ten percent down payment has been made and then it's just a matter of math.

Now, each contract and each transaction, as a matter of a fact, carries with it a different commission structure. So, that has to be computed. You will, will find that the commissions are generally somewhere between five and ten percent of the total amount of the purchase price. So, those will be computed for you. We have folks that do that for a living, that's what they do and they compute it and we will go through and for every transaction that is presented to you as a potential claim we will, we will show you exactly what the commission compensation was, what has been paid and what - and for those that have not been paid why it has not been paid.

Now, I mentioned that there is a contract in place. Everyone has a contract. Everyone has terms of agreement. That will be presented to you for you to see exactly what those terms are and they're very clearly spelled out and it's - that's the way business is conducted. I mean, we have contracts and people are to be held to the contracts and we intend to present the contracts, present the facts that we believe support our view of the way the contract is to be interpreted and make it very clear to you that the contract has been properly managed by our client.

It is also reasonable in a court of law that you as the jurors, as the finders of fact, you've taken an oath to well and truly try and a true verdict render according to the law and the evidence

and the Judge will tell you what the law is. It's your job to figure out what the facts are, and it is - I ask you to hold the Plaintiffs to a reasonable standard of proof. It's not reasonable for someone to come in and say, "Well, I think I sold two or three units and I was entitled to a ten percent commission on that and I think the sale was about so many dollars, and so, I think I'm entitled to so many dollars in commission." I would ask you to reject that claim because that would not rise to a level of reasonable proof that would satisfy you as reasonable finders of the facts and determine whether or not these people are entitled, individually are entitled to a commission on an individual sale. I ask you to hold them to a reasonable standard, require them to present you some documents, require them to present something that shows you what entitles them to this commission and that they have meet these criteria, that is the full down payment, ten percent down payment, hasn't been canceled. So, I ask you to hold them to that as you listen to the evidence and evaluate the testimony and the evidence that's presented and say, ask yourself, "Does that actually prove to me that this person is entitled to a commission?"

Now, after the Plaintiffs testify and there are 25. You may - we may hear from all 25, some of them may not be able to make it to the trial. So, we'll see how many actually, actually testify,

but once that's over then we'll have our opportunity to present the accounting as to where, as to what happened to each one of the transactions that they have identified in their testimony, and we have reviewed each one of those transactions and can present to you to the penny exactly what the commission structure was, what commissions were earned and we will show you that every commission that has been earned has, in fact, been paid in full and every commission that has not been paid has not been paid because it's not due and payable under the criteria that I just laid out for you. Most, most, most of the cases are where the customer did not pay the full down payment, and therefore, the customer did not make, did not make good on the contract, and therefore, the commission was not due. So, we will present to you to the penny evidence to support exactly what happened to each one of these transactions when it's our turn to present evidence.

That's about all I have to say. I do remind you that I - we all agree that you are the folks that are going to decide this case and I ask you to hold, to hold all of us accountable. Hold the lawyers accountable, hold the parties accountable to, to, to handle this matter in a reasonable fashion and hold the parties to a, to a standard of reasonable proof that convinces you that they are either entitled or not entitled to receive payment for these

commissions that they are claiming. Thank you very much for your attention.

THE COURT: All right, Mr. Canty or Mr. Connell, call your first witness.

MR. CONNELL: Your Honor, I have a matter we need to take up with the Court before we start.

THE COURT: All right, ladies and gentlemen, I'm going to excuse you back to the jury room for just a few minutes while we deal with this matter of law and I'll tell you from the outset I will excuse you from the courtroom from time to time and the reason I excuse you is not that we're hiding anything from you, but as I told you, you and you alone decide what the facts of this case are. Now, from time to time we are required to discuss legal issues, and when we discuss legal issues it often require me as the judge or the attorneys to discuss factual matters. Well, whatever we say during these legal decisions are not evidence in this case. So, we don't want you to be influenced by anything that I might say or anything that the attorneys might say when we address these legal issues. We don't want you to be influenced by that. So, that's why we excuse you from the courtroom so that you base your decision exclusively on the testimony and evidence.

I'm going to excuse you back to the jury room for just a minute

and we'll bring you back out in just a second. If you have notebooks you need to leave your pads, pencils, everything right there in the seat. Don't take them with you. Thank you.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, Mr. Connell.

MR. CONNELL: Your Honor, the Defendants' counsel just indicated that they intended to show that everything had been paid in full to the penny and, Your Honor, we have a \$600,000 judgment against the Defendants now they have not satisfied in that file on your desk and we would offer to put that in as Court's Exhibit Number One of the fact that they have not paid everything in full. They have not paid any of these Plaintiffs for the reserve account. So, we'd move that the Court order that that be put in as Exhibit Number One in this case.

THE COURT: Well, I'm going to deny your motion at this point in time. If they present any evidence that - in support of that, this was just opening arguments at this point in time. If when it comes time for them where they can produce evidence or testimony, if they stand by that position at that time I'll address that issue and I might be able to - it might come in as rebuttable testimony but just based upon his opening arguments I'm not going

to put it in at this time. Yes, sir?

MR. WILKERSON: And, and Your Honor, I would, I would remind the Court that you've already ruled that the issues in that case are not coming in in this case.

THE COURT: No, no, no, not the issues. I've ruled that they are not entitled to any of the funds in the reserve account.

MR. WILKERSON: Yes, sir.

THE COURT: But there might be overlapping issues and certainly if your position is you've paid them everything they're entitled to when, in fact, you haven't because there's an outstanding judgment, then that may very well come in. I don't know.

MR. WILKERSON: Well ---

THE COURT: But ---

MR. WILKERSON: --- everything they're entitled to in this lawsuit, Your Honor. The only thing they can claim here is things that were not included in that other lawsuit, and so, I, I ---

THE COURT: Well, and you might be right.

MR. WILKERSON: --- I would suggest to the Court that what I said was not inaccurate, was not inaccurate, that that, that that would be the proof, that we will prove that every issue, every claim that they had, can make and do make in this case that we've paid them or paid them or we can explain why we haven't.

THE COURT: All right, well, I'll address that when the issue comes up.

MR. WILKERSON: Yes, sir.

MR. CANTY: And, Your Honor, there is another matter and that has to do with the terms of the contract that he's referred to in his opening statement and that is the chargeback provision. This was an issue in the other case that was never ruled upon by the Court. The chargeback scheme it is our position is unenforceable under contract law because, first of all, these people did not agree to it and I've set forth in detail the testimony on that subject, the technique that the Defendant used to induce signatures to this contract without the parties knowing of this chargeback scheme, and in fact, after affirmatively representing to them by way of newspaper advertising saying, "Come in and sell timeshares for us, there are no chargebacks," by way of their training before these - this stack of documents was presented for them to sign, wherein it was reiterated that there were no chargebacks and our position is that this chargeback scheme upon which they rely violates public policy and it violates the statute. Your Honor is familiar with the provision that says the wages are due within 48 hours of separation from the payroll or the next regularly scheduled payday which may not exceed 30 days. That is the statutory language. What the

Defense has admitted on the record is that it may be ten years before there is a determination as to whether or not this commission will be charged back. It violates the statute. It violates the public policy and as set forth in detail in our memorandum, these people never agreed to it.

THE COURT: So, what are you telling me to do? What are you wanting, asking me for now?

MR. CANTY: What I am asking the Court to do is to rule that this chargeback scheme does violate the statute, does violate public policy, and furthermore, that that contract was not agreed to, that aspect of it was not agreed to by these Plaintiffs and their ---

THE COURT: So, is there a pending motion for summary of judgment to that effect or you want me to direct a verdict before we even get into the evidence of the case?

MR. CANTY: Well, Your Honor, before we go forward, what I would ask - make the Court aware of that there is this issue. Their, their central defense is that they don't have to pay these people under this chargeback scheme.

THE COURT: Okay.

MR. CANTY: And our position is the chargeback scheme is unenforceable for a list of reasons.

THE COURT: So, I mean - but I mean are you asking for a decision by the Court now on something?

MR. CANTY: Just to make the Court aware we will be presenting evidence on precisely that issue.

THE COURT: Oh, okay.

MR. CANTY: And part of it is, is a legal issue. You can look at the contract and look at the statute and tell.

THE COURT: Well, have you all filed a motion for summary judgment on that issue or ---

MR. CANTY: Not in this case.

THE COURT: All right, sir.

MR. WILKERSON: Could I, could I clarify, Your Honor? I want, I want our position to be very clear on this issue.

THE COURT: Well, I mean, I think I understand everybody's position. I'm just kind of getting convoluted with all of you all's oratory as to what you're asking me to do as a judge. There's no motion for summary judgment pending for me to rule on. There's no evidence. So, I can't grant a directed verdict. I mean, all of this is kind of opening statements to me outside the presence of the jury and I don't know why you all are doing it because I don't know what you're asking me to do at this posture of the trial.

MR. WILKERSON: Well, I, I, I - I'm not asking you to do anything

but I do want to correct or clarify something that Mr. Canty just said.

THE COURT: All right.

MR. WILKERSON: He believes that chargebacks has something to do with this case and I'm suggesting to the Court that it does not. You will never hear chargeback out of my mouth. Chargeback is solely a function that relates to the reserve accounts that we've been talking about all morning. Chargebacks come from the reserves and the reserves have been - are not going to be included in this case. We're talking about what happened to transactions before these people left our employ. If he's talking about chargebacks, he is of necessity talking about reserve money, and we will object to any, any reference to chargebacks throughout the trial of the case because we don't intend to rely upon any chargeback analysis.

THE COURT: Well, gentlemen, I hate to tell you, I don't know what chargebacks are. I don't know where they are, what they are or what they're for. So, you all are going to have to educate me on that process.

MR. WILKERSON: All right.

THE COURT: So, let's go ahead and take about a five minute break. We'll bring the jury in, you can call your first witness and we'll get started then, okay?

MR. WILKERSON: Thank you, Your Honor.

THE COURT: Thank you.

OFF THE RECORD

(On the record.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, anything from the Plaintiff before we bring the jury in?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MS. MAYSONET: No, sir.

MR. WILKERSON: No, Your Honor.

THE COURT: All right, let's bring the jury in. (Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right, ladies and gentlemen, welcome back. We're ready to start the trial of this case. Please make sure that each of you has your own pad and that you don't have someone else's pad and we'll go ahead and start with the Plaintiff's case.

Mr. Connell or Mr. Canty, you can call your first witness.

MR. CONNELL: Mr. Oxentine.

THE COURT: All right.

Whereupon, Chelcie Oxentine was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: State your name for the Court, please, sir.

MR. OXENTINE: Chelcie, excuse me, Oxentine.

THE COURT: All right.

MR. OXENTINE: And I go by Ned.

THE COURT: Could you spell your name please?

MR. OXENTINE: C-H-E-L-C-I-E, O-X-E-N-T-I-N-E.

THE COURT: Thank you, Mr. Oxentine.

MR. OXENTINE: Thank you.

THE COURT: All right, sir.

DIRECT EXAMINATION

BY MR. CONNELL:

Q All right, Ned, tell me if you would please where you live and what you do for a living now.

A I live in a motel. I was homeless for about three weeks and I've gone to work for the Sheraton.

Q All right, and what do you do at the Sheraton?

A I do marketing.

Q And what type of marketing do you work - do you do at the Sheraton?

A For timeshare.

Q Okay, do you have to have a license to be a timeshare agent?

A No.

Q How long have you been a timeshare agent?

A Since 1996.

Q And tell us a little about yourself. Where are you from?

A Originally North Carolina. I've been in Myrtle Beach since 1996 up until last year and I moved away for about six months and I've come back.

Q Okay, and how long did you work at the Westgate? That's what we're talking about Westgate, are we not?

A Yes, sir.

Q All right, how long did you work there?

A Three, three years and seven months.

Q Can you tell these folks, I'm sure they don't - I don't think anybody has bought any timeshare. Where is the Westgate Resort in the Myrtle Beach area?

A It's on South Main Street in the third to the fifth block.

Q Right in the - on Ocean Boulevard?

A Yes, right across from Family Kingdom.

Q How, how big of a project is it? How many units?

A It's an 18-story building in the new building and we had a six-story building in the old building.

Q All right, and do you know how much the project cost?

A No, sir.

Q Is it new?

A The new building is. The other one was redone.

Q Is it - and it's still in operation today?

A Yes, sir.

Q And tell these folks if you would how is it that you go about getting someone to buy a timeshare?

A Well, this other gentleman explained it pretty good. I like the way he explained it.

Q You talking about Mr. Wilkerson?

A Yes.

Q Yeah.

A Mr. Wilkerson, he did a real good job. He said if you get ten percent down you should get paid on your deal and I, I like the way he explained that part of it.

Q Okay.

A That made a lot of sense to me, but anyway someone would come in and sit down in front of me.

Q Well, before we start on that, let's talk about how you - how you were supposed to get paid.

A Okay.

Q You said ten percent down, is that ---

A Once, once the down payment is made and all the down payment money is in, then like he said, 21 to 28 days they should pay me.

Q Okay.

A And we got paid every two weeks.

Q Say, I'm, I'm a customer. Sell me on why I want to buy a timeshare.

A It would be if, if you vacation that way, in case you wanted to go and use the same spot and you wanted to use a condominium instead of a motel, I just wanted to use the same money you spent at a motel and convert it into a condominium and so instead of staying in a motel, you'd stay in a condominium each time you went, for the same amount of money.

Q Would I, would I own that part of the condominium?

A $1/52^{\text{nd}}$ of it, one week out of 52 weeks.

Q So, I can buy a week ---

A Yes, sir.

Q --- forever?

A Yes, sir.

Q And ---

A As long as you paid your maintenance fee each year.

Q All right, and how much does a week cost at the Westgate?

A It depends on and your time's valuable and I don't want to

take up a lot of time explaining timeshare because at my age I know how valuable time is. So, a week costs anywhere from \$5,000 up to \$64,000 ---

Q All right.

A --- depending on the time of the year and the size of the unit.

Q All right, so, the \$64,000 week when would that be, in the summer?

A It would be the summer, in the middle of summer and it'd be a four bedroom.

Q All right, and the \$5,000 a week.

A Would be a winter time and be a studio.

Q When you were working at Westgate, how many, how many salespeople did you have there?

A In the summer they would have over a hundred. In the winter we would go back down to maybe 20, 15.

Q All right, and would the customers come into the Westgate Resort and talk to the salespeople?

A I'm not sure if I'd be hurting the way they do business, but most timeshares invite people in and then you talk to them and go see them. Westgate does it differently. I'm not sure if I'm allowed.

Q Tell us, tell us how Westgate does it. We don't care.

A We're at Westgate are a little different. We - as you check in I would walk you up to the room and invite you back down myself to come see me during the week.

Q And are prizes or TVs or things offered to get people to come in the door?

A There's two types of sales, there's a frontline, there's an in-house and I was - have worked both, but the in-house who I worked at last we just invite you back down for breakfast or lunch. There were no gifts in it.

Q All right, how did the person actually get in the door to begin with?

A They had already bought with me, but it's ---

Q I see.

A ---but in normal timeshares, people go through marketing either on the phone, in person, or by letter and they invite you to come in for a gift, a prize or tickets to a show.

Q All right, now, during the period that you worked there, were you told when to come and when not to come to work?

A Yes, sir, I was told to be there at a certain hour and I had to stay there to a certain hour.

Q All right, how many hours a week were you working?

A Anywhere from 30 to 50. It varied each week. It just

Q All right, and how about during the summer, was it more or less?

A It was more in the summer.

Q Why is that?

A We had more tours in the summer, people that would come in to see us it was more of us.

Q Would there be sales meetings, too, that you'd have to attend?

A Sure in the first thing in the morning.

Q All right, and were there goals that you - that Westgate set for you to sell?

A If you didn't sell at least one out of ten and get at least a certain amount of dollars out of that person you would be let go. You wouldn't be kept as a salesperson.

Q All right, sir, explain that to me. Now, I - they're - you're saying ten people come through ---

A Uh-huh.

Q --- you have to sell at least one.

A You have to sell at least one and keep at least a ten percent close ratio. Out of ten people, you got to sell at least one and then sell them at least a \$10,000 unit which would give you a thousand VPG, volume per guest.

Q All right, you're going to have to - we're going to have to talk in kind of Horry County English here.

A Right.

Q I want to understand what you said there.

A Right.

Q I sell, I sell a \$10,000 week.

A Right.

Q What does the salesman get from that?

A Ten percent.

Q All right, how much is that?

A \$1,000.

Q All right, tell me how the transaction goes after you make the sale with the customer. What do you do?

A We would get the down payment, fill out the paperwork and then give them to another person who would take them in and deed them the actual property and they call the closing officer and they would keep them for approximately two to three hours and go over everything with them, making sure they understand what they purchased.

Q All right, now, let me ask you, Mr. Wilkerson said that you've been paid to the penny everything you were owed at Westgate, is that right?

A That's what he said.

Q All right, let me ask you, were you a Plaintiff in a class action lawsuit against Westgate in this courthouse?

MR. WILKERSON: Objection, Your Honor.

THE COURT: What's the relevancy?

MR. CONNELL: Your Honor, we're going to go - we're going to prove that ---

MR. WILKERSON: Object, can we, can we have this side bar?

THE COURT: Yeah, all right, ladies and gentlemen, let me - well, come on up here. Let me see the attorneys for a second.

(Whereupon, a bench conference is held in the presence but out of the hearing of the jury.)

THE COURT: All right, I sustain the objection.

BY MR. CONNELL:

Q All right, Mr. Oxentine, let's go back and talk about how you made money at Westgate.

A Okay.

Q Talking about the money we're here about today.

A Okay.

Q Tell me if you would, please, have you had an opportunity to look at your file and make a determination as to how much you are owed currently for deals that you transacted and weren't paid for?

A Yes, sir.

Q How much did you come up with?

A \$3,726.40.

Q All right, I'd like you to, since we're going to ---

MR. WILKERSON: If Your Honor, please, I have a matter of law with regard to that.

THE COURT: All right, ladies and gentlemen, I'm going to excuse you back to the jury room for just a brief moment. We'll bring you back out in just a second. Please do not discuss the case even among yourselves.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, Mr. Wilkerson, let me hear from you.

MR. WILKERSON: Your Honor, we may have this with every one of these Plaintiffs, so, Your Honor, we served interrogatories in this case to ask them what they were claiming, how much they claimed they were owed. I would like to have leave to, after I get a copy made, to file the answers to interrogatories that were served on us in this case. We asked the very specific question of Mr. Oxentine what he claims he was - he should be paid and he responded in response, in response to interrogatories as follows, quote, "The dollar value of back due commission, \$1,653.89." He just testified that he's entitled to \$3,726.48 [sic].

THE COURT: All right, Mr. Connell, let me hear from you.

MR. CONNELL: Your Honor, Mr. Oxentine has gone back and looked at his paperwork and has recalculated just based on that, just in ---

THE COURT: Yeah.

MR. CONNELL: --- on these documents.

THE COURT: But still, they're entitled to notice. That's why you do discovery. You can't tell them we're asking for this figure and then show up in court and ambush them with a different figure. So, whatever you responded in your discovery when they say what damages are you claiming, they're entitled to know what damages you're claiming and you can't change that figure on them in trial.

MR. CONNELL: Your Honor, his - shouldn't that be an issue, shouldn't that be - we gave them over I want to say 15,000 pages of documents. In those documents was Mr. Oxentine's ---

A This is what they owed me when I left because this is full down.

THE COURT: Listen, listen.

A These are penders.

THE COURT: No, sir; no, sir.

A I'm sorry.

THE COURT: The point of discovery is so that nobody is ambushed at trial. The point of discovery is so everybody knows what the Plaintiff is going to claim, what the Defense is going to say in response so that everybody puts the facts on the table and the jury can make a decision. I'm sorry. You're not going to be able to ambush somebody by coming in with a different figure than what you've provided them in your responses to interrogatories. They're not going to be able to come in and throw a new defense on you with a new witness that they've never identified because they didn't respond to discovery. That's the reason you have discovery is so that nobody is caught off guard when you get to trial. So, I'm - I mean if you gave a different figure in your discovery requests, now he can't go back and say, "Well, I went and rechecked my documents in preparation of testimony at trial and I came up with a different figure," because they're entitled to know that. They've prepared their defense based upon him saying his damages were 16-53-89.

A This was given to them on that date and these other deals come good after that date. That's the part of - this was deals that were ten percent down.

THE COURT: Sir, I'm sorry, when you filed this lawsuit you had a claim for damages.

A Right, and ---

THE COURT: When you filed this lawsuit, you said, "They owe me unpaid wages." They said, "What are the unpaid wages we owe you," and that is the figure that was given to them and that's ---

A And I didn't give them this but on this date ---

THE COURT: I don't know that you can ---

A --- and that was back in 2008 because that was a full down.

THE COURT: Sir, we're discussing a legal issue, okay? Let's don't discuss anything with your attorney at this time. All right?

So, I'm going to sustain the objection - well, I think it's probably more of a post-trial motion in that if they come back with a judgment in favor of Mr. Oxentine in excess of the 16-53-89 you're going to be able to get it reduced to that figure. I'm trying to decide how do we handle it at this point in time.

MR. CANTY: Your Honor, if I may, wouldn't that be proper subject for impeachment under cross?

THE COURT: No, sir, not unless you're willing to let them just call whoever they want to as witnesses to ambush you all.

MR. CANTY: Well, I mean to confront ---

THE COURT: And then let you all just deal with it on cross.

MR. CANTY: --- to confront this witness with that discovery response?

THE COURT: No, sir, the purpose of discovery is to let the other side know what your testimony's going to be, what you're asking for and why you think you're entitled to what you're entitled to. Their discovery responses to you all is to let you know what their defense is, why they don't think they owe it and who they're going to call as witnesses just like you are. So, that's the reason we have discovery. So, I guess how do we address this? What is your motion and what is it you're asking me to do?

MR. WILKERSON: If, Your Honor, please, my objection is to object to testimony that's inconsistent with his answers to interrogatories, and I would move to strike that testimony and ask the court to ask the jury to disregard it and have him testify consistent with his answers to interrogatories.

THE COURT: All right, Mr. Connell?

MR. CONNELL: Your Honor, our position is is that the numbers we gave them thousands of pages. Mr. Oxentine looked at it. Mr. Oxentine came up with a number. Mr. Oxentine gave that to us. Mr. Oxentine has since looked at it again and figures that there is another discrepancy and Your Honor's going to see all sorts of discrepancies throughout.

THE COURT: So, when did you all advise them that there was a discrepancy and that your first figure was not accurate?

MR. CONNELL: We didn't advise them because we didn't know until just recently.

THE COURT: All right, all right, I'm going to bring them back in and tell them to disregard his answer to the amount of damages because it's inconsistent with what he told the defense during their discovery.

MR. CONNELL: Why don't we do this, Your Honor? We'll - I'll let him testify as to what the number was at the time that he - the interrogatories were answered, the \$1658, whatever it is. I'll let him testify to that and we'll withdraw our claim for the 3200 and some odd dollars.

THE COURT: That sounds like a reasonable solution.

MR. WILKERSON: You're going to explain that to the jury that that number is - that testimony is stricken?

THE COURT: Yeah, I'm going to go ahead and strike it - well, yeah, I think the easiest thing is for me to just strike his last testimony, his response to the question and then let you ask it and he can give the 16-53 figure.

MR. CONNELL: All right, sir.

THE COURT: All right?

MR. WILKERSON: If Your Honor, please, if this is going to come up again, I do have a clean copy of their discovery responses, could I ---

THE COURT: You're going to need to ---

MR. WILKERSON: --- pass it up?

THE COURT: --- no, raise your objections when it comes up because I'm not going to be sitting here looking through answers to interrogatories. So ---

MR. WILKERSON: I don't ask you to. I just want to make sure the record is clear that that's what they answered and they're marked as a Court's Exhibit if I may.

THE COURT: Well ---

MR. WILKERSON: To file, to file their answers to interrogatory.

THE COURT: And why do you want it as a Court's Exhibit?

MR. WILKERSON: Because first of all, we've just had this issue come up and all that the record reflects is that I just read what they said in their answers to interrogatories. Secondly, I expect it might come up in other testimony and I'd just like to have the record be clear as to what they said they were claiming.

THE COURT: Well, do we want to go ahead and make all of the Plaintiffs' and all of the Defendants' responses Court Exhibits?

MR. WILKERSON: It is, it's a consolidated response.

THE COURT: What's your - I don't, okay, we'll make it a Court's Exhibit.

MR. CONNELL: I know what your ruling's going to be on that one.

THE COURT: All right, Court's Exhibit Number Two.

(Whereupon, Court's Exhibit Number Two [Answers to Interrogatories] appropriately marked.)

MR. CONNELL: Okay, I want to look at it once you, once you've marked.

THE COURT: Anything else before we bring the jury back?

MR. CONNELL: No, not from me, Your Honor.

THE COURT: All right, let's bring the jury back in.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right, ladies and gentlemen, welcome back. While you were out we did have to address a legal matter in which I sustained an objection by the Defense and you're to disregard the last response given by this witness in response to the - his attorney's question as to the amount of damages that he sustained. That answer is to be disregarded.

All right, Mr. Connell?

BY MR. CONNELL:

Q All right, Mr. Oxentine, we were talking about how much you were owed. Tell me, sir, if you would, please, how much you're owed?

A On November the 28th of 2008, on that Friday they should have paid me \$1653.89.

Q All right, come up to this board if you would, please, sir, and write that number and write your name at the top here. Leave enough room for everybody to write their name at the end of the time, end of the day.

A (Complies with request.)

Q All right, thank you, sir. Go back and sit down.

A (Complies with request.)

Q All right, Mr. Oxentine, tell me what if any discussions you had with any employee of Westgate who's sitting at the table about your wages.

A Colleen.

MR. CONNELL: Your Honor, that's an employee, I mean.

MR. WILKERSON: We, we go - I have no idea what he's going to say, Your Honor. We have to deal with whatever hearsay. Just because it's an employee doesn't mean it's not hearsay. We have to figure out what he's going to say. I don't know what's going

to come out of his mouth.

THE COURT: You all had opportunities to conduct discovery, do depositions. If you've got an objection, let me know your objection. If not, then I'll address it when you raise your objection.

MR. WILKERSON: Thank you, Your Honor.

THE COURT: But I'm not going to keep sending the jury out every time to make them give testimony to determine whether it's admissible and then bring them back in to allow them to proceed. So, let's go ahead and proceed.

BY MR. CONNELL:

Q All right, Mr. Oxentine, who is this lady sittid [sic], seated at the table with the pink, pink?

A In charge of HR, Colleen.

Q What is HR?

A Human resources.

Q And what if any conversation did you have with her about the commissions owed to you?

A On Friday, November the 21st, when they let me go that morning, Bobby Adams and myself were sitting in her office and we were handing her anything we had to hand her to - before we leave and sign off on anything and she promised Bobby and myself that we would be paid

these three commissions which I give her a piece of paper on, the \$1600, the next Friday because they paid every two weeks. So, it was due to me the next Friday.

Q All right, and what three commissions are you talking about that you were owed on what three deals that you had sold?

A Okay, on November the 17th, the day they say they fired me, I was owed on customer id - gets an id, I don't want to give the name.

Q Yeah, you can give the ID, that's fine.

A 3381954, I sold a \$10,200 upgrade. I got \$5,100 down, which was not ten percent but 50 percent and we financed \$5100. That was ---

Q All right.

MR. CONNELL: We offer that as Plaintiff's Exhibit Number One.

THE COURT: Any objection?

BY MR. CONNELL:

Q Give me the other ones, just let them see them.

A Okay, on November the 10th ---

Q Hold, don't say anything yet. Just give me the ---

MR. WILKERSON: Could I approach the bench for a second, a moment?

THE COURT: All right, sir.

MR. WILKERSON: Thank you.

(Whereupon, a bench conference is held in the presence but out of the hearing of the jury.)

THE COURT: Any objection?

MR. WILKERSON: To that document, no.

THE COURT: All right, Plaintiff's Exhibit Number One admitted into evidence without objection.

(Whereupon, Plaintiff's Exhibit Number One [Proposal 3381954] admitted into evidence and appropriately marked.)

MR. WILKERSON: If, Your Honor, please, I would like our, our continuing objection to that transaction based upon the matters that we just asserted at side bar. I'd like to have the opportunity to put that on the record at a later date.

THE COURT: All right, remind me and we'll do it.

MR. WILKERSON: I will, yes, sir.

THE COURT: All right.

BY MR. CONNELL:

Q All right, let me, let me ask this, how do you know that was not in the reserve account? Tell me how you determined that?

A Very easily.

Q I think that'll resolve this issue.

A Okay, on 4-21 of 2006, my reserve was full and it was paid up to \$3500 and there's ---

MR. WILKERSON: Objection, Your Honor, if he's going to put a document in let's see the document.

A Sure, here.

MR. CONNELL: We're not putting it in. You can look at it.

A And that was two and half years prior to that.

THE COURT: Sir.

MR. CONNELL: Don't say anything till, till we get.

A Okay, oh.

MR. WILKERSON: Can we have the bench?

THE COURT: No.

All right, ladies and gentlemen, I'm going to excuse you back to the jury room for just a minute. Please do not discuss the case even among yourselves at this point in time. Please leave your pads in the jury box.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, sir.

MR. WILKERSON: If Your Honor, please, first of all this is a document that is dated 4-18-2006.. This transaction that he's talking about took place in 2008. The position he's taking is that

this record, this document reflects that his reserve account was at \$3500. If you'll recall, there was earlier statements to the Court that in the Parker matter it was argued that the contract provided that the reserve account would max out at \$3500. The problem that was raised in the Parker case was that more than \$3500 was placed in the reserve account on multiple, on multiple times and that was part of the complaint there. Now, he's trying to claim that as of 2006 his reserve account was at \$3500 to support his argument that his transaction in 2008 did not and should not have gone into the reserve account. The fact is and we will establish through testimony that that commission went into the reserve account. Right, wrong or indifferent, it was in the reserve account as of the time that that judgment went in, and so, we're going to have this problem with every single witness.

THE COURT: Yeah, and I think the only way we're going to be able to reduce it - we're going to have to get into this other case. Now, there was a summary judgment and I granted summary judgment that says they're not entitled to any funds in the reserve account that existed as of January 29th, 2010. So, it now becomes a factual issue as to what if any of their unpaid wages, number one, are they unpaid wages and, number two, were any of those paid into the reserve account? I'm going to give you a jury instruction

and part of the law in this case I'm going to instruct them is if they find that any of these wages that are claimed in this lawsuit are part of that - were part of that reserve account as of January 29th, 2010, then they're not entitled to judgment for those funds because that would be a double judgment; and so, the judge - and that's the only way I know to cure it is with a instruction during my charge on the law and they are going to have to make a factual finding as to whether or not there are any unpaid wages in this case and if they're unpaid wages in this case were any of those unpaid wages a part of the reserve account as of January the 29th, 2010, and I think that's going to be a factual issue for the jury to decide.

MR. WILKERSON: Your Honor, with all due respect, I understand, understand your view on that and the problem though is that whether or not the funds were in the reserve account is not going to be a matter of factual dispute. Whether or not they should have been in the reserve account under their interpretation of the contract perhaps would be, but the only evidence - and they have the same records that we do. If they had taken the time to review them to the same extent that we have they would know exactly where that fund went and it's in the reserve.

THE COURT: But it doesn't matter whether they should have

been there or should not have been in there. The fact of the matter is they were in there at the time we settled or you reached a settlement on the class action and the settlement of that class action was that negates any claim you had to the funds in the reserve account. So ---

MR. WILKERSON: Precisely.

THE COURT:--- I mean, that's the only way I know to handle it.

MR. CANTY: Your Honor, I would just point out our concern again. There were representations made through discovery as to what was in the reserve account, and I think the issue that will be recurring is did, without any disclosure to us, unpaid wages ---

THE COURT: Well, they're going to be - you're going to be able to get into what your unpaid wages are. It's going to be up to them. If they're claiming that that is a claim for something that is - was in the reserve account, they're going to have to put it up. Now, if that - if their testimony as to what was in the reserve account differs from what they provided you in discovery ---

MR. CANTY: It's part of the record.

THE COURT: --- then they're playing by the same rules that

we were in the direct, on the - your claim for damages. They have - they're going to have to rely on what they provided you in discovery as to what was in that reserve account.

MR. CANTY: Very good.

MR. WILKERSON: Your Honor, if I may, and I didn't want to go here, but no discovery was served in this case. There is no response to discovery by the defendant in this case. He's referring to discovery in the Parker case.

MR. CANTY: Correct, and that's what the basis for the settlement and the order was.

THE COURT: Yeah, that's the basis for the settlement. So, whatever - that's what you based your motion for summary judgment on was based ---

MR. WILKERSON: Based summary judgment on the order, Your Honor.

THE COURT: On the order.

MR. WILKERSON: Yes, sir.

THE COURT: Yeah, and that order was issued, I mean, and there - I mean, are you saying that the discovery you provided in that case was not accurate?

MR. WILKERSON: No, I'm just, I'm just wanting to make sure that you understand that in terms of discovery responses in this

case, there is none. Now, whatever discovery responses we made and I'll, I'll stand by whatever those discovery responses were.

THE COURT: Okay.

MR. WILKERSON: And they - the documents that they got from us in discovery were voluminous and they got all of our accounting for, for reserves and they took great issue with the way the accounting had taken place and they're trying to take great issue with it again and that's just not fair.

THE COURT: Okay, well, the fact of the matter is is you had a class action lawsuit. That class action lawsuit has been settled, that case is over with. So, you're not going to be able to claim any unpaid wages because they haven't satisfied that judgment or because you claimed them in that one. That issue is over and done with. All we're dealing with in this is a claim for unpaid wages that were not addressed in the class action lawsuit and that's it.

MR. CONNELL: And Your Honor, I will point out to Your Honor that of the 360 people in the Parker case, we only have 18 or more or so or 20 and that was the reason why we had the memo of understanding because we wanted to cull that out so that, so that they would understand upfront that these people claim something more.

A Right, right.

THE COURT: Okay, well, I mean you're confusing the Court. So I know it's going to be confusing for the jury, but we're going to struggle through this the best way we know how. All right?

MR. WILKERSON: Yeah.

THE COURT: Yeah, right now we've got two Court's Exhibits and one Plaintiff's Exhibit. All right. All right, do you need the exhibit?

MR. CONNELL: Whenever, I'm ready whenever you are, Your Honor.

THE COURT: Yeah, let's - we need the Plaintiff's Exhibit Number One back up.

MR. WILKERSON: You need it now?

MR. CONNELL: I do.

MR. WILKERSON: Okay.

MR. CONNELL: I need one for him to go on.

THE COURT: All right.

MR. CONNELL: Go ahead and mark that.

THE COURT: What are we marking that for?

MR. WILKERSON: Well, this is, this is a document that he's referred to and he's read from.

THE COURT: So, what are you doing?

MR. WILKERSON: Well, it's - I'm objecting to him testifying

from documents not in evidence, objection.

THE COURT: All right, overruled.

MR. CONNELL: No, I haven't offered it, Your Honor.

THE COURT: No, but he's going to be entitled to put it in when he cross examines if he wants to.

MR. CONNELL: I'm going to as soon as we get back in.

THE COURT: Okay, all right, anything further from the Plaintiff before we bring the jury in?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MR. WILKERSON: No, no, sir.

THE COURT: All right, let's bring the jury back in.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right, ladies and gentlemen, welcome back. Mr. Connell, you can continue with your questions.

MR. CONNELL: Thank you, Your Honor.

BY MR. CONNELL:

Q All right, Mr. Oxentine, we were talking about how you know what you're owed and how you know it's not in the reserves.

A Uh-huh.

Q Would you explain that to me please, sir?

A In 2006 my reserve was full.

Q Yes, sir.

A And it stayed full till the day I left. It was never touched from 2006 to 2000 ---

THE COURT: Hold for a second, we've got an objection.

MR. WILKERSON: Objection, hearsay.

A I've got my last pay sheet.

MR. CONNELL: Wait a minute. Don't say anything.

THE COURT: Sir, there's an objection. Let me explain to you as to all of the witnesses. When there's an objection then you stop talking and do not speak anymore at all until you're directed to do so, okay, sir?

A Yes, sir.

THE COURT: All right, all right, I'm going to overrule the objection. I don't think it's hearsay. Go ahead.

MR. CONNELL: All right, thank you, Your Honor.

BY MR. CONNELL:

Q Tell me again how you knew it was not in the reserves.

A My reserve hadn't changed for two years and three months. From that date till November of 2008 it stayed at 3500. No one touched it. They didn't bother it. They didn't add to it. They didn't take away from it.

Q Okay, and what's the significance of \$3500 reserve?

A That's when I first went to Westgate they said there was no reserve and the man that told me that was George Oliver ---

Q An employee?

A --- and he give me a piece of paper that I give you from Florida ---

MR. WILKERSON: If Your Honor, please, objection. Number one, that's hearsay, and number two, it's contrary to the specific language of a contract.

THE COURT: Sustained as to hearsay. That is hearsay.

MR. CONNELL: All right.

THE COURT: I sustain the objection.

BY MR. CONNELL:

Q Let's talk about when you went to Westgate. What if any newspaper articles did you see?

A George Oliver handed me a newspaper article.

Q Who is George Oliver?

A He is a sales recruiter from Florida and ---

Q All right, he came up here?

A Yes, sir, and he called me and he said, "Would you come by," and I was working at another resort and he said, "I want you to leave that resort. We don't have a reserve. We don't have

chargebacks. We'll pay you more. Come see us."

MR. WILKERSON: Objection, Your Honor, I don't know who this Mr. Oliver is. Objection, hearsay.

THE COURT: Sustained.

MR. CONNELL: Your Honor, can I delve into what Mr. - who he is and how he met him and that kind of thing?

THE COURT: Well, how you met him but you can't offer an out-of-court statement for the truth of the matter asserted.

MR. CONNELL: How about if he's an employee from Westgate, a recruiter?

THE COURT: Huh-uh, no.

MR. CONNELL: All right.

BY MR. CONNELL:

Q Who is Mr. ---

A You want a ---

Q Yeah.

A You want his card? It's Westgate card, not mine.

Q Okay, who is, who is Mr. Oliver? Just tell me who he is. Don't tell me what ---

A His father used to be the judge here in Horry County, Judge Oliver.

Q Okay, and where did you, where did you meet him?

A At the Holiday Inn.

Q All right, is that the Westgate properties?

A Uh-huh, yes, sir.

Q And when did you meet him there?

A In March of 2005.

Q All right, and where were you working at that time?

A Plantation Resort in Surfside Beach.

Q All right, and how long were you - how long had you been working at Plantation Resort of Myrtle Beach?

A Off and on about four and half years.

Q All right, and as a result of the conversation did you decide to go to Westgate?

A Sure, no chargebacks, no ---

MR. WILKERSON: Objection.

THE COURT: Sustained.

MR. CONNELL: All right.

BY MR. CONNELL:

Q Don't, don't say what he said, but did ---

A Okay.

Q --- what did you, what did you do then? Did you go to Westgate and ---

A Yes, sir.

Q --- and take a job there?

A I went to Westgate and went to work and, and was there for about three weeks. I had sold a couple of units to people and it was going to take another six weeks or four weeks before I got paid on them. They come to me one morning, Deborah Turner did, the boss.

Q Who, who is Deborah Turner?

A Deborah Turner was the operations manager.

Q All right.

A And she come to me and said, "Ned, you have to sign this contract and if you don't sign it" ---

MR. WILKERSON: Objection, Your Honor, hearsay. I - if he signed the contract, we got to deal with the contract itself and what he's talking about now is just rank hearsay.

MR. CONNELL: Your Honor, she's the general manager of Westgate. She's the one he was working for. She's one of the Defendants, the head agent there.

THE COURT: All right, overruled. I'll allow it. Go ahead.

MR. CONNELL: All right.

BY MR. CONNELL:

Q Tell me what Ms. Turner told you.

A She said if I didn't sign it, I wouldn't work there anymore

that day and I wouldn't be paid my commissions on the deals I'd already sold.

Q All right.

A And I couldn't go back to the place I had just left. So, I would be without a job. So, I was under a, under a brick.

Q Let me let you look at this contract. I know this has Judy Parker's name on it, but tell me if that is ---

A It's - yes, sir.

Q --- similar ---

A Similar.

Q Look at, look at each page, please, sir.

A So, there was 11 pages I had to look at and sign and give right back to her.

Q Okay.

MR. CONNELL: Your Honor, we would like to offer this. It's the next in line. It's not Mr. Oxentine's, but it's a similar contract to what we're going to be talking about.

MR. WILKERSON: Your Honor, I've got Mr. Oxentine's contract.

MR. CONNELL: You can - if you have it? You can give it to me then. That's fine. I was going to offer one, but I'll put them all in if you want.

THE COURT: All right, I sustain the objection. Let's mark

that one as Plaintiff's Exhibit - what is that?

COURT REPORTER: Two.

MR. WILKERSON: Two.

THE COURT: Plaintiff's Exhibit Two is inadmissible. I sustain the objection.

(Whereupon, Plaintiff's Exhibit Number Two [Employment Agreement - Parker] marked for identification.)

MR. CONNELL: Okay.

THE COURT: All right, now we've got Plaintiff's Exhibit Three?

MR. CONNELL: Three, yes, Your Honor.

THE COURT: All right, any objection to Plaintiff's Exhibit Three?

MR. WILKERSON: No objection.

THE COURT: All right, Plaintiff's Exhibit Three is admitted into evidence without objection.

(Whereupon, Plaintiff's Exhibit Number Three [Employment Agreement - Oxentine] admitted into evidence and appropriately marked.)

A Okay.

Q Okay, is that your signature?

A And I marked out that part right there.

Q All right.

A That's my signature.

Q We're going to talk about that in just a minute.

A Okay.

Q All right, tell me if you would, is that your signature on it?

A Yes, sir.

Q All right, and let's see here. Okay, now, there's some marking on page five.

A Uh-huh.

Q Was that marked out by you?

A Yes, it shed - unless - if they ---

Q You don't have to ---

A Okay.

Q I just wanted to show that it's marked.

A Sure.

Q You don't - it doesn't make any difference to this case I don't think. Okay, now, who is Connie Sharp?

A She's in charge of bookkeeping, payroll in Florida.

Q All right, and is there a bookkeeping or payroll officer at the Westgate Resort in Myrtle Beach?

A No, sir.

Q All right, explain if you would to these ladies and gentlemen of the jury how it was that you would get paid, who you would talk to and what process was in effect as to how you were paid.

A If you were not correct or not the same as what you thought you were going to get paid you would talk to either Deborah Turner or Doug Boykin who was her assistant at the time.

Q All right, let's go back. Deborah Turner was the general manager?

A General manager.

Q And what would Mr. Boykin be?

A He would be her assistant, her ---

Q Okay, were all, all the checks out of Florida?

A Yes, sir.

Q All right, and what is Mr. - what did Ms. Sharp have to do with deciding how you were going to get paid?

A You could call her, but it would be hard to get in touch with her.

Q Okay.

A It'd be better to try to go through Deborah.

Q All right, and had you had a - did you ever have any conversations with Connie Sharp about your payments?

A Once or twice.

Q Okay, and tell me about those conversations, please, sir.

A They had charged my account and she put the money back in my account.

Q Okay, and did you ever go to Ms. Turner or anyone else about the payment you're seeking in this case?

A Yes, well, I went to Colleen.

Q You've already said you went to this lady sitting - did you go to, did you go to Ms. Turner and ask about the money?

A No, Ms. Turner had been fired at that time.

Q All right, did you go to Mr. Boykin and ask about the monies?

A No, strictly HR.

Q Okay, had you ever seen any Sun News ads by Westgate prior to being employed there about chargebacks?

A Yes.

Q All right, and how did that figure into your decision to work there?

MR. WILKERSON: Objection, Your Honor, I mean, if we're going to put an ad in, let's put the ad in. Don't talk about ---

THE COURT: He's not offering the ad in.

MR. WILKERSON: Well ---

MR. CONNELL: I got it. It's next in line and I'd like to put it in.

THE COURT: Okay, we'll take a - let's get it marked and let him take a look at it.

MR. WILKERSON: Let's take a look at it. No objection.

THE COURT: All right, that'll be Plaintiff's Exhibit Number Four. Let's get it marked.

MR. CONNELL: Yes, sir, all right.

MR. WILKERSON: If Your Honor, please, I would offer a relevance objection on the same basis we talked about earlier. It deals with an issue that we think has nothing to do with this case. I agree that it is a, it is a, an authentic document.

THE COURT: All right, Plaintiff's Exhibit Number Four, so, you're objecting or not objecting?

MR. WILKERSON: I am objecting on relevance, Your Honor.

THE COURT: Okay, all right, I'm going to - Plaintiff's Exhibit Four admitted into evidence over Defendant's objection.

(Whereupon, Plaintiff's Exhibit Number Four [Sun New Ad] admitted into evidence and appropriately marked.)

BY MR. CONNELL:

Q All right, does the ad say no chargebacks?

A In-house financing, paid training, no chargebacks, no car tours, call Tracy Stelly [spelled phonetically], drug-free workplace.

Q Okay, all right, now, can you tell me who Mr. Siegel is, Richard Siegel?

A Richard Siegel is David Siegel's son.

Q All right, and can you tell me what if any involvement you had with Mr. Siegel and what his job was at Westgate or is at Westgate?

A He come up and relieved Deborah Turner of her job after she had been up there about two years and started taking over her job.

Q All right, and how long did you work with him?

A Over a year.

Q All right, and what if any conversations did you have with him about the payment of your, of your commissions?

A We didn't have too many conversations. He cussed me a lot; and so, I didn't put up with that. I'd walk out on him.

Q Okay.

MR. WILKERSON: Objection, relevance. Move to strike.

THE COURT: All right, sustain the objection. Disregard the last statement given by the witness.

Q All right, let me show you this and ask you if you've ever seen this, please, sir.

A Yes, that was given to me by George Oliver.

Q But, but, but before you go anywhere, let them look at it.

A Okay.

MR. WILKERSON: Your Honor, we object to relevance.

THE COURT: Well, I mean, I don't know what it is or anything like that. So, I'm going to allow him to lay the groundwork to see if it's relevant or not.

MR. WILKERSON: Thank you.

THE COURT: Let's get it marked for identification.

MR. CONNELL: Yes, sir.

(Whereupon, Plaintiff's Exhibit Number Five [Sales Opportunity Document, Brochure] marked for identification.)

BY MR. CONNELL:

Q Now I'll show you Plaintiff's Exhibit Number Five which is the sales opportunity document. Was that one of the documents that was presented to you?

A Yes, I give it to you. George Oliver handed it to me.

Q All right.

A And I believe it's got his picture in here somewhere.

Q All right.

A And, and in the back it says no chargebacks.

Q All right.

A Right there, no commission chargebacks right there.

Q All right, was that one of the documents that induced you to work at Westgate?

A Right, right.

MR. CONNELL: Your Honor, we'd like to offer it.

THE COURT: All right, Plaintiff's Exhibit Five admitted into evidence over Defendant's objection.

(Whereupon, Plaintiff's Exhibit Number Five [Sales Opportunity Document, Brochure] admitted into evidence and appropriately marked.)

BY MR. CONNELL:

Q Okay, how long have you been trying to get the commissions, the \$1653.89? How long have you been trying to get them?

A Since November the 28th, 2008.

Q All right, that's all I have. Answer any questions they might have.

A Do you want the other two deals?

Q I don't want anything. You answer any questions he wants to ask you, okay?

A Okay, thank you.

Q Sure.

THE COURT: All right, cross examination?

MR. WILKERSON: Yes, Your Honor.

MR. CONNELL: You want me to move this?

MR. WILKERSON: Could we find a better place for this, Your

Honor. It stands between me and the jury and I'd like to ---

MR. CONNELL: That's the purpose of it.

THE COURT: All right, all right.

MR. WILKERSON: I don't mind him putting it up in the courtroom and we can walk around it, but I just don't like to be blocked away from it.

THE COURT: All right, sir.

CROSS EXAMINATION

BY MR. WILKERSON:

Q All right, Mr. Oxentine, you were employed at Westgate from April of 2005 until November of 2008.

A Correct.

Q Correct? So over three years you worked there.

A Three years, seven months.

Q All right, sir, and so, you got to know the operation fairly well, when commissions were earned, when commissions were due and how much the commissions should be; correct?

A Correct.

Q All right, sir, now, when you went to work in April of 2005 were you provided with and signed a document referencing terms of employment notice?

A Yes, sir.

Q That's your signature ---

A Yes, sir.

Q --- on the bottom of that document?

A Yes, sir.

MR. CONNELL: We don't object, Your Honor.

MR. WILKERSON: Without objection, Your Honor.

THE COURT: What is that?

MR. WILKERSON: It's going to be Defendant's One, I believe.

THE COURT: All right, Defendant's Exhibit One admitted into evidence without objection.

MR. WILKERSON: Thank you, Your Honor.

(Whereupon, Defendant's Exhibit Number One [Terms of Employment - Oxentine] admitted into evidence and appropriately marked.)

BY MR. WILKERSON:

Q Now, as a sales representative selling timeshares, you were entitled to a commission; correct?

A Correct.

Q And the commission is derived from the documents and the contracts that you signed outlining the terms of your agreement; correct?

A Correct.

Q Okay, I reference Plaintiff's Number Three, that is your contract of employment; correct?

A You said I started in March of 2005?

Q You started in April, I'm sorry, if I said March, I misspoke.

A I'm sorry. I'm sorry, April.

Q You started April 27th, 2005, I believe.

A Okay, in my contract you started October the 5th, 2005. Why the discrepancy of three or four months?

THE COURT: Sir, just listen to the questions and answer his questions.

A Oh, I'm sorry. Okay.

THE COURT: You can't ask the attorneys questions.

A Okay.

THE COURT: You're testifying as a witness in here to provide evidence to the jury.

A Okay, I'm sorry.

THE COURT: So, you're not allowed to ask questions. Just answer the questions asked of you, okay?

A Okay, yes, sir.

THE COURT: All right.

Q But this is your contract?

A Yes, sir, that's mine.

Q Okay, now, is this the contract that you said you were told you had to sign or else you couldn't get a commission?

A I couldn't get a commission. I couldn't get a tour. I would have to leave the building. I would be escorted out.

Q Okay, and so, you're claiming you signed that contract under duress? Is that what, is that what you're claiming?

A Under a brick.

Q Okay, but yet this document reflects that you, in fact, crossed out and changed some of the terms of the written agreement; did you not?

A Yes, sir.

Q Okay, were you under duress to do that?

A No, I told them I had to change that to sign it.

Q Okay, that was with regard to the covenant not to compete; correct?

A Right.

Q All right.

A Which I'm the only one that did that.

Q And so, you actually made changes to this contract that you said they made you sign?

A Right.

Q Okay, and you initialed that, you agreed to those changes?

A I agreed to the 3500.

Q All right, sir, now, that contract references a commission schedule as Exhibit A; does it not?

A It doesn't have a date on it.

Q All right, sir, does it bear your signature?

A Yes, sir but no date.

Q Okay.

MR. WILKERSON: We'd offer that as an exhibit, Your Honor.

THE COURT: Any objection?

MR. CONNELL: No, sir.

THE COURT: All right, that would be Defendant's Exhibit Two. I mean is that correct?

MR. WILKERSON: That's correct, Your Honor.

THE COURT: All right, Defendant's Exhibit Number Two admitted into evidence without objection.

(Whereupon, Defendant's Exhibit Number Two [Commission Schedule - Oxentine] admitted into evidence and appropriately marked.)

BY MR. WILKERSON:

Q All right, sir, you've given some testimony here today about chargebacks; correct?

A No, sir, I said that my reserve was full. I didn't say anything about chargebacks as far as that goes. I said my reserve was full.

Q You've testified extensively, sir, about what you were - what was represented to you about there not being any chargebacks ---

A Oh, that's ---

Q --- at Westgate.

A Yes, sir, that's what they told me.

Q Correct?

A Yes, sir.

Q Now, I would call your attention if I could to, again, this is Defendant's Exhibit Number Two, call your attention to page two under the section entitled chargebacks.

A Uh-huh.

Q It's entitled, that's number four entitled chargeback on cancelled deals. Is that correct?

A Yes, sir.

Q All right, sir.

MR. WILKERSON: Your Honor, I'd like to put this up on a screen here so we can all see it. Is that something we can do?

THE COURT: All right, let's lower the screen.

MR. CONNELL: Your Honor, could we come forward just a second before he proceeds?

THE COURT: All right.

(Whereupon, a bench conference is held in the presence but out of the hearing of the jury.)

BY MR. WILKERSON:

Q Okay, Mr. Oxentine.

A Yes, sir.

Q I'll try to stand where I'm not in anybody's way. This is page two of the commission agreement; correct?

A Correct.

Q And this document you signed and it says here under A, it says, "During the term that employee is engaged by employer no sales originated by employee for which employee has been paid a commission will be subject to chargeback except as otherwise set forth herein."

Is that what - did I read that correctly?

A Yes, sir.

Q Okay, and in fact, you were never asserted, assessed any chargebacks while you were still employed; correct?

A I was. I was charged back, yes, I have been charged back in 2006.

Q Show me the documents for that.

A I didn't bring it. I didn't know you wanted it today.

Q Okay, so, you claim you were, you were asserted a chargeback

while you still, while you were still employed there but you don't have any documents to support it?

A I have it at home. I didn't know I needed to bring it today.

Q Okay, now, but, but the terms of the contract say that there are no chargebacks on - while you're still employed, but then under Section B it says, "In the event employee is no longer engaged by employer, irrespective of the reason for termination of engagement, employee shall be charged back for all sales upon which commissions have been paid in the event the purchasers have or has not made six timely and consecutive monthly payments as well as the ten percent minimum down payment." Now, that relates to what happens in the event of you having left and how they then compute chargebacks on after you've left their employ; correct?

A No, that's different from the way you said it to everybody to start off with. You, you said that there was ---

Q Did I read it correctly?

A Well, you said - you didn't tell everybody there was six timely and consecutive payments when you first explained all this a minute ago..

MR. WILKERSON: Your Honor, please, could you assist me on that?

THE COURT: Listen to his questions, answer his questions.

A Right.

THE COURT: And then if you need to explain your answer, you can explain your answer.

A Okay.

THE COURT: But you must first answer his question, okay? So, ask your question again and then ---

A Okay.

THE COURT: --- respond to the question.

BY MR. WILKERSON:

Q Did I read that correctly?

A I read it the same as you read it, I guess you did.

Q All right, sir, and so, that relates to how chargebacks are computed after you leave employ; correct?

A Correct.

Q Now let's talk about this transaction that you've got here. Your contract provides for a, for lack of a better word, a sliding commission scale. Is that right?

A I don't understand your question.

Q How are commissions computed?

A Right here. I sign a contract. I would be paid eight percent after that date. The same man's in charge right now.

Q All right, sir, so, you were entitled to eight percent commission.

MR. WILKERSON: Let's mark this if we can, Your Honor as Defendant's Exhibit.

THE COURT: All right.

(Whereupon, Defendant's Exhibit Number Three [Memorandum] marked for identification.)

BY MR. WILKERSON:

Q Okay, so, as of 10-30-08, you're entitled to be paid eight percent commission on a sale; correct?

A Yes, sir.

Q Now, the contract provides that, that the commission changes based upon the volume per day or volume per - what's the VP - what are those initials in the contract?

A No, my commission stayed the same and it was paid to me after the full down payment was down, the ten percent that you said ---

Q Okay.

A --- at the very beginning.

Q And so, you were paid, you were paid after ---

A Eight percent.

Q --- after the full down payment had been paid, you were paid eight percent commission.

A Well, I was supposed to but I never got paid on that one.

Q All right, sir, now this one occurred on what day you said?

A November the 17th..

Q November the 17th.

A The day I was left off and I had 50 percent down, not ten.

Q , All right, well, the amount of the down payment doesn't affect the amount of the commission; does it?

A No, sir.

Q Just as long as it's ten percent.

A It just makes it better for the company, more cash for them.

Q All right, sir, and you were not paid that commission. You were not - in due course, you were not generally paid commissions until 21 to 28 days after the, after the, the, the ---

A That is correct.

Q --- the deal had been struck; is that right?

A Right, uh-huh.

Q And so, that due date occurred after you had been terminated from employment; correct?

A No, I sold this before I had been terminated.

Q But the date that the commission would have been paid was after you, after you left; correct?

A Well, it was supposed to have been paid on my next pay period but I was not given a chance to stay there till I got paid. The company kept all my money.

Q All right, sir, but, but - and did I - did what I say - is what I stated, was what I said correct and that is in due course you would not be paid on the day that you made the transaction. You would pay, be paid 28 to 21, 21 to 28 days later; correct?

A Correct.

Q And that period occurred after you had been terminated; correct?

A Correct.

Q All right, sir.

MR. WILKERSON: Bear with me for just a moment, Your Honor?

BY MR. WILKERSON:

Q All right, Mr. Oxentine, you talked about my opening statement. I want to ask you some questions about how the - about what happened - what had to happen under the contract in order for there to be a commission that was, that was - that had been earned, and that is you had to have a commission that was a sale that occurred; right?

A Yes, sir.

Q And the sale had to involve at least a ten percent down payment that was paid; correct?

A Correct.

Q So, tell us what a pender is.

A A pender is where instead of putting \$1,000 down they'd put \$300 down for three months consecutively.

Q Okay, and so, a pender would be where the down payment was actually pending. Is that, is that what that meant?

A That's correct.

Q And the commission was not, was not earned until such time as the complete down payment had, in fact, been paid; correct?

A That is correct.

Q So, in those situations where they were paying \$300 a month you had to wait until the last payment was made until the down payment had been fully paid at which time under your view of, under your view of the world, the commission would have been due at that point; correct?

A That is correct.

Q Would have been earned at that point; is that correct?

A That's correct.

Q All right, sir, and then as we've already stated they were paid 21 to 28 days after the business became good or a good deal.

A Yes, sir.

Q All right.

MR. WILKERSON: One moment, Your Honor.

BY MR. WILKERSON:

Q All right, so that there won't be any dispute, Mr. Oxentine, you're claiming that you should be paid a commission of \$1,653.89

on a contract that you've identified by number but it also bears the name of the purchaser; correct?

A I also have more contracts that totaled up the total amount. I have more contracts right here.

Q The contract that you put into evidence that you claim supports your claim is this contract.

A Plus these.

MR. WILKERSON: Your Honor ---

THE COURT: Well, wait, sir, sir, listen, do not answer a question until he has complete, finished answering - asking the question; okay?

A Okay.

THE COURT: What's happening is you're jumping in and trying to cut him off and it's ruining his - the way he can present his case.

A Okay.

THE COURT: So, do not respond until he finishes asking a question; okay?

A Okay, uh-huh.

THE COURT: All right, sir.

BY MR. WILKERSON:

Q You presented Plaintiff's One in support of your claim for

a commission; correct?

A One of the three, yes, sir.

Q You submitted this document as evidence in this case; correct?

A As, yes, sir, as one of the three that you owe me on.

MR. WILKERSON: If Your Honor, please, you already ruled on this issue.

THE COURT: I mean I don't know what you all are talking about.

MR. WILKERSON: Okay.

BY MR. WILKERSON:

Q Mr. Oxentine, you've presented one document that's marked Plaintiff's Exhibit One that is in evidence; correct?

A Yes, sir.

Q And you claim that you're entitled to a commission of \$1,653.89 on that transaction; correct?

A No, sir, on all three transactions.

Q Okay, your lawyer didn't put in those transactions.

A There they are.

Q Okay, how, how do you - that was going to be my next question, how do you compute your, your commission based on this transaction? You're not entitled to \$1,653.89 on this transaction; are you?

A No, sir. Right here on that transaction I was eight percent.

So, I should have made \$416 on that transaction. On these two transactions, which on November the 10th, 2008, full ten percent down, on November the 3rd, 2008, with these contract numbers, is the rest of the 1600.

Q One contract that you've presented is Plaintiff's Exhibit Number One; is that correct?

A I presented one out of the three, yes, sir.

Q All right, sir, and that's for George and Janet Coquette [spelled phonetically]; correct?

A I didn't want to use their name, but yes, sir.

Q It's in the record.

A Okay.

Q All right, sir, and does this accurately reflect the numbers that you've put in?

A It accurately reflects all three plus the insurance they took out on me, yes, sir. I have all that. I give this to Colleen when I left.

Q Okay.

A She has this.

MR. WILKERSON: Your Honor, I have no further questions at this time of this witness. Thank you.

THE COURT: All right, redirect?

MR. CONNELL: Your Honor, we'd like to offer the two contracts he discussed as additional exhibits.

THE COURT: Any objection?

MR. WILKERSON: Your Honor, it doesn't have to be this difficult. I don't understand why it is this difficult. They put in one document, said that supported his claim and now he's claiming multiple other documents to support his claim. This is improper redirect.

THE COURT: Okay, I agree. I sustain the objection. MR.

CONNELL: All right.

THE COURT: Let's mark those as, be Plaintiff's Exhibits Number Six, Plaintiff's Exhibit Number Seven.

(Whereupon, Plaintiff's Exhibit Number Six [Proposal - Wells, 5895247] and Plaintiff's Exhibit Number Seven [Proposal - Byars, 2725342] marked for identification.)

THE COURT: Redirect deals only with those issues brought out on cross examination. He didn't bring that out. That was in response. So, I'm going to sustain the objection.

MR. CONNELL: All right, thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. CONNELL:

Q All right, let me ask this question. As I understand it from

the contract, if somebody made five - six timely payments then you would get the rest of your money; is that right?

MR. WILKERSON: Objection, the contract speaks for itself.

MR. CONNELL: Your Honor, he, he's got it up on the screen.

I ought to be entitled to ask questions about ---

THE COURT: All right, I'll allow it. Go ahead.

MR. CONNELL: All right.

BY MR. CONNELL:

Q You sold it before you left. Isn't that right?

A Yes, sir.

Q All right, you were an employee at that time. Isn't that correct?

A Yes, sir.

Q All right, now, and you - and unusually you had a 50-percent down payment. Is that usual in the timeshare industry, to have a 50-percent down payment?

A No, sir.

Q All right, now, how much - do you know how much time these people were going to finance that for?

A It's on the contract.

Q All right, how much time was it going to be?

A They were going to pay \$212 a month and 50 cent till they paid

off \$5100.

Q All right, \$212 a month?

A Right, till they paid off.

Q So, under their theory, how long could it take to get your money if they were going to pay \$212 a month for six timely payments for the next how many years?

A Ten years.

MR. WILKERSON: Objection, Your Honor, that's not a theory, that's the contract.

THE COURT: Overruled, go ahead.

Q All right, so, in other words, Mr. Oxentine, stay with me here, if these folks had paid three payments, missed a payment, paid three payments, missed a payment and then finally did that over a ten-year period, you'd never be paid; would you?

A No, sir.

Q All right, and you sure wouldn't be paid within seven days of when you left; would you?

A No, sir.

Q Thank you, sir.

THE COURT: All right. You may step down.

MR. WILKERSON: Mr. Oxentine, if ---

THE COURT: Hold it, hold it, hold it, hold it.

MR. WILKERSON: Sorry.

THE COURT: Are you - what new matter did he bring up that was not addressed?

MR. WILKERSON: He brought up - he asked him about computation of the six timely monthly payments.

THE COURT: Okay, and you asked him that on cross examination as well.

MR. WILKERSON: So, but I asked him how it was, it was computed. He, he, he created some inference that there's some, some, some deal here that it wouldn't ever get paid. I want to show that it would get paid after six months if it were paid.

MR. CONNELL: Your Honor, that's improper re-recross like that.

THE COURT: If it was paid. Well, I'll allow you very limited question, but we're not - the way we're going to proceed from now on is direct examination, cross examination, redirect only as to new matters brought up on cross that were not directed on direct and that's it.

MR. WILKERSON: I understand the ruling, Your Honor

THE COURT: Because we've got about 40 witnesses and we're not going to get this case in any time soon based upon the way you are projecting it. So, very briefly, let's go.

MR. WILKERSON: I understand the ruling. Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. WILKERSON:

Q Mr. Oxentine, on the contrary, if that customer had, in fact, made six timely monthly payments the first six months they were due that would have complied with that provision; would it not?

A If they had made six timely payments, but I never knew if they did or didn't because I'm not in charge of bookkeeping, but most of the time they never let us know.

MR. WILKERSON: Thank you, Your Honor.

THE COURT: All right, you may step down.

A Thank you.

THE COURT: All right, let's raise the screen. Turn the lights back on, please.

All right, ladies and gentlemen, it's five - after 5:20. We're going to go ahead and break for the evening. Leave your notes in your jury box. We'll collect them and we'll distribute them back out to you tomorrow morning. Please be back in the jury room at 9:15 tomorrow morning. We'll try to get started as soon after 9:15 as we can; okay?

Do not discuss the case even among yourselves at this point.

in time. Don't conduct any investigations or try to find out anything about the case and I hope everybody has a good evening. We'll see you back at 9:15 tomorrow morning. Thank you very much.

All right, let's make sure we've got all of the exhibits up here. They said you all have got one over there on you all's. All right, let's remain seated while the jury's excused. Everybody stay seated.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, all right, anything from the Plaintiff before we break for the evening?

MR. CONNELL: Your Honor, we, as you, as you know, we had moved for the Court to declare the contract illegal under the Payment of Wages Statute based upon the six timely payments and our memorandum which you have to pay within seven days thereafter and we'd ask Your Honor to look at that when he has a chance and issue - give us a ruling on that issue. It'll be critical to our presentation the next couple of days.

THE COURT: All right, yes, sir.

MR. EPSTEIN: Well, Your Honor, I mean, I don't - there's no procedure for you to issue what is essentially a summary judgment without a motion being pending in the middle of a case where you're

eliciting testimony about the very contract that they're now trying to declare illegal. First of all the issue has not been properly framed. The contract language is what has to be the focal point of any analysis. You've seen the contract language. It does not inherently mean that the parade of horrors that they're trying to portray is automatically going to happen. There are plenty of instances and plenty of scenarios where the reserve and all we're talking about here is the very same reserve that the other case specifically dealt with and all of the issues concerning the legitimacy, the enforceability of that reserve provision were set forth and argued and alleged in that case and have now been adjudicated in that case, but notwithstanding the fact that they're now trying to circumvent the judgment in the other case, it's not properly before you. All we're doing right now is tracking where the commissions, if they were earned, if they became payable, where they went, and at the end of the day if they went into the reserve and they went into the reserve and were there prior to January 29th, 2010, the Court has ruled on that and the legality or illegality of the contract is not before this Court. It was before Judge Baxley and Judge Baxley entered a judgment that did not rule on the illegality because that was not what the settlement was, and by agreeing to the settlement and by pressing that the court would approve the

settlement as the settlement of that case, whatever issues were surrounded, the enforceability or non-enforceability of that reserve provision were subsumed by the judgment and have been fully and finally adjudicated forever. We're not resurrecting that issue. It is not properly before this Court. So, you know, we're really looking at two different things. Number one, there's no proper motion before you that you could even rule on as a matter.

THE COURT: Well, I think I can take it as a motion for summary judgment saying there's no disputable fact. The contract is what the contract is. The statute is what the statute is; and so, either the contract complies with the statute or the contract is illegal per the statute.

MR. EPSTEIN: Well, then how isn't that already subsumed in Judge Baxley's final judgment because it deals ---

THE COURT: Well, did he, well, did he say it complied with this statute or he said it did not comply with the statute?

MR. EPSTEIN: No, one of the allegations in that complaint ---

THE COURT: Yeah, but the court never ruled on it.

MR. EPSTEIN: Well, it doesn't - the judgment adjudicated that though.

THE COURT: And what did it say?

MR. EPSTEIN: Well ---

THE COURT: Did it comply with the statute or it did not comply with the statute?

MR. EPSTEIN: Well, no, well, clearly, Judge, Your Honor, it, it, well, it didn't say specifically one way or another because that issue while it was raised and was, in fact, litigated in that case was never determined by virtue of the settlement.

THE COURT: Well, then it's not res judicata if it was never determined.

MR. EPSTEIN: Well ---

THE COURT: Res judicata means you have a determination of an issue with like parties and you can't go back and re-litigate it. If that was an issue that was never addressed by the court, then it's not res judicata.

MR. EPSTEIN: It was addressed by the court. It was fully litigated by the court and the judgment ended all of the litigation surrounding the issues that were raised in that case.

THE COURT: So, that judgment ruled that it was not contrary to state law or that it was in compliance with state law?

MR. EPSTEIN: Well, it didn't say either. What it said was is that certain monies were due and that claim and the memorandum of understanding and the order entered approving the settlement

adjudicated all of the claims which were raised or could have been raised in that case and this is one of them.

THE COURT: It did not adjudicate the case if the parties settled it and entered into a settlement. It was not an adjudication by the court.

MR. EPSTEIN: It's a final judgment.

THE COURT: It's a final judgment ---

MR. EPSTEIN: The final judgment is by definition - I'm sorry.

THE COURT: And I'm assuming it was a settlement of a disputed claim.

MR. EPSTEIN: And the dispute included whether the provision was legal or illegal.

THE COURT: I understand your argument, but that's not the law. I don't - it's not res judicata if the court never addressed that issue. So, they do have - I mean, as I said, it's you've got a contract and you've got a statute and either it complies with the statute or it doesn't comply with the statute and that's an issue that the Court'll have to decide because the court has never decided it and it's now an issue in dispute before the Court.

MR. EPSTEIN: Hold on, where's the, where's the pleading?

MR. CANTY: Your Honor. ---

THE COURT: No, I've made my ruling. It's 5:30. We're

going to go ahead and break for the evening.

MR. WILKERSON: Thank you, Your Honor.

THE COURT: I've made my ruling, all right.

MR. EPSTEIN: No, you're, you're not going to - you're not going to rule on, on this request at this point though, are you?

THE COURT: I'm going to take a look at it at some point in time. Now, whether or not, I don't know - it really hasn't been framed as a motion in any regard as I understand it.

MR. CANTY: Our second cause of action is for a declaratory judgment.

THE COURT: Oh, okay, well, then we got to finish with the case before I make the issue then on that.

MR. EPSTEIN: Finish the case.

MR. CANTY: Very good.

THE COURT: So, if it's part of the declaratory judgment then I'm not going to rule on it until all of the evidence has been presented.

MR. CANTY: Thank you, Your Honor.

THE COURT: All right, all right, thank you very much. We'll be in recess until 9:15.

Let me see the attorneys back in the office for just a second.

OFF THE RECORD

(On the record, Tuesday, February 14, 2012.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Good morning, everybody. All right, anything from the Plaintiff before we bring the jury in?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MR. WILKERSON: No, Your Honor, I think we're going to be able to stipulate to a contract template so we don't have to put one in on every one. We just need to figure out which one to use, and

THE COURT: All right, whenever you all get ready to do that just let me know; okay?

MR. WILKERSON: Okay.

THE COURT: All right, let's go ahead and bring the jury in.

(Whereupon the following takes places within the presence of the jury).

THE COURT: Morning, ladies and gentlemen. Good to see everyone back. I appreciate you being on time and being prompt. We're ready to resume the trial of this case. First off I want to remind you if you have any cell phones or pager devices or anything

of that nature, if you have them with you in the courtroom please turn them off at this time. Also, make sure you have your own pad and you don't have anyone else's pad or anything of that nature.

All right, Mr. Connell, you can call your next witness.

MR. CONNELL: Ms. Singleton, come forward, please.

THE COURT: All right.

Whereupon, Sherry Singleton is called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: State your name for the Court, please, ma'am.

MS. SINGLETON: Sherry Singleton.

DIRECT EXAMINATION

BY MR. CONNELL:

Q Sherry, if you would, please, tell us where you live.

A I live in - here in Myrtle Beach, Horry County in Arrowhead.

Q Okay, how long you been living in the Myrtle Beach area?

A Since 2000 - well actually, December the 15, 1999 is when I

Q All right.

A --- officially started.

Q What kind of work have you done since 1999?

A When I actually came here to Myrtle Beach, I was paralyzed and did not have a job at that time and then a friend of my daughter's

had recommended to go into business with timeshare when I got better and I did and I started with a different company called Bluegreen.

Q What do you mean you were paralyzed?

A I had been in a car wreck prior to moving here; and so, I couldn't work or anything. I couldn't walk.

Q Okay, and so, timeshare seemed like a good idea because you didn't have to do any manual work? Is that right?

A Just a little bit of walking, but we had golf carts to ride around in.

Q All right, and you say you went to work at Bluegreen, where was that - where's that located?

A Actually at Harbour Lights which is right next to the boathouse there on the Intracoastal Waterway.

Q How long did you work there?

A Almost five years.

Q All right, and tell me when you came to Westgate.

A May of 2005, I was actually in the second class that started Westgate.

Q All right, where is the Westgate Resort in Myrtle Beach?

A Westgate Resort is on Ocean Boulevard. It's located right there at the family kingdom.

Q And how many rooms are at Westgate's Resort?

A When I was there they just had the old Holiday Inn building that had been converted into the condos, but the construction was just starting for the new buildings.

Q All right, can you tell the folks on the jury what timeshare is and how you sell timeshare.

A Sure, a tour will come in. It will be - there's different ways to get a tour. It could be somebody that's called OPC which is simply means off premise contact. It could be somebody that's at the mall if you've ever been at the mall and you see the booths out there where you can get discounted tickets and different things of that sort. They have brokers which is just people that call you from home and will ask you to come down to usually take a tour presentation. It can range anywhere from like \$99 to a hundred - say \$110 for a weekend, but they'll put you up in a premise somewhere or another in a condo and then you go take the presentation and upon completion of the presentation you actually receive your gifts, which is usually gifts to go to things like Medieval Times or a dinner. So, you actually get your money back.

Q So, the way that people come to the timeshare is that they're offered something to come and look at the unit?

A Correct.

Q When I say unit, I'm talking about the condominium.

A The condo, uh-huh.

Q And then you as the timeshares salesperson would take them

A We would take ---

Q --- around the property?

A Correct, we would take and pick them up, explain how the process works, what you would be getting. It's for people who want to have better quality of vacation. Instead of staying in a hotel room, it puts you in a condo.. So, we have the creature comforts is what I call them, what we all have at home, makes it nice when you go on vacation to be able to have those same things rather than being in a bed and bath.

Q Okay, how did you as the timeshare employee at Westgate get paid?

A We would get paid every two weeks. It was a commission that was based on what you had done previously in experience from other timeshares or if you had no timeshare experience then they would start you out at a lower percentage rate of what your commission would be. That usually ranged anywhere from six to eight percent depending on your level of experience, and as you progressed and you did better there then your percentage rate of commission would go up, would be increased. Mine was increased over the period of

the year that I was there to 11 percent and was put on several different teams and each team that you was put on was recognized from the work that you did, how well you did there.

Q All right, so, the 11 percent commission you got, was that the highest commission?

A That was.

Q And why did you get the highest commission?

A Because I was the highest salesperson there. I was salesperson of the year for two years straight. I sold, the first year, almost a million clean and pressed and that means after cancellations and everything have come out. The second year I sold over a million dollars, again clean and pressed.

Q Okay, and you're using words I'm not familiar with.

A Okay.

Q Clean and pressed tell the ---

A Clean and pressed ---.

Q --- tell them what ---

A --- just means all the cancellations have been removed off of your record. So, everything that you have sold has to total that amount.

Q All right.

A It just means at the end of the year.

Q Did you ever win any awards while you were there?

A Many.

Q All right, tell us about those.

A 2006 I won, I believe, every month but two awards that I was the salesperson of each month meaning that I sold more units. I had the highest average sales price, all of those things.

Q Okay, what does that mean, the highest average?

A Sales price, you could range anywhere from \$5,000 up to \$64,000. So, based on how many units you sold, let's say it's \$64,000 or versus \$10,000, whoever had the largest sum at the end of that month.

Q All right, who was the boss, if you will, when you were working at, at this west - at the, at the resort, Westgate, I'm sorry?

A Westgate, Deborah Turner was the boss when I started and she continued to be there until she relieved by Richard Siegel who is the son of David Siegel.

Q All right, and I've heard several times the name Siegel. Can you tell me how he's related to the Westgate Resort?

A David Siegel is the owner of Westgate Resorts. He would stop by, him and his brother Barry Siegel and several other people would come in just looking at the resort as it was going through the construction from the Holiday Inn into being converted into all of the condos. Richard Siegel was down in Florida doing some other

things with other resorts of Westgate and apparently David decided that Deborah wasn't doing the job that he wanted; however, Barry did say that he did like the way that she was doing it, but Richard had asked to be given another chance to prove to his dad that he could do better; and so, of course, his dad did give him the opportunity, and he came to Myrtle Beach.

Q All right, how many resorts does - how many Westgate Resorts are there?

A I'm not sure anymore. I know they've added some and taken some off, but they're all over the United States. You have them like out in Park City, Utah. You have them in Missouri. They're in Gatlinburg. They're here. They're in - well, they were in Vegas, so.

Q Okay, they're in Florida.

A They're in Florida.

Q How many timeshares salespeople were you told worked at the Westgate Resorts worldwide?

MR. WILKERSON: Objection, hearsay.

THE COURT: Sustained.

MR. CONNELL: All right, thank you, Your Honor.

BY MR. CONNELL:

Q All right, had you - when you, when you got the job at Westgate,

did you go through an orientation program?

A Yes.

Q And what if anything was told to you about the structure of the company, the number of employees and by who?

A Okay.

MR. WILKERSON: Objection, hearsay.

THE COURT: Sustained.

Q All right, let me go back and let's talk about the - tell me about the training that you had and how you learned about the history of the company.

A Okay, Tracy Stelly [spelled phonetically] was the corporate trainer that came from Orlando to help start the Westgate Myrtle Beach property. We were given pitch books which is just a book with all the information in that we were going to go over and the presentation we had to learn, what we were going to say verbatim to the people, and in that pitch book there is actually how many owners that Westgate Resorts did have that we used every day on a daily basis as well as it said the largest privately owned timeshare in the world, that David Siegel was there, had some listings of his other companies and stuff. Again, that was for company credibility and things of that sort.

Q All right, have you ever met David Siegel?

A I have many times.

Q All right, was he a person who came to the Myrtle Beach Westgate?

A Yes.

Q And his ---

A I actually have pictures of him and I together.

Q Okay, when did you leave Westgate?

A I believe it was - when I actually left I was having a nervous breakdown from being called into the office daily, threatened that if I quit or left to go to another property that I would be sued.

MR. WILKERSON: Objection, Your Honor. This is irrelevant first of all.

THE COURT: Okay, what's the relevancy?

MR. CONNELL: Your Honor, it goes to what happened and why she left and what commissions are owed. We're getting ready to get to that.

THE COURT: I don't see why she left has to do with what commissions are owed. I sustain the objection.

MR. CONNELL: All right.

THE COURT: Thank you.

BY MR. CONNELL:

Q Let's talk about this.

A Okay.

Q Was there a contract signed between you and Westgate as to what you would be paid?

A Yes.

Q All right, and I think - let me see if I - have you seen ---

MR. WILKERSON: Here's hers, Gene, you can put that in.

MR. CONNELL: Okay, you want - you don't mind?

MR. WILKERSON: No.

MR. CONNELL: That's fine.

BY MR. CONNELL:

Q All right, if you would look at this. Tell me if that's your agreement.

A This is the second agreement.

Q Okay, there's more than one?

A Yes.

Q All right, all right.

MR. CONNELL: Let me offer this one as number, as number - what number do you want that?

REPORTER: Eight.

MR. CONNELL: Eight.

THE COURT: All right, so that would be Plaintiff's Exhibit Eight?

MR. CONNELL: Yes, sir.

THE COURT: Any objection?

MR. WILKERSON: No objection, Your Honor.

THE COURT: All right, Plaintiff's Exhibit Eight admitted into evidence without objection.

(Whereupon, Plaintiff's Exhibit Number Eight [Contract - Singleton] admitted into evidence and appropriately marked.)

BY MR. CONNELL:

Q All right, Sherry, you said there were two agreements.

A Yes.

Q Can you talk to the - talk to me about what you mean by that?

A Yes, this agreement says it's made and entered into the 24th day of March 2006. I actually started on May, I believe it was May the 5th of 2005, worked there for several months and then left to go to another timeshare because it was giving me an opportunity to become a manager. So, this is the second time that I returned.

Q Okay, and the commissions that you claim are earned, are they under this contract?

A I don't see anything listing the actual percentage in this one.

Q Okay, what percentage were you to receive?

A Eleven percent.

MR. WILKERSON: Objection, Your Honor, that's - there's a

document that sets forth that.

THE COURT: Well, I mean, she can still give her answer. You can cross examine her all you want. Overruled, let's move on.

MR. WILKERSON: You're right.

Q You recognize that document?

A Yes.

Q All right.

A It actually says six to 11 percent based on employee's VPG, which is volume per guest.

Q All right, we need to understand what that - these folks need to understand what the volume per guest is.

A Okay, the volume per guest is just simply the amount of sale that you had if you had a higher constant sales of the actual condo. In other words, if you always sold a condo that cost \$10,000, you would get less percentage. If you were able to continue to progress into selling higher condos at 15,000, 20,000 then you were given a higher percentage because you were making the company more money.

MR. CONNELL: Let's offer this as Number Nine. Any objection?

MR. WILKERSON: No objection.

THE COURT: All right, Plaintiff's Exhibit Number Nine admitted into evidence without objection.

(Whereupon, Plaintiff's Exhibit Number Nine [Commission Agreement - Singleton] admitted into evidence and appropriately marked.)

BY MR. CONNELL:

Q Okay, so simply stated, the more, more money you made the more commission you got?

A Correct.

Q Is that what it means?

A Correct.

Q So, if I was a - if I only sold \$20,000 worth of condominiums in a year I'd get a lesser commission than if I sold 250,000?

A Most definitely.

Q Okay.

A And if you weren't selling at least one out of every ten you would have never made it to the 250,000.

Q Okay, when you say one out of every ten you're talking about one of out every ten people ---

A Tours.

Q --- who came through?

A Correct.

Q So, there was a threshold that you had to get to ---

A Yes.

Q All right, and were you judged based on that, on how many you sold?

A Yes, continually.

Q And were you - and I'm assuming that every time somebody comes in and does the tour you have to give them a gift or you have to give them something; right?

A Yes.

Q So would that mean that every time I'm getting someone to come in to look at it that Westgate is actually paying them something.

A Yes, correct.

Q Regardless of whether they buy or not.

A Absolutely.

Q All right, okay, I gave you I think your file.

A Correct.

Q Hold that up if you would so the jurors can look at that and see and show them and, and tell - just tell me briefly what that is, what all that entails.

A This file has all of my sales for the times that I started from Westgate until the time that I left. So, these are all condos that I sold to owners.

Q Okay, now have you had a chance to look at the records and to determine how much you believe based on the records is owed to

you?

A Yes.

Q All right, and tell me how much that is and come down here and write your name on this board if you would.

A Okay.

MR. WILKERSON: Objection, Your Honor. That would be absolutely hearsay if she's reviewing records and testifying as to what those records say. He wants to put the records in, that's fine, but this is hearsay.

THE COURT: She can testify as to what she says is owed to her. She's the one that earned the income, she knows what her sales are and she can say what she says is owed to her. So, that's overruled.

MR. CONNELL: Okay.

BY MR. CONNELL:

Q Come down here and write your name if you would, please, and put the dollar amount that you - okay.

THE COURT: All right, just so the Court knows, we need to know what was written down.

MR. CONNELL: We're, we're going to have - I'm going to ---

THE COURT: Okay.

BY MR. CONNELL:

Q What did you write down?

A \$100,000.

Q All right.

THE COURT: All right.

Q Now, you wrote down \$100,000.

A Yes, sir.

Q All right, now, tell me how you came to that determination.

A Okay, if you ---

Q Tell, tell these folks, not me.

A Okay.

Q I know what you're talking about.

A If you take a million dollars and that's the easiest way to kind of figure this because the 900 and some thousand to give you - it's right there at a million. Take that times two years because when Richard came in, he took ---

Q All right, wait a minute. Who's Richard? We've got to talk about ---

A Richard Siegel.

Q And what is his, what is his job? What was his job at the time?

A He was, he was the one that replaced Deborah Turner. So, he was the - our boss.

Q Okay.

A He was the general manager.

Q He was the one you reported to.

A Correct.

Q All right.

A Correct, he came in and when he started there he took everybody's commission that was above the 10 percent and made it to 10 percent. He took everybody that was lower than 10 percent and increased them to 10 percent. So, everybody that was working there was on the same 10 percent. Therefore, he made it retroactive, did not give us anything to sign, did not tell us, just did it.

Q Okay, wait, let me - I need to understand what you're talking about; okay?

A Okay.

Q You had an agreement.

A Correct.

Q And when he came in he did what now?

A He took away our 11 percent and reduced it to only getting 10 percent on every deal that was sold.

Q Was that based on deals you had previously sold and hadn't been paid for?

A Yes.

Q All right, and how do you know that?

A I actually have the paperwork from Westgate.

Q Okay, all right, so, tell me again how you came to the \$100,000 number.

A Okay, if you take one million dollars times two years ---

Q Okay.

A --- take the one percent difference that he took away from me, each year would add up to 20,000. That's a total of 40,000 for the one percent difference.

Q Okay.

A I took an average of \$100,000 that I sold each month to make it easy because there a lot of paperwork to go through to figure out every month that I was above 100,000 that I sold in some months, very few less than 100,000. So, 100,000 times each month at four percent, which is this paperwork that we had to abide by of what we were given for a bonus, so this was a bonus if you sold.

Q Okay, so, what - so, let me ask about that. So, if you got above a certain threshold of sales ---

A Correct.

Q --- you got a bigger piece of the pie.

A Correct, and this is as you see right on here it says per Barry and that's Barry Siegel which was David Siegel's brother.

Q Okay.

A So, this was the bonus structure. If you sold between 35,000 and 49,999, you got an extra one percent for that month, 50 to 69,990 two percent, 70 to 89,990 three percent, 90 to 109,999 four percent, 110 to 199,990 five percent and 200,000 or more at six percent.

Q All right.

A So, if I take that math at 100,000 each month times 24 months, that was two years, at an average that gives me 4,000. Those two years add up to another 48,000, there's 88,000. Then there were those times that the deeding, which was the closing officer, would take our 10 percent that we had to have as a full down to get paid, but they were called penders, just simply meaning that if the 10 percent was not met at the time we actually did the closing they had monthly payments to make that total of the 10 percent as the complete 10 percent down payment. We did not get paid until that total of 10 percent was put into that. So, sometimes they might be having trouble making that monthly payment to add up to the 10 percent and the closing officers would then there call our owners and ask them if they were having trouble, and if so, that they could help them by taking the rest of that down payment and putting it at the rear of their note which means now until the 10 percent was down in full we were not getting paid.

MR. WILKERSON: Objection, Your Honor, this whole thing is hearsay. I didn't realize where she was going with that, but it's clearly hearsay statements. Objection, move to strike.

A This was actually ---

Q Wait a minute, wait a minute.

A Okay.

Q You can't say anything to the Court.

A Uh-huh.

MR. WILKERSON: Objection, move to strike.

THE COURT: Overruled, I'm going to allow it. Go ahead.

BY MR. CONNELL:

Q Okay.

A Okay.

Q Go ahead.

A Okay, this was told to me actually by the deeding officers that they were doing this.

Q All right, but we've got to go back a little bit.

A Okay.

Q --- because this is a complicated transaction.

A Yes, it is.

Q So we understand, all right, I'm the, I'm the person buying

from you.

A Correct.

Q I say I'm going to buy it. Where do you take that person and what do they get a deed to?

A Okay, they get a deed to 1/52nd of a condo, which is basically a one week or you could have bought more, two weeks, three weeks. Whatever timeframe you bought you were able to come back to Myrtle Beach or exchange it and go to other resorts.

Q All right.

A During that process I would do all the paperwork which meant I was taking 10 percent from cash, check or credit card, a combination of all three of them put together, their driver's license, writing all of that information down then giving it to the closing officer which was the actual deeding officer, the same as you would go to a closing of your own house that you would be buying.

Q So, I'm just -. if I'm buying a timeshare, I'm just buying one week of a whole year?

A Correct.

Q And I'm getting a deed just like if I'm buying a mobile home or a car or ---

A Exactly.

Q --- or a house.

A Correct.

Q Okay.

A There are different types of deed. Westgate's was actually a deed to real estate, so the same as what you had to your house.

Q Okay.

MR. CONNELL: Do you object to that?

(Mr. Connell confers with Defense counsel.)

MR. CONNELL: Okay, all right, thank you. That's all.

BY MR. CONNELL:

Q All right, let's go back and then talk about - you had indicated that something about - something about a pender in the down payment. We need to understand what that is.

A Correct.

Q The jurors need to understand that; what that is.

A It's just the total amount that we had to have before the representative would get paid was a total of the 10 percent of the total cost of the condo. Once that 10 percent was put in, then depending on when it went through corporate and that, we would get paid basically between 21 and 28 days. Since we got paid biweekly then that would usually mean a month before you got paid.

Q Okay, when we last talked about the numbers you had talked about \$88,000.

A Correct.

Q And then you came up with an additional - how did you get to be the round number of \$100,000?

A Okay, the additional simply comes from the 10 percent not being paid to me and being placed to the rear of the note. Therefore, I never got paid on those deals because until 10 years from the date that that purchase was made I will not actually be considered having the 10 percent down payment.

Q Okay, so give me an example, and let's say that I - let's make it \$10,000.

A Okay.

Q Let's say I buy a \$10,000 condominium from you. How much do I have to put down?

A 1,000.

Q All right, if I don't have the 1,000, I put down \$400?

A You would have a remaining of \$600 that would be due toward that 10 percent.

Q Okay, and when you don't get it, you don't get a commission on that; right?

A Correct.

Q Okay, when do you get the commission?

A When the rest of that 600 is put in.

Q Okay, and when would that be put it?

A Basically it was within 30, 60, 90 days. So, you would have had a two hundred, a two hundred, a two hundred payment each month; however, if they were having trouble making the \$200 a month payment toward that 10 percent, then the deeding officer would say, "Well, I can help you out with that and I'll place it to the rear of the note," which meant 10 years is what the notes are set up on, 10 years with a no pre-penalty payment loan.

MR. WILKERSON: Your Honor, Your Honor, we would like to have a continuing objection to this line. It's clearly hearsay and it's substantive out of her mouth.

THE COURT: Well, I mean, the fact of the matter is when any employee makes a claim for unpaid wages they're going to have to base their claim upon what the employer tells them that they were going to pay them. So, what is the distinction? How is - how do you ever have an unpaid wages claim if you're going to always claim, "Well, the employer told you this, so, it's hearsay."

MR. WILKERSON: This is one of her co-employees, the deeding person, the person making the deed.

MR. CONNELL: It's an agent of the company talking about how, you know, how they - how the pay is going to work.

THE COURT: But is he - is this someone that is responsible

for her compensation?

MR. CONNELL: It's someone who determines it.

MR. WILKERSON: No, no, sir, the deeding officer has nothing to do with her compensation.

THE COURT: Okay.

MR. WILKERSON: He, he has a different function.

THE COURT: All right, well bring that up on cross examination because she's testifying to something different. If she changes it under cross examination it affects her credibility, but the way I understand her testimony is this is who determines what her commission is. Now, if that's not the case, you can bring it out on cross examination and it'll affect her credibility.

MR. WILKERSON: Thank you, Your Honor.

THE COURT: So, I'm going to overrule it, go ahead.

MR. CONNELL: Thank you, Your Honor.

BY MR. CONNELL:

Q Okay, all right, so the, so, the deeding officer takes that and does what with it, the down payment?

A The down payment would be placed at the rear of the note which, like I said, it's set up on a 10-year no pre-penalty payment loan. So, it could be paid from any time that they would have come up with the \$600 and that 600 would mean it would have to be actually

designated to go to the down payment. In other words, if they sent a \$200 monthly, regular monthly payment in it, then that was never going toward the down payment. So, it would be put at the end of the note. So, until that note was paid in full, I actually would not get paid on that deal.

Q Okay, so, the down payment and the purchase price are two different things; right?

A They're really one of the same, but dealt with differently. The one is part of the actual total price, but the down payment is what we got paid on that had to be in place first. We got paid on whatever the entire amount was, but to get the entire amount of our ten percent had to be in before we got paid on that deal.

Q Would Westgate still get the monthly payments according to that?

A Yes.

Q And in my example of the \$10,000 with them, with the customer only putting down \$600, what normally would that payment that Westgate would get monthly for that unit?

A It ranged because they had the ability to do difference with interest rates. At some point in time they actually had it if you put 50 percent down then they would charge absolutely no interest rate if you paid that note off in one year. So, there could be

different interest rates.

Q Okay, and also, if the down payment was paid, then you would get your money; right?

A Correct.

Q Okay, and putting the, the remainder of the down payment at the back of the loan, what did that do for your commission?

A I did not get paid on that until that down payment was finished being paid at the end of the note.

Q Okay, and the \$100,000 that you're talking about here, over what period of time are we talking about that you are owed that for?

A Almost four years.

Q Okay, now, have you ever had any conversations with Mr. Siegel about your pay - about the payment?

A No.

Q All right, have you had conversations - have you made complaints about not being paid?

A Yes.

Q All right, and who did you make those complaints to?

A To Deborah Turner, to, let's see, Doug Boykin, who is no longer employed there.

Q Okay, and what was his job there?

A He was Deborah Turner's assistant. It was very hard to get a hold of Connie Sharp per phone. So, we did a lot of papers that were you wrote down the account number, the person's name that you had not been paid on, gave it to Doug Boykin. Doug Boykin then sent it either email or fax to Connie Sharp and then we had to wait until things came back, and most of the time it was never - there were things told to us that they were canceled by Doug Boykin per Connie Sharp, that they had been canceled, but yet there was no way to prove it.

Q Okay.

A What, in fact, had happened, according to Deborah Turner what ---

Q You had a conversation with her and she told you this?

A I did.

Q Okay, what was that?

A And also with Jerry and I can't remember his last name who was also a deeding officer that why I was not being paid on these and some of them were showing up canceled.

MR. WILKERSON: Objection, hearsay.

THE COURT: Overruled, go ahead.

Q Okay, go ahead.

A That conversation consisted of exactly what I just said, that

the 10 percent down was being moved to the rear of the note, as well as they were up-selling the deeding officer or down-selling them.

Q Okay, we don't know what those terms mean, up-selling and ---

A Exactly, up-selling means moving them to, let's say, let's just use the same \$10,000 unit.

Q Okay.

A And they would give them a lower interest rate or drop their monthly payment, but yet give them a \$15,000 unit for the same price. So, therefore, they would then take my name off of who was the actual sales rep and place the deeding officer's name, whoever that was, and they would now get the commission.

MR. WILKERSON: Objection, where she's talking about a document here that she says changed something and we don't have that in the record. It's clearly hearsay, Your Honor.

THE COURT: Overruled, go ahead.

Q Okay, let me ask you this: Once you took the customer who was going to buy to the deeding officer would you stay with the deeding officer or would you leave and the deeding officer would then talk with them?

A We left and they were kept in the deeding officer's with them only two to three hours.

Q Okay, and that was when the documents were signed?

A Correct.

Q Okay, all right, you talked about up-selling. You didn't talk about down-selling.

A Down-selling just the opposite, they would reduce their monthly payment and actually also reduce the size of the deal, maybe from 10,000 to 8,000 or to 6,000, still a unit, but it would be a different season meaning that they couldn't use it in the summertime. They were going to use it in a less desired season.

Q You - I've heard other timeshare phrases we probably should talk about. You all have your own lingo.

A Yes.

Q Something called a kit, what is that?

A A kit is the owner's books that they have to go with what we have showed them. It would be the resorts that they were able to exchange to other than just to Myrtle Beach. It would be actually a book of Westgate's resorts and then also a book that came from Interval International. We simply called it II for short. In that book is over 2,000 resorts worldwide that they could also take their week and exchange it to go to.

Q Okay, and talk to me about some of the other lingo, VPG, what does that mean?

A Volume per guest, that is simply how - again, the size of the unit that you're selling. If you're selling a 10,000, a 10,000, a 10,000 versus selling a 30,000, and a 30,000 and a 30,000. You were selling less, but you're still making the company money. When you sell the \$30,000 deal, of course you're making the company a whole lot more.

Q Okay, have you ever been a trainer or a manager at Westgate?

A Manager, yes.

Q Okay, when were you a trainer or a manager at Westgate?

A I was a manager in 2006, I believe it was.

Q All right, and what did you manage there?

A I managed the frontline which is just ---

Q You've got to talk to me about what a frontline is. We don't know what that ---

A Yep, frontline as Ned said yesterday there is a frontline and there's an in-house sales. In-house sales is simply owners already. Frontline is those just like yourself that would come in and take the presentation, and if you became an owner, that's the frontline, meaning new owners.

Q All right, all right, so, a frontline is if I walk in off the street and I don't own a unit ---

A Correct.

Q --- and I'm looking to buy ---

A Correct.

Q --- to buy one, and an in-house is if I already own a unit and I want to get a bigger one?

A Correct.

Q Okay, all right, and how long did you manage the frontline?

A For about seven months. I decided to go back because of the meetings that were done every morning. We called them you suck meetings because we were told how bad we were doing. We were never good enough. Taking two hours of that every day was a little bit distracting to, one, to have the ability to go out with a positive attitude. We were made to place chairs in a line and sit in them provided on what we had done that week or the prior month before that and the closer you were to the outside door, "The closer," Richard would say, Richard Siegel would say, "The closer you are to being fired," and then he would say to the other reps in the chairs, "If I'll fire Sherry" ---

MR. WILKERSON: Objection, Your Honor, firing is not an issue in this case.

THE COURT: Sustained.

Q Okay.

A Okay.

Q When did you finally leave?

A I believe it was in 2000 and I can't remember if it was 2008 or 2009. As I said, I was having some ---

Q I understand. Are you still in the timeshare business?

A I am. I have went back to it.

Q Okay, where are you working at?

A I'm working with Starwood which is Sheraton here in Myrtle Beach.

Q And how long you been working at Sheraton?

A A little - almost a year now. It'll be a year next, like next week.

Q Okay, have we missed any of the lingo that's used in the timeshares sales business? Have I missed some of it? I think we talked about pender; right?

A Correct.

Q What, what other lingo that's been used have we missed, have I missed?

A Chargebacks, those are things that, again, if a person canceled after say five days or ten days or it could be a year later then you could be charged back.

MR. WILKERSON: Objection, Your Honor. Objection, the same objection as yesterday, relevance to that as well as anything with

regard to reserve account, relevance.

THE COURT: All right, what is the relevance?

MR. CONNELL: Your Honor, it goes to the, to the system and how they were being paid, that's what, that's what we're arguing.

THE COURT: But I mean the chargeback doesn't that go to the reserve account that's already been ---

MR. CONNELL: It does go to that.

THE COURT: Okay.

MR. CONNELL: But it goes to how they're - it goes to the whole commission structure which we - I think we need to kind of explain. I won't, I won't go into it in detail.

THE COURT: All right, I'm going to allow you a little bit of leeway, but not, not a lot.

BY MR. CONNELL:

Q All right, what, besides chargebacks, what else, what else have I missed in regard to the lingo that is used in the timeshare business? Missed any of the other?

A Oh, I'm sure there is. There is so much lingo that, that you learn that, you know, that just is on a common thing that we don't even think of when you're talking to a normal person that you use and try to explain like here right now, I mean, I'm sure there's a lot more, but we use it so much on a regular daily basis that

it's not anything out of the ordinary.

Q Okay, all right, thank you. A Thank you.

MR. CONNELL: I'm going to sit this down.

MR. WILKERSON: Thank you.

THE COURT: All right, Ms. Maysonet, you doing cross examination?

MS. MAYSONET: Yes.

THE COURT: All right, go ahead. Thank you.

CROSS EXAMINATION

BY MS. MAYSONET:

Q Good morning, Ms. Singleton.

A Good morning.

Q This podium is a little bigger than I am. I'm just going to stand to the side. Okay, I'm going to be asking you some questions just like your attorney asked you some questions and I will ask you for the favor to answer the questions I am posing to you. Okay?

A Sure.

Q All right, Ms. Singleton, I'm going to show you what we're going to mark as the next Defendant's Exhibit and I want us - you, to tell me what the - I want you to tell me what the name of this document is and if you - whether you signed it; okay?

A Okay.

MS. MAYSONET: May I approach?

THE COURT: Yes, ma'am.

BY MS. MAYSONET:

A Yes, I did sign it.

Q And can you tell me on top what it's called, that document?

A I think it says terms of employment notice. It's kind of - it's blacked out. So, I can't really read the part.

Q Thank you.

A Uh-huh.

MR. CONNELL: We don't object to that.

MS. MAYSONET: Sir, I would like to enter this into exhibits, as the next Defendant's Exhibit.

THE COURT: All right, Defendant's Exhibit Number Four admitted into evidence without objection.

(Whereupon, Defendant's Exhibit Number Four [Terms of Employment - Singleton] admitted into evidence and appropriately marked.)

BY MS. MAYSONET:

Q All right, and you agree with me that you also signed an employment agreement when you started working for Westgate. Is that correct?

A Correct.

Q And you told me - you said that you signed two because you worked twice for Westgate.

A Correct.

Q At different times, right?

A Yes.

Q And you also signed a scheduling commission that on Exhibit

A.

A Yes.

Q Is that correct? And you also signed that twice; right?

A I'm not sure if I did sign that one twice or not.

Q But you did sign it; right?

A Yes.

Q And in that commission schedule and I see you understood it, in order for you to make a commission, you had to have a 10 percent down payment. Is that correct?

A Correct.

Q Okay, and also in order for you to make a commission, you also have to have - well, a customer cannot cancel within the rescission period, is that okay; is that correct?

A Say it again. I'm sorry.

Q Yeah, for you to make a commission, a customer cannot cancel within the rescission period; right?

A Correct.

Q Otherwise you can't - you don't receive a commission; right?

A Correct.

Q Okay, now, you - if I understood you correctly, you worked in the deeding department?

A Frontline, yes.

Q Okay, is that part of the sales department?

A Yes.

Q Okay, did you work in the deeding department?

A No.

Q Okay, who, who did you report to?

A Deborah Turner.

Q And she was - what was her position?

A The director of sales, she was our boss.

Q Okay, she wasn't - you didn't report to anybody in deeding. Right?

A No.

Q Okay, now, can you tell me the person that you said that in working deeding that told you about the down payment?

A Yes, Jerry.

Q What was the last name?

A I can't remember his - like Gervinia [spelled phonetically].

I don't know how to pronounce his name.

Q Okay, and that person wasn't in your chain of command; right?

A Not in my chain of command as far as my boss, in my chain of command of who I had to go through to get paid.

Q Okay, you are - are you saying that you had to get permission from that person to get paid?

A Permission, no, but if they didn't do the deeding, I would not get paid.

Q I understand that, but she - that person wasn't part of your chain of command; right?

A I, I feel yes because like I said, if it did not go through that person to do the paperwork then I would have not gotten paid.

Q That person didn't ---

A As far as who I reported to, no, I did not.

Q Okay, and that person didn't work in the sales department; right?

A Yes, they were considered part of the sales department.

Q But they were part of the deeding department; right?

A Yes.

Q Okay.

A It's all considered sales.

Q I would appreciate if you answer the question that I am asking

you.

A Yes, ma'am.

Q I don't want to be disrespectful, but if you could it would be helpful. And what would you say the spelling of the last name was?

A I don't know how to spell it, it was an Italian name. I'm sorry, I don't know.

Q Okay, and that person worked throughout the entire time you were there?

A No. Q Okay, what portions did they work? Do you recall?

A He was on the sales line and then went into the deeding department. As far as to when he went into the deeding department, I don't know specifics.

MS. MAYSONET: All right, may I have a second?

Sir, I have no further questions.

THE COURT: All right, redirect?

MR. CONNELL: Just a couple.

REDIRECT EXAMINATION

BY MR. CONNELL:

Q The deeding department was also part of the financing department?

A Yes.

Q And tell us how that worked, please, ma'am, so we can understand why it's so important.

A Until the actual paperwork of the new owner was completed through the deeding department, the closing officer, we would not be paid on a deal.

Q All right, so, who had control over the financing of the unit when the person was going to buy?

A It actually went through a process of your director of sales, that's the person that you reported to. You had managers that helped you do some paperwork; get the actual deal that was needed for the person. Myself as the sales rep then that it would go through finishing the paperwork and completing the tour, the presentation and then again it would go back to the manager to take paperwork to the deeding officer to the office where it was all printed out by secretaries, handed to the deeding officer and then our signatures on it through the deeding officer and then the deal would be completed after they came out of the closing office.

Q All right, now, were you ever given an opportunity to read the contract in Exhibit A that you've been shown?

A Absolutely not.

MR. WILKERSON: Outside the scope, Your Honor, objection.

THE COURT: Sustained.

MR. WILKERSON: Move to strike.

MR. CANTY: Didn't they just put it into evidence?

THE COURT: All right, disregard.

MR. CONNELL: Your Honor, I think that was just put in by them. Was it not?

THE COURT: Well, refer to it by exhibit.

MR. CONNELL: Okay.

THE COURT: Are you talking about exhibit - which one?

MR. CONNELL: Exhibit Four.

THE COURT: Defense Exhibit Four?

MR. CONNELL: Notice of employment.

THE COURT: Okay, that just came in. I'll allow that question. Go ahead.

MR. WILKERSON: But that, that's not the contract, Your Honor. He put in the contract.

THE COURT: Okay, that's what I was thinking. You said contract. If you're talking about Defendant's Exhibit Number Four, I'll allow you to question that.

A Okay.

Q All right, you've had a chance to look at Defendant's Exhibit Number Four?

A Yes, I did.

Q And when did you sign that?

A This is signed on 3-20-06, again, which is my second time there and I actually have paperwork where it shows from Westgate where I was actually paid 11 percent.

Q Okay, all right. Thank you, come down, please, ma'am.

THE COURT: All right, you may step down. All right, you can call your next witness.

MR. CONNELL: All right.

Whereupon, Steven Thoni was called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: State your name for the Court, please, sir, and spell your last name.

MR. THONI: Steven Gregory Thoni, T-H-O-N-I.

DIRECT EXAMINATION BY MR. CONNELL:

Q Okay, Mr. Thoni, if you would tell us, please, sir, where you live.

A I live in a community in southern Myrtle Beach called The Lakes.

Q Okay, how long, how long have you lived in the Myrtle Beach area?

A Six to seven years.

Q And what kind of work have you done since you lived in the Myrtle Beach area?

A I had my own business for years, 25 years in North Carolina and I came down here on a venture with an old high school friend who's been living here to install swimming pools.

Q Okay, all right, and how long did you work in that business?

A Two years.

Q And where else have you worked?

A From there, the economy tanked and I took my ball and went home so to speak.

Q Okay.

A I went to work from there, sold cars.

Q Okay, you worked at Wal-Mart, I think you told me at the break.

A I sold cars. I did timeshare. Last year, I did a stint at Wal-Mart for seven months.

Q All right, and when you said you did a stint at Wal-Mart, what did you do there?

A I was a home lines manager.

Q And when you did you decide to try timeshare?

A Oh, that was my first job in timeshare was with Bluegreen.

Q Okay.

A And that's been five, six years ago. Five years ago, I think

and I worked in-house sales at Carolina Grande.

Q Okay, and when did you, when did you go to Westgate?

A From Bluegreen, I was going to start my own company and that's when the economy really failed. So, I didn't do it. I went - after the pool business, I went to Bluegreen, going to start my own company, that failed and then I went back into the car business. I did that through the eighties at East Coast Honda.

Q All right, and what - when did you first become employed at Westgate?

A I believe it was in May.

Q Of what year?

A '08 I believe.

Q How long did you work at Westgate?

A The numbers that I have on your sheets show me going through August, but I actually worked through October. I stayed on the frontline until Labor Day. Then I requested a transfer because in the timeshare business in the wintertime they cut the line.

Q Okay.

A And I knew I would probably get cut. I was about average. So, they only keep the best for the winter. So, I transferred to marketing to become an OPC on the advice of Victor Curry who was the director of the - sales director and Frederick Von Sant who

was my training manager, kind of a mentor type.

Q All right.

A They suggested that I do that so I could continue to collect my pending business.

Q All right, when you said you were working on the line, we've talked about this but tell me again what the word the line means.

A The line is simply in all timeshare resorts where you go to become an owner or not to become one. It's the, the first sale. It's your first sales opportunity.

Q All right.

A Take a tour.

Q I walk, I walk in off the street and somebody comes to greet me.

A Most, no, you have to be done by invitation most of the time.

Q All right.

A And you're usually gifted by an OPC, which is an off property contact, or ---

Q Somebody gives you something to go look at the unit?

A It could be anything from a hundred bucks to show tickets to a free vacation, whatever you need to give them, but within certain criteria that vary.

Q And from May of 2008 until almost October of 2008 you were

working as a salesperson?

A I was a salesperson, yes, but no. I was a salesperson till Memorial Day on the frontline ---

Q All right.

A --- then I transferred to marketing is what they call it to become an OPC.

Q Okay, now, was the contract signed by you?

A Yes, sir.

Q All right, without using all - different contracts, is - this has already been offered as Number Eight. Is that similar to the contract that you signed?

A No, mine was more - was a little bit different. The verbiage, I haven't read this one, I don't know. Basically it was, "We'll pay you 10 percent and if they stay with us six months, it's your money."

MR. WILKERSON: Objection, hearsay.

THE COURT: Overruled, I'll allow it.

Q Okay, so, what was, what was the arrangement that you had as to how much you would be paid?

A Ten percent on my sales when I got a full down, full 10 percent down payment and they also paid us minimum wage for the time we were there.

Q Okay, all right, what I'd like you to do is come down here please, sir, and tell me - write your name here and tell me how much you say you're owed, then we're going to talk about how you figured that.

A (Complies with request.)

Q All right, what number did you write down there so the court reporter can take that down?

A \$11,800.

Q Okay, and tell me if you would, please, sir, how you arrived at that number.

A I had \$111,000 and change on pending business that I was never paid for.

Q Okay.

A None of my penders had an opportunity to become paid, that's why I went and became an OPC so that I could make it through the winter okay.

Q Okay, you're going to have to take me back on that. You wanted to go and get a different job at Westgate.

A Right.

Q And why did you want to do that?

A So that I could continually be paid on my penders. It was under the advice of Victor Curry who was director of sales, Frederick

Von Sant who was director of training and Doug Boykin who was an assistant manager or something, I don't know what his title was.

Q Okay.

A We did transfer paperwork, and when that paperwork arrived I was told that I had been terminated and rehired into marketing so that I wouldn't get - I was told this after two months when my penders became due by Victor Curry and Doug Boykin at two separate instances that the company had made a decision if you were terminated they would not pay any penders for six months.

Q Okay.

A And at that point in time Bluegreen had been recruiting me. I quit and went to work again for Bluegreen.

Q Okay.

A Can I correct something I just said?

Q Yes, sir.

A My supervisor in, in the marketing department, OPC supervisor was named Shane. When I asked him why I wasn't getting my pending business he came back to me, Shane was a good guy, he came back to me a few days later and said, "I don't know if I'm supposed to tell you this or not but they ain't paying penders."

MR. WILKERSON: Objection, Your Honor, I'm, I'm not sure who this marketing department is.

THE COURT: He said it was his supervisor.

A Worked out of the same building.

Q Wait a minute, wait a minute, let the judge finish.

A I'm sorry.

THE COURT: Okay.

MR. WILKERSON: There's no foundation for this even if - I object on the grounds of hearsay and lack of foundation, Your Honor.

THE COURT: All right, overruled. Go ahead.

Q All right, tell us what Shane said please.

A He said that they had made a decision in Orlando that they would not pay penders for six months even if you were still employed.

He told me that I had been listed as terminated and rehired.

Q All right.

A So, and I think that's probably standard, but I didn't know - I transferred. I requested it on their advice.

Q Okay, were you given any advance notice or were you given any notice in advance of the changes of your employment contract?

A No.

Q Okay, were you paid within 30 days of the separation from the payroll?

A No.

Q Do you think Westgate complied with the terms of your agreement?

A No.

Q If a down payment was moved to the back of the note, how long when - after you left would you have - would it been when you, when you would have been paid?

A Probably 10 years if then.

Q Were you - tell me what up-selling is, please, sir.

A Basically I'm going to agree with what Ms. Singletary [sic] just told you that you get someone that you've closed the sale with, you've got the down payment, you get them into the deeding office, which is - it's not as much like buying a house as it is like buying a car, and you get them in the deeding office and then they get a little, for lack of a better term, I'll say squirrely, wishy-washy. The closing officer would make the decision to, "Okay, I tell you what I can do, we, we just had something come about and I can give you instead of a week in the spring, I can go ahead and put you in a summer week for the same money," and that gets them excited again and they proceed on with the sale.

Q Okay, it kind of, it kind of reminds me of like when I go to buy a car with my wife and she wants that yellow car and we're not sure we can afford it, that person tries to sweeten the deal. Is that what you mean by that? A It's sweetening the deal, but it's giving them more. Down-selling would be where it goes the other

way, you move them down from the luxury model to the basic.

Q Okay, and you'd move them from the luxury car to the basic car because they couldn't afford the luxury car?

A Up-selling would be where I'm taking a Honda Civic ---

Q All right.

A --- and you get shaky with me and I go ahead and give you an Accord for the same money or raise the money because you can - I'm giving you more. Does that - see, they didn't tell us when they did this.

Q Okay, okay, all right, and you weren't - when the - that person and I'm talking about that person, I'm talking about the deeding person had total control at that point?

A Yes, sir.

Q All right, okay, thank you sir.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MS. MAYSONET:

Q Good morning, Mr. Thoni.

A Good morning.

Q I represent Westgate. I'm going to also ask you some questions, and as you heard me say prior, I would ask that you answer the questions I pose to you.

A I have a slight hearing problem.

Q Oh.

A Can you talk slowly for me? Your accent makes it a little more difficult for me. Thank you.

Q No problem. Let's start by this. Can I approach you? I'm going to show you a document. I want you to tell me what the name of the document is and whether you've signed it. Do you understand that?

A Yes, ma'am.

MS. MAYSONET: May I approach, sir?

THE COURT: Yes.

A That looks like my signature, but I don't recall it. I signed a lot of things at Westgate.

Q I understand, but that is your signature; right?

A Okay, yes, ma'am.

Q And the name of this agreement, this document, it's entitled terms of employment notice. Is that correct?

A Yes, ma'am.

MR. CONNELL: We don't object to that.

MS. MAYSONET: Sir, I would request that we enter this into exhibit, next Defendant's Exhibit.

THE COURT: All right, I've got that'll be five. All right,

Defendant's Exhibit Number Five admitted into evidence without objection.

(Whereupon, Defendant's Exhibit Number Five [Terms of Employment - Thoni] admitted into evidence and appropriately marked.)

BY MS. MAYSONET:

Q All right, and during your testimony you stated that you signed an employment agreement. Do you recall that?

A Yes, ma'am.

Q That's correct. Now, I'm going to - you said that you signed also a commission schedule that was kind of different from the one that they showed you; right?

A It may have been the same verbiage, but it appeared different just to me. Now, I, you know, that's been a long time.

Q I'm going to show you this document that's entitled commission schedule. It bears your signature. Can you please verify that it is your signature?

A Sure. Yes, that's my signature.

Q And this is the commission schedule you are referring to when you talked in your direct; right?

A Yes, ma'am, I think.

MR. CONNELL: We don't object.

MS. MAYSONET: Like to introduce this as the next exhibit.

THE COURT: All right, Defendant's Exhibit Number Six admitted into evidence without objection.

(Whereupon, Defendant's Exhibit Number Six [Commission Agreement - Thoni] introduced into evidence and appropriately marked.)

BY MS. MAYSONET:

Q If I understood your testimony, you said that you were owed approximately \$11,000 - \$11,800; is that correct?

A Yes, ma'am.

Q And those are on penders? You call it penders; right?

A Yes, ma'am.

Q And penders, as I understand it, are deals that have not made their full down payment; right?

A Yes, ma'am.

Q Okay, and you agree with me that in order for you to receive a commission you have to have a full down payment; right?

A No, ma'am. When the Westgate ---

Q Okay, yes or no?

A No, I don't agree with it.

Q Okay, so, what you're saying is ---

MR. CONNELL: Your Honor, objection, he can explain.

THE COURT: Okay, I'll allow it. Once he gives his answer he can explain his answer if he needs to.

MS. MAYSONET: Okay.

THE COURT: Go ahead.

A I was never told and to my knowledge no other timeshare company that I've worked for has ever moved a pender payment schedule to the end of the deal except Westgate.

Q All right.

A And if I had known that I probably would not have taken the job.

Q All right, but that wasn't the question that I asked.

A Well, that's why I'm explaining my no.

Q Okay.

A Because I think you should be able - you should get the down payment, but ---

Q All right.

A --- you know, you don't get to cheat after you get part of it.

Q I understand, but the question was one of the conditions of the agreement for commission payment was that the customer has to make a full down payment; correct?

A Yes, and that was set on a three month to four month timeline.

Q I understand. Now, can you tell me the specific down payment, the penders, the specific contracts that you contend are owed to you?

A Yes, I can. I have them here. Would you like to ---

Q Okay, tell me the names.

A Gene has two in the big file, two of them ---

Q Well, can you just ---

A --- that aren't in this stack, Hubbell, H-U-B-B-E-L-L.

Q Are you, are you looking at a specific contract that was given by - can I have that proposal please?

A Yes, you have two of them in your file, Gene, that ---

MR. CONNELL: Didn't I give you the ---

Q Okay, let's do this. Can you, can you give me the proposal name and contract number that you contend is a pender that is owed to you?

A Yes.

Q Go ahead.

A All right, it is Hubbell, H-U-B-B-E-L-L, and I'm showing account number 2801073028.

Q Okay, and the next one?

A The K-L-A, I believe it's I-S, account number 2800956128; White, Kenneth, 2800954728.

Q Okay.

A Pappu, P-A-P-P-U, 2800952428; Lasco, L-A-S-C-O, 2800939128; Pierson, Kimberly, 2800949128; and Gene has two more over there that are in the other file.

Q Wait, give me a second please.

MR. CONNELL: In your file, don't I have your file up there with me? Let me look. Can I get his file?

MS. MAYSONET: Well, hold on.

MR. CONNELL: Well, you asked the question. You asked the question.

MS. MAYSONET: Your Honor ---

MR. WILKERSON: May we approach the bench, Your Honor, for just a moment?

THE COURT: All right.

(Whereupon, a bench conference is held in the presence but out of the hearing of the jury.)

BY MS. MAYSONET:

Q Mr. Thoni, do you remember receiving a request for production from Westgate through your lawyer telling you to turn over all the documents of the transactions that you believe were owed to you? Do you recall that?

A Yes.

Q Okay, yet those documents that you're talking about were not part of the production.

A Mr. Connell has those in my file.

Q That's not the question, are you aware that those documents that you're talking about were not produced to us; right?

A No, I'm not aware of any of that.

MS. MAYSONET: I have no further questions, sir.

THE COURT: All right, redirect?

MR. CONNELL: Just a couple, Your Honor.

REDIRECT EXAMINATION

BY MR. CONNELL:

Q The pender situation that you've talked about, if Westgate was getting the money for the monthly payment, could that have been applied towards the down payment?

MR. WILKERSON: Improper redirect.

THE COURT: Sustained.

MR. CONNELL: Your Honor, they've asked questions ---

THE COURT: Sustained.

BY MR. CONNELL:

Q If you would, please, explain to me again, you were arguing about what you think pendents were, correct, and how they were to be paid.

A How they were to be paid.

Q Okay, explain to me if you would, please, how the penders were to be paid as far as your understanding was.

MR. WILKERSON: Same objection.

THE COURT: Sustained.

Q Let me ask it this way then, your understanding of the agreement of how you were to be paid was what?

A If it was ---

MR. WILKERSON: Same objection.

THE COURT: Sustained.

MR. CONNELL: All right, come down.

THE COURT: All right, ladies and gentlemen, I think it's a good time for us to take about a 10-minute break, give you an opportunity to stretch your legs, get something to drink, use the restroom if you need to. You can check your phone messages and return calls but you cannot discuss this case with anyone even among yourselves at this point in time. Don't conduct any independent investigations. We'll take about a 10, 15-minute break and then we'll resume the trial. Thank you very much. Everyone else please remain seated while the jury's excused.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, anything from the Plaintiff before we take a break?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MR. WILKERSON: Your Honor, I'd like to put on the record a little side bar that we had just then about the testimony.

THE COURT: Yeah, the - but I mean, I still don't understand what - I mean, I understand your objection was is that you requested the contracts that this witness was claiming he was due commissions on and that he did not produce the ones that he testified to under cross examination.

MR. WILKERSON: Correct.

THE COURT: All right, so, what is your motion?

MR. WILKERSON: Your Honor, please, my, first of all, my objection was to allow that to - not to allow him - to strike his testimony in its entirety because it's based upon information that was not provided in discovery. The Court stated that we would be allowed to challenge his credibility on that by crossing, crossing him, but the problem is it becomes very awkward with a response to requests for production because those are produced by the lawyer, it does not require it to be signed by the party, and he just simply denied any knowledge of what had been produced and left us, A, unable

to effectively cross examine him and, B, we're unable to effectively present a rebuttal to his claim because we're prepared to rebut the claims that he presented in his response to requests for production and now we've got completely different contracts that we're not prepared to address.

THE COURT: All right, Mr. Connell, let me hear from you on that.

MR. CONNELL: Your Honor, he, he - they asked the question. I didn't talk about those contracts ---

THE COURT: Yeah, but the, but the fact of the matter is is they requested that you produce the contracts that he was relying upon to get his commission. Were those - and Hubbell, Klais, White, Pappu, Lasco, Pierson, that's what he says he's relying on for his commissions. Why weren't those produced to the defense?

MR. CONNELL: Your Honor, we gave them back thousands of pages of documents.

THE COURT: Did you give them these?

MR. CONNELL: I don't know. I have to go look at the file.

THE COURT: Okay, that's part of the problem is we don't even know what is produced. So, check and see. We're going to take about a 10-minute break. Check and see if you produced those contracts to them; okay?

MR. CONNELL: All right, sir.

THE COURT: And then I'll address it when we get back.

MR. WILKERSON: Thank you, Your Honor.

THE COURT: All right.

OFF THE RECORD

(On the record.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, Mr. Connell, have you had an opportunity ---

MR. CONNELL: Yes, sir.

THE COURT: --- to determine whether those contracts were produced to the Defendant?

MR. CONNELL: Your Honor, we gave them - the answer, short answer to that, we did not give them those particular contracts; however, we gave them a list of all of the - may I approach, Your Honor?

THE COURT: Yeah.

MR. CONNELL: I'll show you this. We gave them a list that included those particular names that we talked about and ---

THE COURT: In response to what interrogatory?

MR. CONNELL: This is the interrogatory, Your Honor. Here's

the - here's Mr. Thoni's. That was what was asked.

THE COURT: All right.

MR. CONNELL: And that's what we gave them.

THE COURT: All right, let me find - I don't see what was asked.

MR. CONNELL: It's at the top here and then on the next - first page.

THE COURT: Where's the question?

MR. CONNELL: It is, it goes way back. You'll have to go back. Question three, and then we have one for each, each of the ---

THE COURT: Okay.

MR. CONNELL: You see where I'm coming from?

THE COURT: I got you. So, question number three, "Set forth an itemized statement of damages that you believe have been sustained by you. For each item of damages listed provide the following information, the dollar value claimed for said element, a list of all documents upon which you rely in proving said element and a list of all witnesses upon whom testimony you will rely in providing said damages."

All right, now, this list that you gave me, what is

this?

MR. CONNELL: That's the list that we gave back to them and that's the list he was referring to.

THE COURT: But I mean, what is this list reflective of? What are you telling - when you give them this list, you're saying this is a list of?

MR. CONNELL: Those are all the sales that he was involved in, including the ones he talked about.

THE COURT: Okay, these - this is a list of all of the sales

MR. CONNELL: He sold.

THE COURT: --- that Mr. Thoni, okay.

MR. CONNELL: Yes, sir, and on top of that, Your Honor, they gave us that list in some of the other litigation, too.

THE COURT: All right, let me hear from the Defense.

MR. WILKERSON: If Your Honor, please, there are, I'm sure, documents in the file that reflect those names as, as Mr. Connell has just, just indicated. This document he handed up which we'd like to have marked as an exhibit is representative to be all the deals that this individual sold. Now, we asked for them to produce

the documents that support their claim for, for compensation. As matter of a fact, that would be our request for production number nine, "All documents supporting your allegation that you were owed any wages or commissions." His answer was, "Enclosed," and enclosed in that package is a list of all the sales that this individual had made that he's just passed up to you. Also enclosed in that package was a list of day line proposal that - proposal sheets like we've talked about the deal sheets that they've put in on some other deals, and those, those deal sheets reflected specific names which we went back and did some research on to determine what had happened on these specific deals. What Mr. Connell would have us do is go back and inspect each and every, each and every sale that this individual, I assume every other individual in this case, performed or was involved in and be prepared to address how the commission was paid on each and every sale when they have identified a specific amount of money that they're claiming, and it just - it's just untenable for - to put us into that position to require us to do it. Now, we, in good faith, Your Honor, relied upon these proposals sheets as the contracts that he was relying upon or that he was claiming had not been paid. We did the research to determine how those commissions had been accounted for. We're prepared to testify about

that.

THE COURT: Okay.

MR. WILKERSON: We're not prepared to testify about every transaction that this individual was involved in for the entire time he worked there.

THE COURT: All right, I mean, they do - let me hear back from you, Mr. Connell. They say, "A list of all documents which you rely on and providing, in proving said element," but you didn't provide them with this - these contracts.

MR. CONNELL: We didn't provide them with those. We did give them the list. Your Honor, there's no prejudice to them. They were put on notice of the amount.

THE COURT: No.

MR. CONNELL: They could have taken Mr. Thoni's deposition and asked him anything they wanted to about those items. They did not do that. It's our position, Your Honor, that they want to come up and I assume they're going to do this at a later point ---

THE COURT: Well, the fact of the matter is is a person can conduct, but they don't have to do depositions. They can do interrogatories. They can do requests for productions and when they say, "Give us the contracts that you're saying we have not paid the commissions on," then why don't you just give them the

contracts that you're saying they're - the commissions weren't paid on?

MR. CONNELL: We gave them the list.

THE COURT: Did you even - did you know that these were the contracts that your client was going to bring up today and say, "I have not been paid on Hubbell, Klais, White, Pappu, Lasco or Pierson?"

MR. CONNELL: Did I know which ones?

THE COURT: Yeah.

MR. CONNELL: No, sir.

THE COURT: Okay.

MR. CONNELL: I did not know which ones, but I did know that they would be on this list.

THE COURT: Okay.

MR. CONNELL: That's what I knew.

THE COURT: But that list, some have been paid and some have not been paid.

MR. CONNELL: True.

THE COURT: So, you didn't even know which ones had been paid and which ones had not been paid?

MR. CONNELL: I knew that he had taken this list and he had come up with \$11,800 by the use of that list.

THE COURT: Okay.

MR. CONNELL: That's what I knew.

THE COURT: All right. All right, let's go ahead. We'll - we're going to go ahead with the trial. There is going to have to be some curative, but I don't know how we're going to address it at this point in time. So ---

MR. WILKERSON: Thank you, Your Honor.

THE COURT: --- so, let me - I'm going to need to do some research to see what we do on that one? All right?

Anything from the Plaintiff before we bring the jury back in?

MR. CONNELL: No, sir.

THE COURT: Anything from the Defense?

MS. MAYSONET: No, sir.

THE COURT: All right, let's bring - oh, oh, oh, I'm sorry. I'm sorry, that's right. Mr. Wilkerson, you said you had something you wanted to mark.

REPORTER: The list.

MR. WILKERSON: Oh, the list that you had in your hand.

REPORTER: He took it back I think.

THE COURT: Yeah.

MR. CONNELL: You want to get your own?

MR. WILKERSON: Can we just have a stipulation that what he

was relying upon was the list of all the sales that this individual had made and that the contracts that we received, the actual proposal documents that we received were different names than he just testified to?

THE COURT: Let's - no ---

MR. WILKERSON: Can we just have that stipulation on the record?

THE COURT: No, this thing's so convoluted. We need to dot our I's and cross our T's.

MR. WILKERSON: All right, sir, I'll ---

THE COURT: So, let's ---

MR. WILKERSON: --- then I'll pass up the ---

THE COURT: Well ---

MR. WILKERSON: --- the actual contracts, if I may.

THE COURT: Well, wait a minute. What do you mean you're passing it up? They, they - give me the list back that you gave me. All right, you want this marked as a Court's Exhibit?

MR. WILKERSON: Yes, sir.

THE COURT: All right, let's mark that as a Court's Exhibit. That would be, all right, Court's Exhibit Number Three.

(Whereupon, Court's Exhibit Number Three [Sales List - Thoni] appropriately marked.)

MR. WILKERSON: And the - we would also request that Court's Exhibit ---

THE COURT: Hold for a minute, all right.

MR. WILKERSON: --- Court's Exhibit also include the actual proposal sheets or day line proposals that were, in fact, attached to his affidavit.

THE COURT: See, I don't even know what a day line proposal sheet is, what it reflects or what it was in response to. That's all Greek to me.

MR. WILKERSON: Yes, sir, these are ---

THE COURT: What ---

MR. WILKERSON: --- these are contracts. These are his, his, his information relating to contracts. This is the contract information.

THE COURT: His who?

MR. WILKERSON: The witness's information.

THE COURT: All right.

MR. WILKERSON: This is the information he gets about a contract that he just - that he, that he sold. He received - he fills this document out and there's already been testimony as to what happens after this document is filled out.

THE COURT: Yeah, but you haven't questioned him on those

individual things or not. All we're dealing with now is what was produced in discovery and Mr. Connell gave me the list that he produced in discovery and we marked that as a Court's Exhibit.

MR. WILKERSON: This was produced in discovery.

THE COURT: In response to what?

MR. WILKERSON: It was attached to his affidavit in response to the questions about - in response to the questions that you just read. This is the information we got that we relied upon.

MS. MAYSONET: Sir, these are the contracts that he said were owed.

THE COURT: Okay, so, those ---

MS. MAYSONET: Yes, are ---

THE COURT: --- that is - when you asked the interrogatory, "Give me the contracts," he did not give the ones he testified to, these are the ones that he gave.

MS. MAYSONET: Exactly.

MR. WILKERSON: These in my hand, yes, sir.

THE COURT: All right.

MS. MAYSONET: Exactly.

THE COURT: Any objection to making those a Court's Exhibit?

MR. CONNELL: No, sir.

THE COURT: All right.

MR. EPSTEIN: Your Honor, if you don't mind while we're doing that ---

THE COURT: Wait a minute, we got to - let's get these, get that marked as Court's Exhibit Number Four.

(Whereupon, Court's Exhibit Number Four [Day Line Proposals] appropriately marked.)

MR. EPSTEIN: You asked ---

THE COURT: Hold for a minute.

MR. EPSTEIN: I'm sorry.

THE COURT: All right, go ahead.

MR. EPSTEIN: You maybe want to go off the record on this.

THE COURT: No.

MR. EPSTEIN: Oh, okay. You've bought a car and you're sitting with the salesperson and he writes up this worksheet. When, you know, you're negotiating with him about buying this car, he's writing up a worksheet, running back and forth to the manager. Those sheets are exactly the same. The sales line is to the timeshares just like car loans.

THE COURT: It's ---

MR. EPSTEIN: You know, so.

THE COURT: But it doesn't matter. All I'm concerned is

MR. EPSTEIN: Well, you were, you were asking and we have to convey this to the jury, of course, but I wanted to make sure you had a better picture so you kind of understood.

THE COURT: But that's not going to the jury. MR.

EPSTEIN: No.

THE COURT: That is simply Mr. Connell's response to your client's discovery requests.

MR. EPSTEIN: Mine, mine was just for the Court's edification on this to give you a better understanding because we talked about this last night, too.

THE COURT: Okay.

MR. EPSTEIN: You know, just trying to give you sort of a better understanding of how it worked. It's very much patterned after the way cars are sold.

THE COURT: All right.

MR. EPSTEIN: Very much like.

THE COURT: Thank you.

MR. EPSTEIN: There we go.

THE COURT: All right, anything from the Plaintiff before we bring the jury back in?

MR. CONNELL: Nothing from me, Your Honor.

THE COURT: Anything from the Defense?

MR. WILKERSON: No, Your Honor.

THE COURT: All right, let's bring the jury in.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right, ladies and gentlemen, welcome back. I remind you if you have any cell phones, pager devices, let's turn those off at this time. All right, Mr. Connell, you can call your next witness.

MR. CONNELL: All right, Mr. Adams, come up here, please sir.

Whereupon, Robert Adams was called to the stand duly sworn by the clerk and testified as follows:

THE CLERK: State your name for the Court, please, sir.

MR. ADAMS: My name is Robert Adams.

DIRECT EXAMINATION

1 BY MR. CONNELL:

2 Q All right, Ms. Adams, tell me if you would, please,

3 where you live and what you do for a living?

4 A Okay, I live in Myrtle Beach, South Carolina.

5 Q All right.

6 A Carolina Lakes Subdivision and presently I am

7 unemployed.

8 Q All right, and when did you move to the Myrtle Beach

9 area?

10 A 1995.

11 Q Okay, and what kind of work have you done since 1995 in

12 the Myrtle Beach area?

13 A Well, I worked at the Legends Golf Club for five years

14 as a - in charge of ordering all the food and beverage and

15 shortly after that I worked for Coca-Cola delivering and

16 filling machines for a couple of years and then after that I

17 opened my own business down in Georgetown selling DirecTV and

18 wireless phones, doing installs and then after that I went

19 into timeshare at Bluegreen was my first stop that I started

20 in timeshare. Then I ended up in 2007 going to Westgate.

21 Q All right, how long did you work at Bluegreen?

22 A A little over a year.

23 Q And what was your job at Bluegreen?

24 A I worked sale on the line. A tour would come in, the

1 non-owners and give a presentation and after it was said and
2 done either they became an owner or they received their gifts
3 and they went on their way.

4 Q All right, and about how long were you at Westgate?

5 A Almost 2 years.

6 Q Okay, and who was the - who was the boss at that time?

7 Who was the general manager?

8 A Deborah Turner.

9 Q All right, and was she the boss the entire time you were
10 there?

11 A No, sir.

12 Q Okay, who else was the boss there when you were there?

13 A Richard Siegel came in and more or less started running
14 the show after Deborah left.

15 Q All right, and Mr. Siegel came in about what year did he
16 come in?

17 A That would have been 2008.

18 Q And when he came, came in did he replace Ms. Turner?

19 A Yes.

20 Q Was that who you answer to?

21 A Well, I had a boss. I ended up getting a promotion from
22 the line. I went into in-house sales where I dealt strictly
23 with the owners. My immediate supervisor was Bisha Belardi.

24 Q Okay.

1 A And then above him was Richard.

2 Q So, if you're - let's go back through it because I know

3 it's complicated. If you're an in-house salesperson you're

4 selling to people who already have a timeshare there?

5 A Yes.

6 Q And if you're a person who's working the front desk I

7 guess ---

8 A The frontline.

9 Q Yes, sir.

10 A Okay.

11 Q That would be a person who sees a new, new prospective

12 owner?

13 A Right, right.

14 Q Okay, and how long were you in the in-line sales

15 division?

16 A Almost a year, almost a year and a half.

17 Q Okay, and tell me how you were paid there, please, sir?

18 A I was paid an hourly rate, minimum wage. At the time I

19 think it was like six something an hour, plus I received a 10-

20 percent commission on anything that I sold.

21 Q Okay, and have you been able to determine how much you

22 are owed for unpaid wages?

23 A Yes.

24 Q Okay, and how much have you determined that to be?

1 A It would be \$3,572.40.

2 Q Okay, let's see here, okay.

3 MR. WILKERSON: Your Honor, may we approach?

4 THE COURT: All right.

5 MR. CONNELL: I'm getting ready to cure what you're

6 going to ask about.

7 THE COURT: Well, come on up.

8 (Whereupon, a bench conference is held in the presence

9 but out of the hearing of the jury.)

10 BY MR. CONNELL:

11 Q Okay, now, take a look at this document if you would,

12 please, sir.

13 A Uh-huh.

14 Q Was that written by you?

15 A Yes.

16 Q Okay, and does that include the deals that you claim

17 you're owed for?

18 A Three, three deals I wrote down that I owed for.

19 Q Okay.

20 A And you have one other thing was an owner I had upgraded

21 but ---

22 Q Okay.

23 A --- but I can explain this for you if you want.

24 Q All right, let's go on to page two you have the reserve

1 account. That's not involved; is that right?

2 A That's not involved in the total I gave.

3 Q Okay, tell me how you figured the total?

4 A Okay.

5 Q We're not including the reserve.

6 A The first - can I go by the name ---

7 Q Sure.

8 A --- of the owner.

9 Q Go by the name of the owner, that'll be fine.

10 A Okay, the first one I wrote down was a party that was

11 not an owner. They, they became new owners I dealt with by

12 the name of Doug Brown and the account number was 2801198128.

13 That was a sale that was a pender and I sold that on November

14 2nd of 2008 and they didn't give a full down payment. They

15 were supposed to do theirs over four monthly payments, which

16 they did, and the purchase price of the unit was 7200. My

17 commission rate at the time, they had just lowered our rate

18 from 10 percent, a couple of us went to eight percent. So,

19 \$7200 was the sale price. They did - the pender did become

20 good times eight percent is \$576 was the commission I

21 should've received on that one.

22 Q Okay.

23 A The second one was the customer's name was Clara Graham,

24 account number 2801216528. Now, that was a full-down sale and

1 it was to an owner and it was written in October 27th of 2008.
2 What happened was I was getting a commission on that, should
3 have been, the purchase price of the unit was 7200. The
4 commission rate was 10 percent but they only paid me five
5 percent on that. There was a discrepancy of five percent ---
6 Q Okay.
7 A --- that I did not receive. So, I had an amount of \$360
8 I did not receive on that particular sale.
9 Q Okay.
10 A The third one, Gloria Johnson, account number
11 2801223728, that was an owner that I upgraded and it was a
12 full-down sale and that was written about five days before I
13 was let go.
14 Q Okay.
15 A Purchase price was 18,900. They had equity that they
16 applied to it of \$12,740, which made a purchase price which I
17 would have received commission on for \$6,155. So, I figured
18 my commission on that to be \$492.40.
19 Q Okay, and what was the total you came up with?
20 A On those three there was ---
21 Q Yes, sir.
22 A --- \$1,572.40.
23 Q Okay, and what is the total amount that you now believe
24 is owed to you?

1 A \$3,572.40.

2 Q Okay, how did you come up with that number?

3 A I had an owner, and you do have the paperwork there, but

4 I could probably do pretty good without looking at it. Her

5 name was Edith Hagler. She came and she was an owner that had

6 a two-bedroom unit. She came and saw me in October. She

7 wanted to upgrade to one of our new four-bedroom units, which

8 she did, and the way she set up her down payment on it she

9 paid half of it that day and about a month later she was

10 supposed to send the other half, which she eventually did that

11 month later.

12 MR. WILKERSON: Objection, hearsay. He would have to

13 have - that would have to be hearsay.

14 THE COURT: Sustained.

15 A Okay.

16 Q Okay.

17 A Well, I did - okay, I'm sorry.

18 Q Wait a minute, let me, let me ask the question so we

19 don't get in trouble here.

20 A Okay.

21 Q How were you - how were you able to determine that the

22 other half was paid at a later time?

23 A Because I did get paid on the - on that deal.

24 Q Okay.

- 1 A About four weeks later.
- 2 Q Okay.
- 3 A So, she would have had to made the full down payment for
4 me to get the original payment, payment on it, which was \$2000
5 commission.
- 6 Q Okay, come down here and write that number on this board,
7 if you would, please, sir.
- 8 A (Complies with request.)
- 9 Q All right, now, were you given notice in advance of
10 changes in your employment agreement?
- 11 A Yes.
- 12 Q Okay, and what notice did they give you in advance that
13 they were going to change your employment agreement?
- 14 A The only thing that I can recall on the employment
15 agreement was like my commissions structure was going to
16 change.
- 17 Q Okay, were you paid all your wages that you were due
18 within 30 days of after you left the payroll?
- 19 A No.
- 20 Q Did you get all your payments? Okay.
- 21 A Not the ones I mentioned I ---
- 22 Q Okay, is there anything in the contract that provided
23 that they would pay you within 30 days?
- 24 A I'm trying, I'm trying to recall. It's been almost four

1 years, but ---

2 Q All right, and you think the ---

3 A --- if that was in there. I'm not sure if that was in

4 there or not.

5 Q All right, do you think that Westgate complied with the

6 contract that they - when they agreed to pay you? Have they

7 complied with the payments?

8 A No.

9 Q Okay.

10 A Everything was fine up until when I left because of those

11 ---

12 Q Okay.

13 A --- existing deals.

14 Q Were you given, were you given notice in writing that

15 they would withhold your - part of your pay? Did they give

16 you a notice in writing they were going to withhold part of

17 your pay?

18 MR. WILKERSON: Objection, Your Honor, the contract

19 speaks for itself.

20 THE COURT: Overruled, go ahead.

21 Q Were you given notice in writing?

22 A That they would hold part of my pay?

23 Q Yeah, they'd hold that 3500 and some dollars back?

24 A All I was aware of, not, not on that.

1 Q Okay, very good. Were you told that some of your sales
2 would be up-sold or down-sold by another person?

3 A I was never told, told that, but ---

4 Q Okay, all right, the Sun News article that's in evidence
5 was that something that drew you to Westgate to get a job
6 there?

7 A Yes.

8 Q Did you look at that?

9 MR. WILKERSON: Objection, relevance.

10 MR. CONNELL: Your Honor, it's in evidence and we're
11 trying to prove the employment agreement.

12 THE COURT: How is that if it drew him there what's
13 ---

14 MR. CONNELL: Your Honor, the Sun News document speaks
15 to what they're going to offer the employee.

16 THE COURT: Okay, overruled, I'll allow it.

17 MR. CONNELL: Let me confer with my - I think I'm done.

18 THE COURT: All right.

19 BY MR. CONNELL:

20 Q Okay, were you given an opportunity to review the
21 employment contract before you signed it?

22 A Yes.

23 Q Okay, and how much opportunity were you given to do
24 that?

1 A It was more or less given to me one morning by Deborah
2 Turner.

3 Q Okay.

4 A And it was right before I had my appointments to see
5 some of my owners. So, I was more or less it was put down, I
6 glanced over it quick. She said she needed it signed and I
7 signed it and handed it back, and I needed, anything I say
8 could be hearsay but more or less either if you signed it, no
9 problem, if you didn't sign it, there'd be problems, so.

10 Q All right.

1 A I wanted my job. I just signed it.
2 Q Okay, sir.
3 MR. CONNELL: That's all I have, Your Honor.
4 THE COURT: All right, cross examination.
5 MR. CONNELL: I don't object to those two documents.
6 MR. WILKERSON: Without objection the next two, Your
7 Honor.
8 THE COURT: That would be Defendant's Seven and Eight.
9 All right, Defendant's Exhibit Number Seven, Defendant's
10 Exhibit Number Eight admitted into evidence without objection.
11 MR. WILKERSON: Thank you.
12 (Whereupon, Defendant's Exhibit Number Seven [Terms of
13 Employment Notice - Adams] and Defendant Exhibit Number Eight
14 [Commission Schedule - Adams] admitted into evidence and
15 appropriately marked.)
16 CROSS EXAMINATION
17 BY MR. WILKERSON:
18 Q Mr. Adams, Defendant's Seven does that bear your
19 signature?
20 A Yes, sir.
21 Q And that sets forth, it's identified as the terms of
22 employment sheet?
23 A Employment, yes, sir.
24 Q All right, sir, and this document, Exhibit A, this was

1 attached to your contract; is that correct? That's
2 Defendant's Number Eight?

3 A Yes, sir.

4 Q And it bears your signature?

5 A Yes, sir.

6 Q All right, sir, now, I'm a little confused as to your
7 testimony. If you don't mind ---

8 A Sure.

9 Q --- I'd like to go back. You've identified four
10 transactions ---

11 A Yes.

12 Q --- you believe you're entitled to be paid for?

13 A Yes, sir.

14 Q A Doug Brown, a Clara Graham and Gloria Johnson and
15 you've told us how you made those computations. You also
16 identified a Ms. Hagler; is that right?

17 A Yes, sir.

18 Q And you realize that if you - you will agree with me,
19 will you not, that in order to be paid a commission you have
20 to have full down payment made by the customer; correct?

21 A Yes, sir.

22 Q And that full down payment is 10 percent?

23 A Uh-huh.

24 Q Now, you, you were, you were asked ---

1 THE COURT: Excuse me, you need to answer yes or no.
2 They can't pick up a uh-huh or huh-uh.

3 A I'm sorry, yes, sir.

4 Q All right, sir, and you testified that the way you know
5 that Ms. Hagler paid her full down payment was that you were
6 paid that commission; is that right?

7 A Yes, sir.

8 Q So, you're asking the jury to pay you, to give you \$2000.
9 for a commission you've already been paid; is that, is that
10 what I understand?

11 A No, sir, I was charged back nine months later. It's -
12 he has the documentation right there showing it from a
13 payroll. I was charged back the \$2000 that I received from
14 the owner that upgraded. I got paid nine months earlier and
15 then in November I got paid on that particular deal. July of
16 the next year I'm looking at my pay stub and it said
17 chargeback of \$2000 with that owner's name.

18 MR. WILKERSON: Your Honor, of necessity, based on
19 the records thus far that would of necessity involve reserve
20 account issues. The Court has already ruled on that. We
21 would move to strike that testimony.

22 MR. CANTY: Your Honor, may we be heard? His
23 testimony is not that it was charged back against the reserve
24 account.

1 A No.

2 MR. CANTY: It was charged back against his paycheck.

3 A Uh-huh.

4 MR. CANTY: And there is a difference.

5 THE COURT: All right, overruled.

6 BY MR. WILKERSON:

7 Q And, and where's the statement?

8 A It was, Gene.

9 Q You have the paycheck?

10 A Gene.

11 MR. CONNELL: What you wanting?

12 THE COURT: Hold it, hold it, you just respond to his

13 questions; okay?

14 A Oh, yes. I, I ---

15 Q Do you have the paycheck?

16 A The paperwork showing that.

17 Q The paycheck that you're talking about that you're, that

18 you say ---

19 A It's the, it's the paperwork from Westgate that shows

20 that I got charged back.

21 MR. CONNELL: You got the documents?

22 A No, you - Gene, the one that was highlighted. He had it

23 together with ---

24 Q So, you've, you've testified that you were charged back

1 sometime later for that, for that?

2 A Nine, nine months after it became good, the down payment
3 was paid.

4 Q And you have documents that support that?

1 A Not with me. Gene has it in his folder.
2 MR. WILKERSON: No further questions, Your Honor.
3 THE COURT: All right, redirect?
4 MR. CONNELL: Come down, nothing, nothing else. Come
5 down.
6 THE COURT: All right.
7 A Okay.
8 THE COURT: Step down. Call your next witness.
9 MR. CONNELL: Mr. Middleton, come up, please, sir.
10 Whereupon, Khalif Middleton was called to the stand, duly
11 sworn by the clerk and testified as follows:
12 THE CLERK: State your name for the Court, please,
13 sir.
14 MR. MIDDLETON: Khalif Middleton.
15 DIRECT EXAMINATION
16 BY MR. CONNELL:
17 Q All right, Mr. Middleton, tell me if you would, please,
18 where you live?
19 A I live in Burgess, Virginia.
20 Q All right, okay, and when did you move to Burgess,
21 Virginia?
22 A Back in November of 2008.
23 Q All right, and where did you live previously?
24 A Myrtle Beach, Carolina Forest area.

- 1 Q Where is that?
- 2 A Carolina Forest area.
- 3 Q Okay, how long did you live in the Carolina Forest area?
- 4 A Two years.
- 5 Q And what were you doing in the Carolina Forest area?
- 6 A I worked at Firestone for the first seven, eight months.
- 7 Then I worked at Medieval Times and then I was working both
- 8 jobs at the same time. Then my wife talked to me, talked to
- 9 me into getting into timeshare.
- 10 Q All right.
- 11 A So.
- 12 Q Had you ever been in timeshare before that?
- 13 A No.
- 14 Q And what job did you take at time - with timeshare?
- 15 A Sales.
- 16 Q Okay, and where did you work?
- 17 A Westgate.
- 18 Q And how long did you work at Westgate?
- 19 A Three months.
- 20 Q How long?
- 21 A Three months.
- 22 Q All right, and what was your job at Westgate?
- 23 A I was a sales rep.
- 24 Q Inside or outside?

- 1 A Inside, frontline..
- 2 Q Okay, tell us again what the frontline salespeople do?
- 3 A We pick up the tours and we do our presentation. Then
- 4 if we sell them they go to deeding. If we don't sell them
- 5 they go.
- 6 Q Okay, all right, did you sign a contract?
- 7 A Yes, I did but I didn't really read it briefly because
- 8 at the time we was thrown on the floor the same day.
- 9 Q Okay, were you ever given notice that if you left
- 10 employment that you would be paid your wages within 30 days?
- 11 A No.
- 12 Q Okay, were you paid your wages that you claim due within
- 13 30 days of leaving the job?
- 14 A No.
- 15 Q Do you think the Defendants complied with the contract?
- 16 A No.
- 17 Q Okay, and do you - can you describe whether or not you
- 18 ever had any sales that were up-sold?
- 19 A No.
- 20 Q Okay, did you ever have any sales that were down-sold?
- 21 A No.
- 22 Q Have you been able to determine what you believe
- 23 Westgate Resorts owes you?
- 24 A Yes.

1 Q All right, and let me ask you to come down here and
2 write that on this piece of paper, please, sir.

3 MR. WILKERSON: The same objection as with the
4 others, Your Honor, speculation, no foundation.

5 THE COURT: Overruled.

6 Q Okay, write your name and the number, please, sir.

7 A (Complies with request.)

8 Q All right, okay, thank you.

9 MR. CONNELL: All right, Your Honor, the witness has
10 written \$15,000, signed his name.

11 BY MR. CONNELL:

12 Q Okay, Khalif, tell me how you came up with the \$15,000
13 number, please, sir.

14 A Well, all my deals haven't come through, they was all
15 penders.

16 Q Okay.

17 A Every last one of them was penders.

18 Q Okay, tell me what you mean by that?

19 A They was branched off from three to five months. Then
20 I haven't seen anything since I moved back from - moved back
21 to Virginia. So, I been in Virginia four years.

22 Q Okay.

23 A And I haven't received anything.

24 Q You've received no pay?

1 A No, no, sir.

2 Q And those were deals that you sold?

3 A Yes, sir.

4 Q And tell me how you understood you were to be paid?

5 A If you - if they made they monthly payments that you

6 would get your commission.

7 Q Okay.

8 A I haven't received a commission check since I left to

9 move back to Virginia.

10 Q What if any complaints did you make to any of the

11 managers there about your payment of your monies?

12 A I didn't make no complaints because at the time when I

13 left in - well, when I was let go in September they was

14 telling me that I can come back in February but I end up

15 moving back to Virginia.

16 Q Who was telling you you could come back in February?

17 A Frederick Von Sant.

18 Q Was he - who was he at Westgate?

19 A He was our training manager.

20 Q All right, he was the one who trained you in the

21 beginning?

22 A Yes, sir.

23 Q All right, and what was - him - you coming back in

24 February going to have to do with, with getting paid?

- 1 A Well, they, they was going - they put everybody back on
2 the line to start all over again. Then you will get - start
3 back with your money, getting your money back.
- 4 Q All right, have you had any contact with anybody at
5 Westgate in Orlando?
- 6 A No.
- 7 Q Have you called Connie Sharp?
- 8 A I called once or twice in the beginning but then after
9 that I stopped calling because it was no use.
- 10 Q Okay, and you say it was no use. Why do you say that?
- 11 A Because you couldn't get in contact with her.
- 12 Q Because what?
- 13 A You couldn't get in contact with her.
- 14 Q Okay, couldn't get - you couldn't talk to her on the
15 phone?
- 16 A Couldn't get her on the phone.
- 17 Q Had - was - did you write any letters to her?
- 18 A No.
- 19 Q Did you leave voicemail messages for her?
- 20 A Yes.
- 21 Q Did you leave your phone number?
- 22 A Yes.
- 23 Q Did you ever get any return calls?
- 24 A No.

1 Q Did you ever go to any supervisor at the Westgate Resort
2 in Myrtle Beach and ask about why you weren't getting your
3 pay?

4 A No, I mean because I was just - I was - I thought that
5 we were supposed to be getting our pay after the, the - the
6 monthly payment was down, the down payment was done.

7 Q Okay, were the people that you sold were they making
8 their payments?

9 A Yes.

10 Q How do you know that?

11 A In my records they showed that each of my people have
12 made their down payments.

13 MR. WILKERSON: Objection, Your Honor, he - I need to
14 find - it's obviously hearsay, objection, hearsay.

15 THE COURT: All right, sustained.

16 MR. CONNELL: Your Honor, it goes to the records they
17 presented that we've looked at.

18 THE COURT: Well, show them the records that they
19 presented and let's go with that then.

20 MR. CONNELL: Okay.

21 THE COURT: Otherwise he's just testifying to
22 hearsay. If they produced it during discovery then you can
23 show them.

24 MR. CONNELL: All right, sir.

1 THE COURT: And go on that.

2 A It should be right on top, Gene.

3 Q Okay.

4 A No, right, right in your hand now. You've got in your
5 hand, right there, the top, yes.

6 Q Okay, those are the records you were looking at?

7 A Yes.

8 Q From your employment history?

9 A Yes.

10 Q Is that how you determined what you were owed?

11 A Yes.

12 THE COURT: Yeah, I sustain the objection. Strike
13 that last response.

14 MR. CONNELL: You want me to go and ask him to look at
15 each one, Your Honor.

16 THE COURT: I'm striking that last testimony. Let's
17 move on.

18 MR. CONNELL: Okay, okay. Your Honor, could we be -
19 can we talk to you just a second?

20 (Whereupon, a bench conference is held in the presence
21 but out of the hearing of the jury.)

22 THE COURT: We just got to move on. I'm going to
23 sustain the objection.

24 MR. CONNELL: All right.

1 BY MR. CONNELL:

2 Q All right, let me, let me ask this question, Khalif.

3 You signed the contract?

4 A Uh-huh.

5 Q What percentage were you going to be paid?

6 A Ten.

7 Q Ten what?

8 A Ten percent.

9 Q And 10 percent of what were you expecting to get?

10 A I got - it was whatever I sold on, on that date you get

11 10 percent of it.

12 Q Okay, all right, and from your understanding and your

13 memory how did you come up with the \$15,000 figure.

14 MR. WILKERSON: Objection.

15 MR. CONNELL: Your Honor, that's ---

16 THE COURT: Overruled, I'll allow that.

17 A Everything that I sold on all my documents that's in my

18 paper I did the 10 percent and then ---

19 MR. WILKERSON: Objection, he's reviewing documents

20 that are not in evidence, hearsay objection.

21 MR. CONNELL: He's not doing anything but just

22 explaining how he thinks - how he came up with the \$15,000.

23 THE COURT: Okay, I'm going to allow this testimony.

24 Go ahead.

1 A Everything that I did I added ---

2 Q When you say you did everything you sold?

3 A Everything I sold I added it up and then with the, at
4 the end of the, at the end of the paper it said I made 160,000
5 for the, for the year to date.

6 MR. WILKERSON: Objection.

7 THE COURT: All right, I sustain the objection. He's
8 talking about paper that we don't know anything about.

9 Q All right, let me ask ---

10 A Okay.

11 MR. CONNELL: Thank you.

12 BY MR. CONNELL:

13 Q Let me ask this, to your knowledge, how much did you, how
14 much did you sell, what dollar amount?

15 A 15,000.

16 MR. WILKERSON: Objection, hearsay.

17 MR. CONNELL: No, no, no.

18 THE COURT: No, he said to his knowledge. So, if he
19 knows how much he sold I'm going to let him - he's under oath
20 and I'm going to let him testify as to how much he knows that
21 he sold if he knows of his own personal knowledge how much he
22 sold. That's not hearsay. He's - he, he sold it. He knows
23 what it sold for, and if he knows that he can testify to it.
24 So, overruled.

1 A 15,000.

2 Q All right, that's your commission. How much did you

3 sell to these people?

4 A Oh, that I sold for them?

5 Q Yes, sir.

6 A 160,000.

7 Q All right, and so, you're taking the 10 percent from

8 that?

9 A Yes.

10 Q And you're reducing it to \$15,000?

11 A Yes, sir, because I did get paid on one while I was

12 still here.

13 Q Okay, all right, and that - during the entire course of

14 your employment there you, you've ---

15 A I didn't get, I didn't get paid it all.

16 Q Okay, I understand that, but you sold \$160,000 ---

17 A Yes.

18 Q --- worth of timeshare ---

19 A Yes, sir.

20 Q --- to customers?

21 A Yes, sir.

22 Q All right, and you got paid on one?

23 A Got paid on one.

24 Q And that's why you took that off?

1 A Yes.

2 Q All right, and that's how you came up with a number?

3 A Yes, sir.

4 Q All right, thank you.

5 THE COURT: All right, cross examination.

6 MR. CONNELL: No objection.

7 MR. WILKERSON: Next two exhibits without objection,
8 Your Honor.

9 THE COURT: All right, that would be Defendant's Nine
10 and Ten. All right, Defendant's Exhibits Nine and Ten
11 admitted into evidence without objection.

1 MR. WILKERSON: Thank you.

2 (Whereupon, Defendant's Exhibit Number Nine [Terms of
3 Employment Notice - Middleton] and Defendant's Exhibit Number
4 Ten [Commission Schedule - Middleton] admitted into evidence
5 and appropriately marked.)

6 CROSS EXAMINATION

7 BY MR. WILKERSON:

8 Q Mr. Middleton, I show you Defendant's Nine, Terms of
9 Employment Notice, does that bear your signature?

10 A Yes, sir.

11 Q Defendant's 10, Commission Schedule, that bear your
12 signature on the last page?

13 A Yes, sir.

14 Q All right, sir. Now, you, you will agree with me that
15 the terms of your employment in order for you to be paid a
16 commission that the full amount of the down payment must be
17 paid by the customer?

18 A Yes, sir.

19 Q Correct, and that's full 10 percent?

20 A Yes, sir.

21 Q You've testified that all of your contracts that you
22 solicited, that you negotiated on behalf of the - on behalf of
23 your employer were penders?

24 A Yes, sir.

1 Q And they were penders as of the time that you left the
2 employ?

3 A Yes, sir.

4 Q Correct, all right, sir, and so, so, in order for you to
5 have a commission due to you it would be necessary that those
6 down payments be made by the customers after you left the
7 employ?

8 A Yes, sir.

9 Q And those down payments were not paid to you; were they?

10 A What you mean not paid to me?

11 Q The down payments by the customers? They sent those to
12 someone other than you; right?

13 A Basically, well, they sent it to the company. They got
14 to pay, pay you all and then I get my, my commission from you
15 all.

16 Q All right, and those payments were made after you left
17 the company?

18 A Yes.

19 Q And that's your testimony that they were made, those
20 payments were made?

21 A Yes, but I never got paid by the company.

22 Q All right, sir.

23 MR. WILKERSON: If Your Honor, please, we would, we
24 would move to strike his entire testimony on the grounds that

1 he has not, he, he has no knowledge as to whether or not those
2 down payments were made. They were made after he left the
3 company.

4 THE COURT: Well, I don't remember that question ever
5 being asked of him. Do you know whether or not the
6 commissions were paid?

7 A Yes.

8 THE COURT: Of your own personal knowledge?

9 A Yes..

10 THE COURT: All right.

11 A I know, I know they were paid.

12 THE COURT: All right, if they were not paid to you
13 then how do you know that?

14 A Because my documents tell me, and my, my paperwork.

15 THE COURT: Okay, all right, yeah, I'm going to
16 strike the testimony.

17 MR. WILKERSON: Thank you, Your Honor.

18 THE COURT: I sustain the objection. All right, all
19 right, I'm going to strike your testimony. You can step down.

20 All right, the jury is to disregard the testimony of Mr.
21 Middleton. All right, Mr. Connell, call your next witness.

22 MR. CONNELL: Mr. Zinn, come up here if you would,
23 please. Okay, let's see, how about Ms. Lanpher come up here,
24 please, ma'am.

- 1 MR. WILKERSON: I'm sorry, who do we have now?
- 2 MR. CONNELL: Ms. Lanpher.
- 3 Whereupon, Lynn C. Lanpher was called to the stand, duly

1 sworn by the clerk and testified as follows:

2 THE CLERK: State your name for the Court, please,
3 ma'am, and spell your last name.

4 MS. LANPHER: Lynn Lanpher, L-A-N-P-H-E-R.

5 DIRECT EXAMINATION

6 BY MR. CONNELL:

7 Q Okay, Lynn, tell me if you would, please, what you do for
8 a living now.

9 A I am a benefits enroller, which is insurance.

10 Q Okay, tell me if you would, please, where you live.

11 A I live in Surfside Beach, South Carolina.

12 Q Okay, how long have you been living in Surfside?

13 A Twenty-four years.

14 Q Okay, and tell me if you would, please, where you came
15 here from.

16 A Green Bay, Wisconsin.

17 Q Okay, and when did you move here from Green Bay,
18 Wisconsin?

19 A The year before Hugo.

20 Q Okay, and what kind of work did you do prior to working
21 at Westgate?

22 A I'm an esthetician. I do skin care.

23 Q And when did you first come to work at Westgate?

24 A In April of 2008.

- 1 Q Okay.
- 2 A Bike week.
- 3 Q All right, and how long did you work at Westgate?
- 4 A Three months.
- 5 Q And what was your contract, what was your arrangement for
- 6 how you were going to be paid?
- 7 A Ten percent on your sales and minimum wage hourly.
- 8 Q Okay, and what part, what department did you work at?
- 9 A I worked the frontline.
- 10 Q Okay.
- 11 A Sales.
- 12 Q And how long did you work the frontline?
- 13 A For those three months and after that I also went to OPC.
- 14 They had told me also I was slowing down and the lines would
- 15 be cut. So, they said in order for me to receive my penders I
- 16 would go to the front, OPC.
- 17 Q Okay, and have you - did you sign an - did you sign a
- 18 contract with them?
- 19 A Yes.
- 20 Q And were you given notice in advance that there would be
- 21 changes in the employment contract?
- 22 A No.
- 23 Q Okay, and were you told that all wages would be paid
- 24 within 30 days of separation of the company in leaving, being

1 terminated or quitting?

2 A As long as the down payments had been due, yes, yes.

3 Q Okay, did you, did you get paid all wages that were due
4 within 30 days of separation from the company?

5 A No, no.

6 Q Okay, and does the contract provide that the Defendant is
7 to pay all wages within 30 days?

8 A I am not sure on that.

9 Q Okay.

10 A Our contract was quite thick and we were not given time
11 to go over that.

12 Q Okay, is - do you think the Defendant complied with the
13 contract?

14 A No.

15 Q All right, tell me why.

16 A I have not received commissions due and when I did
17 receive commissions while I was still at work, Doug Boykin
18 would hand out our pay stubs. I was - I received mine by
19 direct deposit. After it did get busy, we were working during
20 bike week and then black bike week after that. There were no
21 names listed. We didn't get those. He said he'd get them to
22 us eventually. We never did get them. So, I don't actually
23 know other than three sheets of paper who I was actually paid
24 on and who I was not.

1 Q Okay.

2 A I have a few names. You have those in your file.

3 Q All right, how are you able to determine how much you're

4 owed?

5 A I went by the number of sales that I did do.

6 Q Okay.

7 A I knew that I was to receive 10 percent on the sales. I

8 knew that I was supposed to receive \$40 on the VOAs, which is

9 a vacation package that we sold if they did not buy timeshare

10 itself and I totaled those up. I took my W-2 forms from 2008

11 and 2009 and put the two together and saw what I did not get.

12 That was the only way that I could do it.

13 Q Okay, let me - let's take you back now. You took your W-

14 2s and your what now?

15 A My W-2s that and also the final pay stub. It is listed.

16 You'll see that commission is stated there, but it does not

17 have names of who you were paid on.

18 Q Okay, and so, what number did you come up with?

19 A \$13,695.

20 Q All right, come down here, put that on this board,

21 please, ma'am. Come down here and write that on this board if

22 you would.

23 A (Complies with request.)

24 MR. CONNELL: Okay, Your Honor, the witness has written

1 down \$13,695.

2 THE COURT: All right.

3 BY MR. CONNELL:

4 Q All right, if you would kind of take me through how this
5 number comes to be 13,695.

6 A I sold \$224,030 of sales. The commission on that when
7 you add those up would be \$21,610. In 2008, I was paid
8 commission of \$5,130 and in 2009 I was sent one check for
9 \$2500. That was in February and I left July 2008.

10 Q Okay, and so, take me down to how you got the rest of the
11 13,600 - is that how you did it?

12 A Right, I ---

13 Q Okay.

14 A --- from the \$21,610 commission due from those sales, I
15 took away the 5,000 and also the 21 - 2500. Also, with my
16 final check there was a letter from Connie Sharp that stated
17 that it was actually reserve, but if you look at the final pay
18 stub it said it was commission. So, I just subtracted it as
19 commission, but it - that's how they confused us.

20 Q Okay, when you say that's how they confused us, what do
21 you mean by that?

22 A Well, they ---

23 MR. WILKERSON: Objection, Your Honor. She's
24 testifying about a document that's not in evidence. Can, can

1 we require that they show us that document?

2 THE COURT: All right, motion's overruled. Let's go
3 ahead.

4 Q Okay, all right.

5 THE COURT: I mean, show it to them. Yeah, show it to
6 them. I thought he was moving it into evidence. He'll be
7 able to look at what he - she's testifying to.

8 MR. CONNELL: Okay.

9 MR. WILKERSON: Thank you.

10 MR. CONNELL: Yes, sir.

11 MR. WILKERSON: Thank you.

12 BY MR. CONNELL:

13 Q Okay, you said, "That's how they confused us." What did
14 you mean by that?

15 A Well, when we did receive - I received my checks direct
16 deposit and you would go to Doug and would like to know who
17 you actually got paid for so that you could keep a record. He
18 would say he'd get it to us but he didn't. He was too busy.

19 Q Okay, so, you were, you were trying to keep records of
20 who you'd been paid for and who you hadn't.

21 A Right.

22 Q Is that right?

23 A Right, uh-huh.

24 Q And tell me who Doug Boykin is.

1 A His name is at the top of our pay. He, he was in
2 accounting, that's all I know.

3 Q His name was on - at the top of the paycheck?

4 A I believe so. I know his - I'm not actually sure.

5 Q Okay, he was an officer ---

6 A Right.

7 Q --- or manager of the company?

8 A He is who we went to talk to about our paychecks.

9 Q All right.

10 A Other than one time when I went to Colleen to talk to
11 her.

12 Q All right, and you say Colleen, is that the lady seated
13 over here?

14 A Yes, uh-huh.

15 Q What did you go to talk to her about?

16 A I received direct deposit and according to their records
17 a check had been deposited and my bank said that it had come
18 but it had been sent back because there was a number of mis-
19 marked ---

20 MR. WILKERSON: If Your Honor, please, objection,
21 hearsay.

22 MR. CONNELL: Your Honor, it goes to - he's - she's
23 talking to the HR manager of the company about what's wrong
24 with her paycheck.

1 THE COURT: Yeah, but it's being offered for the truth
2 of the matter, I'll ---
3 A Right.
4 THE COURT: --- sustain the objection.
5 MR. CONNELL: Okay.
6 BY MR. CONNELL:
7 Q So, don't tell me about - if you would, don't tell me
8 about the part on the document you're talking about. Tell me
9 about your conversation with Colleen.
10 A Colleen in turn - it was a while before she got a hold of
11 Connie Sharp, I believe, and they sent back a memo saying that
12 that check had been included in my next check, which was quite
13 confusing, that's actually Doug Boykin's work right there, but
14 anyway, I had to take their word.
15 Q Okay, all right, but it's your testimony that you're owed
16 how much?
17 A \$13,685.
18 Q All right, and was that paid to you when you left?
19 A \$95 - no, it was not.
20 Q Okay, did you have - have you had any other attempts to
21 try to contact ---
22 A I ---
23 Q --- Connie Sharp or anyone else in regard to the payment?
24 A I called her many times and most of the time you could

1 not get her on the phone. I would talk to other people. They
2 would say she'd call back. I talked to Connie Sharp a couple
3 of times and that is when I did receive the final check from
4 them which was \$2500 in February of 2009.

5 Q How many times do you think you called her?

6 A Probably 10 to 15 times.

7 Q Okay, were you able to read the - I didn't - don't know
8 if I asked you this, were you able to read the contract before
9 you signed it?

10 A No, no.

11 Q Tell me about that.

12 A Like I said, it was biker weekend and Colleen actually
13 came in, Frederick, our trainer, we were during a class. She
14 came in, handed out the contracts and she waited for them to
15 be passed down to the end of the aisle and we just had to sign
16 our names and were to receive a copy later.

17 Q Okay, all right, thank you, ma'am. Answer any questions
18 they might have for you.

19 THE COURT: Cross examination?

20 MS. MAYSONET: Yes, sir.

21 MR. CONNELL: Don't object to those.

22 MS. MAYSONET: Sir, I'm going to move to be admitted.

23 THE COURT: All right, those would be Defense Exhibits
24 11 and 12?

1 MS. MAYSONET: Yes, sir.

2 THE COURT: All right, Defendant's Exhibits 11 and 12
3 admitted into evidence without objection.

4 (Whereupon, Defendant's Exhibit 11 [Terms of Employment
5 Notice - Lanpher] and Defendant's Exhibit 12 [Commission
6 Schedule - Lanpher] admitted into evidence and appropriately
7 marked.)

8 MS. MAYSONET: May I approach the witness, sir?

9 THE COURT: Yes, ma'am.

1 CROSS EXAMINATION

2 BY MS. MAYSONET:

3 Q Ma'am, I'm going to hand you what we have marked as
4 Defendant's Exhibit 11. I want you to take a look at it and
5 tell me whether that's your signature on this document named
6 Terms of Employment Notice.

7 A It is, but there's something marked out here in white. I
8 don't know.

9 Q I asked for your signature. Is that your signature?

10 A Yes, uh-huh.

11 Q May I see that back? I'm going to ask you to look at
12 this commission schedule and tell me whether that is your
13 signature affixed there on the third page.

14 A Yes, it is.

15 Q Thank you. Now, ma'am, the way the commission you
16 understood it and testified that was done was you earn a
17 commission on a deal that received a full down payment, which
18 was 10 percent. Is that correct?

19 A Yes.

20 Q So, to earn a commission, you have to at least have the
21 10 percent down; is that correct?

22 A Yes.

23 Q Okay, and the other way - the other thing that had to
24 happen before a commission could get paid is that person

1 cannot cancel the contract within seven days, or, or the
2 rescission period. Is that correct?
3 A Yes.
4 Q Okay.
5 A Correct.
6 Q Now, you said that you're owed \$13,695..
7 A Yes.
8 Q Okay, and I'm a little confused about how you arrived at
9 this. You said that you looked at a W-2 form, is that - did I
10 hear you correctly?
11 A Yes.
12 Q The W-2 form is a form produced by CFI; right?
13 A Yes.
14 Q That contains all the wages.
15 A Right.
16 Q Okay, now, you said that you came up with a number and I
17 wrote it down, \$224,330; did I ---
18 A Yes.
19 Q Okay, how did you come up with that number?
20 A I have all my sales here.
21 Q Okay.
22 A And Gene has a copy of all my sales.
23 Q And those are documents that are - that belong to
24 Westgate, right, the sales, documents produced in the

1 business, in the course of business for Westgate; right?

2 A Yes, they're given to the salesperson after they're -
3 they go through deeding.

4 Q Okay, now, you said, if I understood you correctly, that
5 you added, that the total came to 2-24-3-30; is that correct?

6 A Yes.

7 Q Okay, and you, essentially you took 10 percent of that;
8 right?

9 A No.

10 Q I'm sorry.

11 A No, no, no. I did put aside the VOAs, which were \$40 and
12 the other sales.

13 Q And let's talk about that a little bit because the jury
14 never worked in timeshare.

15 A Okay.

16 Q Okay. There - you sold timeshare; right?

17 A Yes.

18 Q You were selling the actual interest in the real estate,
19 the week; right?

20 A Yes, uh-huh.

21 Q Okay, and that usually is - ranges between, you know, one
22 bedroom to three bedroom, the bigger the bedroom, the better
23 the week, the higher the price; right?

24 A Correct.

- 1 Q Now, VOA is something different. You didn't sell VOAs;
2 right?
- 3 A No.
- 4 Q Okay, because the way it worked if the person wasn't
5 willing to purchase a timeshare they would be turned over to
6 somebody else who wasn't a sales rep; right?
- 7 A Right.
- 8 Q And they then - they would try to entice the person to -
9 a vacation ---
- 10 A Right.
- 11 Q --- essentially, right?
- 12 A Right.
- 13 Q And that's what a VOA is, vacation ownership - I forgot
14 what the A stands, but that's what it is; right?
- 15 A Uh-huh.
- 16 Q Okay.
- 17 A Correct.
- 18 Q So, that - you weren't in charge of selling that product;
19 right?
- 20 A No, but you did receive \$40 if it was sold because it
21 goes off of the things that you had talked to that.
- 22 Q So, when you turn over the person ---
- 23 A Right.
- 24 Q --- to the VOA agent and the agent actually sold a

1 vacation, which is something different than you were doing ---
2 A Right.
3 Q --- you received a \$40 commission; right?
4 A Right.
5 Q And that was it and there's no down payment, there's
6 nothing associated with that; right?
7 A Yes, there are down payments with that, yes.
8 Q I know, but you received the \$40 if they got a vacation?
9 A Right.
10 Q Okay.
11 A Uh-huh, uh-huh.
12 Q So, you're telling me that you - and that's what a VOA
13 is, which is different than what you were selling; right?
14 A Right.
15 Q Okay, and did you discount the VOAs that you received
16 from this total?
17 A The volume, the volume is totaled in our sales.
18 Q Okay, I understand that, but ---
19 A Okay, that's why I went there.
20 Q Okay, now, what else did you look at to come up with the
21 \$13,695?
22 A Do you want to come over here for just a minute? I have
23 all my sales here and I went by the purchase price, 26-9.. I
24 was to receive \$2,609 from that.

1 Q Okay, what - will you agree with me that you received
2 some wages and commissions. So, not every deal that you sold
3 was not paid; right?

4 A Right.

5 Q Okay.

6 A Correct.

7 Q And you agree with me that in order for you to be paid on
8 every deal there still has to be a down payment; right?

9 A Correct.

10 Q A full down payment and a cancellation; is that correct?

11 A Uh-huh, correct.

12 Q All right, I have no further questions. I thank you for
13 your time.

14 THE COURT: Redirect?

15 MR. CONNELL: Come down, ma'am.

16 MR. WILKERSON: Your Honor, can we, can we document
17 the stipulation that we've got about the contracts? I think
18 we've all agreed that we're going to use Sherry Singleton's as
19 the prototype, prototype contract and that it applies to
20 everyone that's testified. If we can have the record reflect
21 that because we're not putting these contracts in as each,
22 each one of these witnesses testifies.

23 THE COURT: All right, so, what exhibit is that?

24 MR. WILKERSON: That'd be a Plaintiff's Exhibit, Your

1 Honor.

2 THE COURT: All right, it's going to be either Eight
3 or Nine?

4 MR. WILKERSON: Plaintiff's Exhibit Eight, Your Honor.

5 THE COURT: All right, so, the stipulation is that
6 Plaintiff's Exhibit Number Eight is ---

1 MR. WILKERSON: The prototype contract that, that
2 binds each of these Plaintiffs.
3 THE COURT: All right, is that correct?
4 MR. CONNELL: Yes, sir.
5 THE COURT: All right, so stipulated.
6 MR. WILKERSON: Thank you.
7 MR. CONNELL: How long were you going to run?
8 THE COURT: Let's keep going. Call your next witness.
9 MR. WILKERSON: What's his name, Gene?
10 MR. CONNELL: Mr. Loughlin.
11 MR. WILKERSON: Loughlin?
12 MR. CONNELL: Yeah, John Martin Loughlin.
13 Whereupon, John Martin Loughlin was called to the stand,
14 duly sworn by the clerk and testified as follows:
15 THE CLERK: State your name for the Court, please,
16 sir.
17 MR. LOUGHLIN: John Loughlin.
18 DIRECT EXAMINATION
19 BY MR. CONNELL:
20 Q Mr. Loughlin, if you would tell me, please, sir, where
21 you live.
22 A I live here in Myrtle Beach in the Avalon Community,
23 Carolina Forest.
24 Q Okay, how long have you lived in the area?

1 A Since 1992.

2 Q Okay, and tell me what you do for a living?

3 A I am currently the assistant general managers of Cici's

4 Pizza.

5 Q Okay, and how long have you been at the pizza place?

6 A I've been there since October.

7 Q All right, and when did you move to the Myrtle Beach

8 area?

9 A 1992..

10 Q Okay, and what type of work have you done in the Myrtle

11 Beach area since 1992?

12 A I've been a certified chef for most of my life. So,

13 I've been in the restaurant business predominantly.

14 Q Okay, how about the timeshare business, have you been in

15 that?

16 A Yes, sir.

17 Q All right, and what timeshare companies have you worked

18 for?

19 A I worked for Wyndham Resorts initially starting in -

20 would've been I believe May of '07 and then I was actually

21 asked to come to Westgate by a friend of mine that had been at

22 Wyndham and transferred to Westgate and I went to work for

23 Westgate in May of '08.

24 Q Okay, and how long did you work at Wyndham?

- 1 A I was there at Wyndham from I believe it was May of '07
2 till April of '08 and then I left Wyndham and went to
3 Westgate.
- 4 Q Okay, and what did you do at the Wyndham Resorts?
- 5 A Frontline sales.
- 6 Q And frontline sales are what?
- 7 A Basically what we've been talking about. We had tours
8 that we got. You picked up your tour. You attempted to
9 convince them to buy your timeshare product, and at the end of
10 it they either purchased or they got their gifts and left.
- 11 Q Okay, and when you went to Westgate how long did you
12 work there?
- 13 A I was there from May of '08 until November of '08, I
14 believe, yes, sir, November of '08.
- 15 Q Okay, and about how many total years have you worked or
16 did you work in the timeshare industry?
- 17 A A year and a half, two years.
- 18 Q Okay, are you familiar with the industry and how it
19 works?
- 20 A I am now.
- 21 Q Okay, are you familiar with how people are paid at, paid
22 in working at timeshares?
- 23 A Yes, sir.
- 24 Q And are you familiar with the commission structure?

1 A Yes, sir.

2 Q All right, and did you sign a contract of employment,
3 let's see, that would be number, okay, thank you, thank you,
4 ma'am. Did you sign a contract similar to, I think, Number
5 Eight?

6 A It was placed in front of us and we were asked to sign
7 before we went on the floor on our last day of training.

8 Q Okay, and how about the attachment, was that given to
9 you, also?

10 A Yes, sir, I believe it was.

11 Q Okay, now, let's talk about the - let me talk to you
12 about the training at Westgate and tell me briefly about how
13 you were trained and in what way?

14 A Very upbeat, we were kind of almost put through a tour I
15 guess was the basic way to explain it. We were kind of given
16 the idea that this was going to be a fun and exciting place to
17 work. We all wore Hawaiian print shirts and khaki shorts.
18 So, it was a very relaxed atmosphere and the training was
19 basically we covered every aspect of what we were going to be
20 asked to present to the potential buyer of the timeshare.

21 Q Okay, how long did the training last?

22 A I believe it was two weeks.

23 Q Okay, and then what happened afterwards?

24 A On our last day of training the class that I was in we

1 were finished our final written exam and we were told if we
2 had passed the final exam then we would be given an
3 opportunity in the next day or so to take a tour. Frederick
4 Von Sant, our corporate trainer, at the end of our taking the
5 final exam and were all given our grades he said he'd be right
6 back. He left the office or our classroom. He was gone for
7 about five minutes. He came back in with a stack of papers,
8 very excitedly told us that there were 25, 30 extra tours that
9 they didn't have sales representatives to take care of and if
10 we wanted to get on the floor right now all we had to do was
11 sign this and we could go right out on the floor and sell and
12 I am pretty sure that that was most of the paperwork that we
13 were handed. It was a pretty thick stack.

14 Q Okay.

15 A So ---

16 Q All right, were you ever given any written, any notice
17 in advance of any changes to your employment contract?

18 A No, sir.

19 Q All right, were you paid 30 days, within 30 days of
20 leaving the job the wages you claim are due?

21 A No, sir.

22 Q Do you think the Defendant complied with the contract?

23 A No, sir.

24 Q Did you ever have any deals that were either up-sold or

1 down-sold?

2 A Not to my knowledge.

3 Q Okay, are you aware of the down payment being moved to
4 the back of the note as has been described previously?

5 A Yes, that had been described to us on several occasions
6 by both deeding officers and some of the other sales floor
7 managers.

8 Q Okay, and let me talk to you about how that works,
9 please, sir. Tell me how the down payment would be moved from
10 the front, up front to the back of the note, what would
11 happen?

12 A Basically the way it was explained to us was the person
13 came in and gave the down payment. If it was broken up into
14 multiple portions of the down payment ---

15 Q Yes, sir.

16 A --- then they were supposed to make timely payments on
17 that and if they didn't then there was an opportunity for the
18 closing officer, the deeding officer to step in and move one
19 of those payments or several of those payments to the end of
20 the actual loan and what that did was it extended seven to ten
21 years before that actual down payment would be complete and
22 that was the point in time to which we would actually get paid
23 seven to ten years down the road.

24 Q Okay, all right, have you come to - do you know how much

1 you sold there?

2 A I believe it was, actually I think you have it, but it
3 was approximately \$195,000 worth of sales.

4 Q Okay, that was the number of sales you think that you
5 made there?

6 A Yes, sir.

7 Q All right, and have you been able to determine what
8 you're owed?

9 A Yes, sir.

10 Q All right, and what did you determine you were owed?

11 A \$14,460.

12 Q Okay, okay, come down and put this - put it on this
13 board if you would, please, sir. Write your name and put the
14 number down, please.

15 A (Complies with request.)

16 Q Okay, thank you, sir.

17 MR. CONNELL: Your Honor, the witness has written down
18 \$14,460.

19 BY MR. CONNELL:

20 Q Okay, how did you determine that it was \$14,460, please,
21 sir?

22 A I took the amount of sales that I had, took the 10
23 percent commission that I was supposed to be paid for every
24 sale, less the payments that I had received, and came down to

1 \$14,460 was basically missing.

2 Q All right, and have you made - did you make inquiries of
3 Connie Sharp or any other people at Westgate in regard to your
4 payment?

5 A Connie Sharp, Victor Curry, the director of sales at the
6 time.

7 Q Okay.

8 A Doug Boykin who I believe his title was our director of
9 operations of sales floor, something like that. I did make
10 probably five to seven phone calls to Connie Sharp's office.
11 I never did get a hold of her.

12 Q Who is she, by the way, and she's - her name has been
13 used?

14 A I'm thinking she was a head of accounting or the head of
15 the payroll department.

16 Q Okay.

17 A So ---

18 Q All right, so, you made - you called her how many times
19 did you say?

20 A At least five.

21 Q Okay, and then you also mentioned some other people.
22 Who did you contact?

23 A Victor Curry was the director of sales and then Doug
24 Boykin. Doug Boykin, in my understanding of our chain of

1 command, would've been my immediate supervisor and then above
2 him was Victor Curry who was our director of sales or ---

3 Q Okay, and what were you told, what did Mr. Boykin or Mr.
4 Curry say to you?

5 A Basically that we would be paid within 90 days of
6 leaving. Now, the one stipulation, not necessarily for my
7 pay, I didn't remain on frontline sales. There were several
8 of us that were offered an opportunity to remain with the
9 company through transferring from the frontline sales
10 department to the off-site premises, which is the OPCs where
11 they try and get you to take the tour itself and I was given
12 the opportunity to stay on and do that so that I would
13 continue to get my paychecks.

14 Q Okay, and you're going to have to tell me what - how
15 that affected your ability to get your paycheck.

16 A I'm not real sure how it affected my ability. I was
17 under the impression and was led to believe by Doug Boykin,
18 Victor Curry, Frederick Von Sant was one of the people who
19 actually, our corporate trainer was one of the people who
20 helped convince me to do it. Basically what they said was,
21 you know, that there was a possibility of a timeframe that you
22 wouldn't get paid if you just left the company. As long as
23 you remained and as long - whenever the commissions came due
24 you would continue to get paid your commissions owed. So, I

1 took the route of staying with the company thinking that I
2 would continue to receive my commissions on top of being paid
3 for ---

4 Q Okay, and what job did you take doing that?

5 A I was an OPC, an off premises contact. We had places on
6 the pier, down on the boardwalk or not the boardwalk but Ocean
7 Boulevard, and basically we were the ones that tried to lure,
8 for the lack of a better word, potential tours to come in and
9 sit down with the sales reps.

10 Q All right, and how long did you work in the OPC
11 position?

12 A I believe I left frontline in September and I stayed
13 with - there from September to November.

14 Q Okay, and when were you finally released?

15 A November of '08.

16 Q All right, were you given your, were you given any pay
17 within seven days of your release?

18 A No, sir. The next pay that I received wasn't until
19 April of 2009.

20 Q Okay, tell me what - we've - it's been mentioned before
21 but tell me what a VOA is and try to give it to me in an
22 explanation I can understand what that means. That's
23 different than a commission?

24 A Yes, sir, basically our job was to sell the actual

1 timeshare, a week in a one, two, three bedroom, whatever the
2 case may be, and at the end of a two and a half hour process
3 if the potential client was still unwilling to buy into the
4 timeshare we turned them over to an exiting type person who
5 basically laid a glorified vacation in, in front of them, gave
6 them an opportunity to come back and actually utilize one of
7 the condominiums in the resort itself for a week or four days
8 or five days or whatever the case may be and we did receive, I
9 do believe it was \$40 for each one of those, but it was based
10 more on we had pretty much laid the groundwork for these
11 people to be interested in the resort itself and normally the
12 VOA people were with them for 10, 15 minutes, so.

13 Q Okay, and tell me if you would if you can explain to
14 these folks how the deeding officer interacted with the
15 timeshare salesperson such as yourself.

16 A Basically we dropped them off with deeding. We were in
17 there for maybe the first 10 to 15 minutes of the deeding
18 process and it was more of a, I guess a meeting of the minds.
19 They would ask us a couple of questions, "Is this the unit
20 that you sold, is this the, you know, the price that you had
21 agreed on," and so on and then we were asked to leave the
22 office. So, they were in there another two hours without us
23 being privy to anything that went on inside the office.

24 Q Okay, when you said they were you talking about the

1 customer?

2 A The customers, yes, sir.

3 Q All right, and when a customer decided that he was going
4 to purchase from you tell me how he decided - what - would he
5 sign something before you took him into deeding or what would
6 happen?

7 A We had the initial paperwork that was basically an
8 interview and an initial day line proposal sheet which we've
9 kind of gone over a couple of times and they did - it was more
10 of an approval. They hadn't actually signed a, I'm guessing
11 legal anything but it even says purchaser's approval on there.
12 It doesn't say and then from that point we took them to the
13 deeding office, so.

14 Q Okay, I kind of think of it like in the car sales
15 business you're the car salesman and then they take you to the
16 finance and insurance guy?

17 A Yes, sir.

18 Q Is that kind of how it works?

19 A Yes, sir, pretty much.

20 Q Okay, and the deeding guy is the finance and insurance
21 guy?

22 A Yes.

23 Q And he would discuss with them how they're going to pay
24 for it?

- 1 A The finite details, yes.
- 2 Q How much is going to be paid, what you're going to get
- 3 and that kind of thing?
- 4 A Yes, sir.
- 5 Q Okay, you said you had - you made some comment about
- 6 Victor Curry and you talked to him about your problem with
- 7 the, with the commissions?
- 8 A Yes, sir.
- 9 Q And when do you think that was?
- 10 A That was probably October of '08 not long before I left
- 11 Westgate.
- 12 Q Okay, and is Victor Curry to your knowledge still
- 13 working there?
- 14 A Not my knowledge.
- 15 Q All right, and then you also indicated that you talked
- 16 to Doug Boykin and what was his job there?
- 17 A He was basically the frontline director. I'm not real
- 18 sure what his title was.
- 19 Q All right, sir, is he still employed there to your
- 20 knowledge?
- 21 A Not to the best of my knowledge.
- 22 Q There, there's - I understand there's something about an
- 23 additional \$50 you could get for an exiting, do you know
- 24 anything about that?

1 A I don't, I don't remember that.

2 Q Okay, how did you come to decide - you decide to go to

3 Westgate? Did you say a friend sent you or did you go ---

4 A Well, it was part friend and at the time the friend

5 said, he said, "They've even got an ad in the newspaper. I'll

6 put in a good word for you to Frederick Von Sant."

7 Q Okay.

8 A "You need to come down and fill out an application and

9 if you want to read the ad it's in the paper."

10 Q All right, did you actually read the ad in the paper?

11 A Yes, sir, I did.

12 Q All right, did you ever receive a call back from Ms.

13 Sharp?

14 A No, sir.

15 Q And were messages left on her recording device?

16 A Yes, sir.

17 Q Have you ever met her?

18 A No.

19 Q Have you ever met - I think I've heard Laura Turner's

20 name; did you ever meet her?

21 A No.

22 Q How about Mr. Siegel, have you ever met Mr. Siegel,

23 David or Richard Siegel?

24 A I've met Richard, yes, sir.

1 Q When did you meet Richard Siegel?

2 A Several occasions he was visiting the resort. He took
3 part in some of our morning sales meetings.

4 Q All right, and when you met with Richard Siegel did you
5 discuss with him any concerns you had about the commissions?

6 A No, sir, I didn't have any concerns at that time.

7 Q Okay, were you generally paid until you left?

8 A Pretty much, sir, yeah.

9 Q Okay, and when you left what happened?

10 A Like I said I left and I did receive one final payment
11 in April of 2009 which would've been five and a half, six
12 months after I left. It was for \$2,992 and then again going
13 back and deducting everything that I had received from what I
14 had sold I'm still left with \$14,460.

15 Q All right, have you ever received any explanation from
16 Westgate as to why you weren't paid?

17 A No, sir.

18 Q Okay, have you received any explanation as to why there
19 was a five and a half month delay between the time that you
20 left and the time you got the check you're talking about?

21 A No, sir.

22 Q Were any inquiries made by you in regard to that?

23 A I made several inquiries but it just got kind of
24 frustrating, so ---

1 Q Why do you say it got frustrating?

2 A You could never get a straight answer when you did talk
3 to somebody. The people that you did need to talk to were
4 never available to talk to and I don't know, I've been in the
5 corporate world for a long time. So, I'm kind of used to
6 having an immediate response to my problem especially with my
7 payroll, so.

8 Q All right, and when you say used to having an immediate
9 response to your problems, at Westgate would you get an
10 immediate response to your problems with your payroll?

11 A No, sir.

12 Q And at the other corporate jobs you worked what were you
13 talking about where you didn't have it, have any problem?

14 A I worked for Logan's Roadhouse for six and a half years,
15 ran their kitchen for four of those. Anytime there was a
16 discrepancy on my pay versus the hours I worked or a raise
17 that I was supposed to get it was a matter of a phone call to
18 the corporate office, and 15, 20 minutes later it was 90
19 percent of the time resolved.

20 Q All right, how about at - I think you said you worked at
21 another timeshare place, too; right?

22 A Yes, sir, Wyndham.

23 Q Was there any problem like this at Wyndham?

24 MR. WILKERSON: Objection.

1 THE COURT: Sustained.
2 Q Were you paid on a percentage at Wyndham?
3 A Yes, sir.
4 Q Were all the payments made?
5 MR. WILKERSON: Objection.
6 THE COURT: Sustained.
7 Q How long did you work at Wyndham?
8 A I believe I ---
9 MR. WILKERSON: Objection.
10 THE COURT: Sustained.
11 MR. CONNELL: All right, that's all I have, Your Honor.
12 THE COURT: All right, cross examination.
13 MR. WILKERSON: Thank you, Your Honor.
14 MR. CONNELL: No objection.
15 THE COURT: Okay, Defendant's Exhibits 13 and 14
16 admitted into evidence without objection.

1 MR. WILKERSON: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (Whereupon, Defendant's Exhibit 13 [Terms of Employment [
4 Loughlin] and Defendant's Exhibit Number 14 [Commission
5 Schedule - Loughlin] admitted into evidence and appropriately
6 marked.)

7 CROSS EXAMINATION

8 BY MR. WILKERSON:

9 Q Now, Mr. Loughlin, as a part of this employment process
10 when you were handed this stack of documents you've talked
11 about ---

12 A Yes, sir.

13 Q --- did you also sign something called a Terms of
14 Employment Notice?

15 A I'm sure I did, sir.

16 Q I hand you Defendant's 13. Does that bear your
17 signature?

18 A Yes, sir, it does.

19 Q All right, sir, did you also sign a commission schedule
20 that was attached to the contract marked Defendant's Exhibit
21 14 for this case?

22 A Yes, sir, that's my signature.

23 MR. WILKERSON: May I provide some water to the
24 juror, Your Honor?

1 THE COURT: One of the bailiffs can get it. Go ahead
2 and continue with your questioning.
3 MR. WILKERSON: All right, sir.
4 THE COURT: All right.
5 BY MR. WILKERSON:
6 Q Now, Mr. Loughlin, I'm not sure I understand what you're
7 trying to say when you talk about the stack of documents that
8 was presented to you to be signed. You're not saying that you
9 signed that contract under duress; are you?
10 A Yeah, I would say I signed it under duress.
11 Q Okay, are you saying that you're not bound by that
12 contract then?
13 A I guess - I don't know the stipulations of the law but
14 ---
15 Q Is that what your position is?
16 A My position is that I was handed a stack of documents,
17 told that we were needed on the floor immediately and that we
18 had to sign the documents in order to get out on the floor.
19 Q All right, sir, so, you want this jury to disavow that
20 contract and say it has no meaning and no bearing at all on
21 this case; is that what you're trying to argue to this jury
22 when you say that you were handed this stack of documents and
23 didn't get time to sign it?
24 A I'm not arguing anything.

1 Q That's not your position then?

2 A I was handed a stack of documents and I signed them when

3 I was asked to sign them.

4 Q Okay, I'm just trying to figure out what you're trying

5 to say about that. I mean, what, what does that mean?

6 A What does it mean?

7 Q Yes, sir.

8 A It means I don't feel like I may have been given a full

9 amount of the time to sit down and read everything that we

10 were needed to sign.

11 Q All right, sir, you had plenty of time to read it after

12 you took it home later on; didn't you and you could read that

13 document?

14 A I didn't even get a copy of it until I believe it was

15 several days later.

16 Q Okay, you had time to read it then; didn't you?

17 A I don't remember actually sitting down and reading it to

18 be honest.

19 Q Nobody, nobody held a gun to your head and said you

20 can't read the document; did they?

21 A No, sir, nobody held a gun to my head.

22 Q Okay, you've had plenty of opportunity to read it while

23 you were still working at Westgate?

24 A Yes, sir.

- 1 Q Now, you were paid in two parts. You were paid,
2 initially you were paid minimum wage for the time that you
3 worked; correct?
- 4 A Yes, sir.
- 5 Q Okay, and you were paid that; right?
- 6 A Yes, sir.
- 7 Q Okay, and in addition to that you were paid a commission
8 on sales; correct?
- 9 A Yes, sir.
- 10 Q And that commission on sales the agreement for the
11 payment of commission on sales is contained in this contract
12 you say that you signed in a stack of papers; right?
- 13 A Yes, sir.
- 14 Q Okay, so, you're not claiming that that contract's not
15 valid. You're actually suing on that contract trying to get
16 this jury to give you money under that contract; is that
17 right?
- 18 A I'm not real sure if I understand what you're asking me.
- 19 Q Okay, well, you understand the only way you're going to
20 get commissions is if you have a contract to get the
21 commissions; right?
- 22 A That would be a presumption, yes, sir.
- 23 Q Okay, and so, you're asking this jury to give you
24 commissions and that's based on the contract that you signed?

- 1 A Yes, sir.
- 2 Q Okay, so, this business about having a stack of
3 documents handed to you that you didn't have time to read that
4 doesn't have anything to do with this case; does it?
- 5 A I would assume it would. It didn't give me an
6 opportunity in that heat of the moment, but ---
- 7 Q All right, sir, now, you've, you've - there's been some
8 discussion about VOAs, vacation, these vacation deals?
- 9 A Yes, sir.
- 10 Q Whatever that stands for, you're not claiming you were
11 not paid for the VOAs that you, that you were entitled to;
12 were you?
- 13 A No, sir.
- 14 Q Okay, so, that doesn't have anything - that's, that's
15 not a ---
- 16 A No, sir.
- 17 Q --- that's not part of your number?
- 18 A No, sir, it's not.
- 19 Q Okay, that's just extra information?
- 20 A Yes, sir.
- 21 Q Okay, now, the way I understand you computed your claim
22 is that you took the amount of the sales that you had made
23 which was how much?
- 24 A I believe it was hundred ---

- 1 Q 195,000 I think you said ---
- 2 A Some, somewhere in that neighborhood, yes, sir.
- 3 Q --- give or take, okay, and you applied a 10 percent
- 4 commission to that.
- 5 A Yes, sir.
- 6 Q Right, and you reduced that by the commissions that you
- 7 had been paid?
- 8 A Yes, sir.
- 9 Q And the rest you claimed was owed?
- 10 A Yes, sir.
- 11 Q And that's the amount of \$14,460 that you wrote on this
- 12 board?
- 13 A Yes, sir.
- 14 Q All right, sir, now, the - you didn't get a commission
- 15 on every sale that you made unless certain things happened
- 16 after that; did you?
- 17 A That's correct, sir.
- 18 Q Okay, we've already had discussion about that but
- 19 clearly in order for you to earn a commission under your
- 20 commission arrangement you would - the customer would have to
- 21 not cancel the contract; right?
- 22 A Correct.
- 23 Q And the customer would have to pay the full 10 percent
- 24 down payment; correct?

1 A Yes, sir.

2 Q Now, some of the deals that you entered into were known
3 as penders; right?

4 A Some of them, yes, sir.

5 Q All right, sir, some of those that you're suing about
6 that you claim you were not paid for right, were penders?

7 A Yes, sir.

8 Q Now, a pender would be that, already been testified to
9 but that there was time payments on the down payment; right?

10 A Yes, sir.

11 Q Okay, so, what that means is the customer after they
12 left from the tour ---

13 A Yes, sir.

14 Q --- signed all the papers, went home, over the next two
15 or three months that customer was to pay the down payment back
16 to, to the, to the seller of the unit, not to you but back to
17 the seller of the unit?

18 A Correct, sir.

19 Q Right? Now, and you don't have any personal knowledge,
20 do you, about what of those were paid?

21 A Well, yes, sir, I do. One of the things that we were
22 trained to do at Wyndham was after point of sale or after sale
23 of service and I kind of carried that with me. I've been in a
24 customer driven business for most of my life, and in order to

1 keep customers coming back they have to be happy not only
2 while they're there but after they leave. So, I made it a
3 point to go back and call people.

4 MR. WILKERSON: If Your Honor, please, if I may.

5 MR. CONNELL: Your Honor, he asked the question now.

6 MR. WILKERSON: I asked about personal knowledge.

7 A That's right and I'm giving you personal.

8 THE COURT: And that's what he's doing. I'm going to
9 allow the testimony. I'll let him explain his answer.

10 MR. WILKERSON: You going to allow him to provide
11 rank hearsay in response to my question?

12 THE COURT: Not rank hearsay but you asked him how
13 did he know and I'm going to see what his answer is.

14 MR. WILKERSON: All right, sir.

15 THE COURT: All right.

16 BY MR. WILKERSON:

17 Q Go ahead.

18 A My penders, actually I called most of those people and
19 spoke to them on the phone. I spent two and a half, three
20 hours with them on a daily basis the day that I had them and
21 we were told and expressed by our sales managers not only at
22 Westgate but at Wyndham that we were to have a personal
23 relationship with these people, no differently than I expect
24 we've brought in the car deal on several occasions in here.

1 That's part of my thing. I want not only sale on the day but
2 I want good service after I've bought the product and that was
3 what I tried to provide to my clients and the people that did
4 have penders I made it a point to call them and I'm sure we
5 could pull it up on phone records where I had contact with my
6 penders making sure that they made those timely payments.

7 MR. WILKERSON: Same objection, Your Honor. Move to
8 strike.

9 THE COURT: Overruled.

10 BY MR. WILKERSON:

11 Q All right, sir, now, do you have the names of the
12 individual customers that you claim you were not paid for?

13 A Yes, sir.

14 Q Let me see what you got there.

15 A That's Amanda Bostic, Jose ---

16 Q I mean, what do you have that shows those, shows those
17 names?

18 A It's there, frontline, day line proposal and their
19 purchaser approvals.

20 Q How many of them are there?

21 A Eleven, sir.

22 Q All right, sir, I'm going to ask you to give me the last
23 name of each of those customers if you would, please?

24 A Bostic, B-O-S-T-I-C.

- 1 Q Yes, sir.
- 2 A Argueta, A-R-G-U-E-T-A.
- 3 Q G-U-E-T-A, what's the customer number for Argueta,
- 4 please, sir?
- 5 A 2800915228.
- 6 Q All right, sir.
- 7 A Looks like Simon, S-I-M-O-N.
- 8 Q All right, sir.
- 9 A Short, S-H-O-R-T.

1 Q All right, sir.

2 A Redoutey, R-E-D-O-U-T-E-Y.

3 Q All right, sir.

4 A Bingham, Dodson, D-O-D-S-O-N, Flory, F-L-O-R-Y, Hughes,

5 H-U-G-H-E-S, Craig, C-R-A-I-G, Tyler, T-Y-L-E-R.

6 Q Any others?

7 A No, sir, the rest of those are the VOAs.

8 Q All right, sir, thank you very much.

9 A Yes, sir.

10 THE COURT: Redirect.

11 REDIRECT EXAMINATION

12 BY MR. CONNELL:

13 Q Did Westgate comply with the terms of the employment

14 agreement in your opinion?

15 A No, sir.

16 Q All right, thank you, come down.

17 THE COURT: All right, ladies and gentlemen, it's

18 about lunchtime. We've ordered lunch for you. So, we've got

19 it, I understand that it's here and we're ready to eat lunch.

20 So, I'm going to excuse you to the jury room so that you can

21 eat lunch, also give you an opportunity to stretch your legs,

22 whatever the case may be. If it's not raining you want to

23 take a step outside you can do that during your lunch period,

24 but please do not discuss the case with anyone even among

1 yourselves at this time, don't conduct any independent

1 investigations into the case. Make sure you leave your
2 notepads and notes here in the jury box. We'll give them back
3 to you at the end of lunch. We'll take about 45 minutes for
4 lunch, give you an opportunity to eat a good lunch, then we'll
5 get started back on the case. Thank you very much. Everyone
6 else please remain seated while the jury's excused.

7 (Whereupon, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right, anything from the Plaintiff
10 before we break for lunch?

11 MR. CONNELL: No, sir.

12 THE COURT: Anything from the Defense?

13 MR. WILKERSON: Nothing, Your Honor.

14 THE COURT: All right, let's take about a 45 minute
15 lunch break. I'm going to try to take the bench back at about
16 12:30; okay? All right.

17 MR. CONNELL: You said 12:30, Your Honor?

18 THE COURT: I mean 1:30. I'm sorry, 1:30.

19 MR. WILKERSON: Thank you, Your Honor.

20 THE COURT: All right, thank you.

21 OFF THE RECORD

22 (On the record. Whereupon, the following takes place outside
23 the presence of the jury.)

24 THE COURT: All right, back on the record. All

1 right, anything from the Plaintiff before we bring the jury
2 in?

3 MR. CONNELL: Yes, sir; yes, sir.

4 MR. CANTY: Your Honor, with regard to the testimony
5 of Mr. Middleton, Your Honor struck his testimony in its
6 entirety based upon the document upon which he was relying.
7 We would ask the Court to reconsider with regard to the
8 following portions: he testified as to the dollar amount that
9 he sold, as to what his commission rate was and that he had
10 not been paid and that is unrelated and not dependent upon the
11 document which Your Honor found objectionable and we would ask
12 the Court to allow that portion of his testimony not dependent
13 upon that document.

14 THE COURT: All right, let me hear from the Defense on
15 that.

16 MR. WILKERSON: Would you give me a moment to review
17 my notes, Your Honor?

18 THE COURT: Yeah.

19 MR. WILKERSON: Thank you.

20 THE COURT: I mean, my - that's my question is can a
21 Plaintiff just get up and say, "I sold X amount, I'm due Y
22 amount and they only paid Z amount," without giving any
23 further specifics as to who they sold it to, when they sold it
24 and things of that nature. I mean, is it sufficient for

1 Plaintiff's testimony to get on the stand and say, "The
2 Defendant owes me X amount of dollars," and that's it.

3 MR. CANTY: We would submit that that's a matter for
4 the jury for them to attribute whatever weight to that
5 testimony they deem appropriate. In terms of its
6 admissibility I think he can testify, "I sold this much, this
7 was my commission rate, this is what they owe me."

8 THE COURT: So, you're saying in a breach of contract
9 action a Plaintiff can take the stand and say, "The Defendant
10 breached this contract and owes me X amount of dollars," and
11 not give anymore testimony and that creates a jury question?

12 MR. CANTY: Well, in a payment of wages case a
13 Plaintiff can testify as to what he is owed in wages and then
14 at that point the Defense, there is sufficient evidence in the
15 record at that point then the Defense can attack that
16 testimony in whatever manner they choose, and as for the jury
17 we believe to attribute whatever weight to that testimony.

18 THE COURT: Well, let's say the Defense doesn't attack
19 it. You got a Plaintiff that just gets up there and says,
20 "This employer owes me X amount in unpaid wages," that's all,
21 that's the extent of his testimony.

22 MR. CANTY: But then absent evidence on the part of
23 the Defense as to whether or not that's the truth or whether
24 or not it's partially the truth then it would carry the day.

1 It's the preponderance of the evidence.

2 THE COURT: All right, let me hear from the Defense
3 on that.

4 MR. WILKERSON: Your Honor, please, it is undisputed
5 in every one of these contracts that there is a condition
6 precedent to being paid, two conditions precedent. The
7 Plaintiff has the burden of proof that the conditions
8 precedent for payment have been met. By simply sitting up
9 there and saying that, "I'm owed this amount of money," not
10 being able to identify any of the contracts, not being able to
11 identify whether any of the down payments have been made fails
12 for failure to prove a condition precedent to payment; and so,
13 that applies to Mr. Middleton as well as others.

14 THE COURT: Okay, well, they're - what they're
15 arguing at this point in time and I'm sure I'm going to have
16 to address your, your point a little bit later, what they're
17 saying is that I struck Mr. Middleton's testimony in its
18 entirety and that I should leave in the fact that he testified
19 that he is owed \$15,000 in sales based upon \$150,000 - he's
20 owed \$15,000 in commission based upon \$150,000 in sales and
21 leave it at that, that when I - that I shouldn't have struck
22 his testimony in its entirety but that I should have left in
23 the fact that he testified he had \$150,000 in sales and he was
24 due \$15,000 in commissions that hadn't been paid.

1 MR. WILKERSON: So, this is, this is the problem that
2 we have with virtually all of the people that have testified
3 about and not presented any contracts and that is that
4 pulling, pulling a number out of the air like that, I mean we
5 have rules of evidence and certain foundation requirements
6 that must be made in order for evidence to be admissible and
7 simply allowing a witness to testify as this man did there's
8 absolutely no foundation to his testimony.

9 THE COURT: Well, they're saying, their argument is
10 is it just becomes a credibility issue, either the jury
11 believes him or doesn't believe him.

12 MR. WILKERSON: But foundation, Your Honor, is an
13 admissibility issue and it's not a credibility issue.

14 MR. CONNELL: Your Honor, all breach of contracts,
15 numerous case law that finds all breach of contract issues are
16 issues for the jury, every breach of contract is an issue for
17 the jury and this is just a contract and ---

18 THE COURT: So, you're saying that a Plaintiff in a
19 breach of contract action can just get up and say, "Defendant,
20 we - I had a contract with Defendant, Defendant breached it,
21 he owes me X amount of dollars," without identifying the
22 contract, without showing whether or not conditions were met,
23 without specifying anything because that's basically a large
24 part of the testimony of the Plaintiffs in this case are, "I

1 sold timeshares, I sold X amount, I was paid Y amount, I'm due
2 Z amount," but they're not showing who they sold them to, when
3 they sold them, when they closed, how much the purchase price
4 was or anything of that nature.

5 MR. CONNELL: My position - our position, Your Honor, is
6 is that that's a question for the jury, breach of contract is
7 always a question for the jury as to what - how the wages are
8 paid. The employer has control of the records and they can
9 get up there and put on a defense, which I'm sure they will,
10 and say, "We're going to show we paid this, that and the
11 other," but that's still an issue for the jury to decide.

12 THE COURT: Okay, all right, well, I'm going to take
13 your motion under advisement since Mr. Middleton's not on the
14 stand anymore. I may give some curative instructions and put
15 some of the testimony back in. I may leave it struck in its
16 entirety. I'm just going to have to do a little bit more
17 research on that because I don't know what the answer is at
18 this point in time as far as sufficiency of evidence and
19 things of that nature. All right?

20 MR. CONNELL: Your Honor, before you get them can I, can
21 I also ask how long are you going to go this afternoon and
22 what your intentions are so I can maybe shorten some things.

23 THE COURT: Well, I'm going to, you know, go as far as
24 we can. You know, I'd like to stop as close to five as I can

1 but I want to make sure that we get this case done this week.

2 MR. CONNELL: I understand.

3 THE COURT: I mean, where - you know about how much
4 more or you all know about how much longer this case is going
5 to take and you tell me if we go to five does that mean we're
6 not going to get it in this week unless we go to six or seven
7 or ---

8 MR. CONNELL: No, sir, I think some people have - that
9 are not going to testify we're going to drop them out.

10 THE COURT: Okay.

11 MR. CONNELL: That's going to restrict the list. Also,
12 we had a number this morning and as fast as we're going I
13 think that we'll be finished tomorrow with our presentation.

14 THE COURT: Okay.

15 MR. CONNELL: So, you know, I point that out because the
16 last two. ---

17 THE COURT: Be finished with your presentation
18 tomorrow if we go to what time tonight?

19 MR. CONNELL: Oh, we're not going to - we can end about
20 four o'clock I think.

21 THE COURT: I see.

22 MR. CONNELL: Because I got, I got three that I can't
23 get here today.

24 THE COURT: Yeah.

1 MR. CONNELL: These people came from out of town and all
2 but I'm going to put up everybody else we have today. I'm
3 going to give you the names of the people, I've already told
4 the Defendants this, but I'm going to give you the names of
5 some people that we can't locate and are not coming. So, I
6 mean, obviously their cases are going to be dismissed.

7 THE COURT: Uh-huh, okay.

8 MR. CONNELL: And so, that will leave us only four or
9 five this afternoon and then three tomorrow I'm thinking.

10 THE COURT: Okay.

11 MR. CONNELL: And that'll be - so, I do think we're
12 going to finish. I don't know what - how many witnesses you
13 all are going to have. I think Richard said two. I don't
14 know if that's ---

15 THE COURT: Well, if you're saying you've got about
16 four or five more witnesses and they go as quickly as one,
17 two, four have, five, six have thus far then we'll get through
18 those five.

19 MR. CONNELL: Yes, sir, and I think the Defendants have
20 abbreviated their cross from yesterday. So, I think we're in
21 a different situation as to what we thought was going to be
22 when we met with you yesterday.

23 THE COURT: Okay, all right, well, if you've got five
24 ready to go and some that are not here I'll break after you

1 get done with what you're doing today.

2 MR. CONNELL: Okay, I'm going to call everyone I got
3 left and then I got, I think we've got three that are going to
4 be here tomorrow.

5 THE COURT: Okay, that'll be good.

6 MR. CONNELL: And I'll tell the Court that, I think I've
7 told the Defendants, Jimmy Kelly, cannot locate him and the
8 Defendants have told us he didn't work at Westgate Myrtle
9 Beach. So, we've agreed to dismiss him as a Plaintiff.

10 THE COURT: Who, wait a minute, who is this?

11 MR. CONNELL: Jimmy Kelly.

12 THE COURT: Well, I've got him struck off your witness
13 list anyway.

14 MR. CONNELL: Okay.

15 THE COURT: So, I didn't even call his name out, okay.

16 MR. CONNELL: All right, and Your Honor, just for the
17 Defendants and the Court's edification, Whitney Renee Knox
18 we've contacted her or written letters and called her. She
19 did not, she did not come yesterday, did not come today, no
20 one seems to know where she is. If she's not here by the time
21 I finish she's going to be struck off the list. The next one
22 is Joe Maranville. He's in Texas and he said he could not
23 come. I explained if he couldn't come that he was going to be
24 struck off the list. So, he's going to be gone off the list.

1 THE COURT: Yeah, I've got a line through his name as
2 well.

3 MR. CONNELL: Okay, Mr. Vitikos has told us that he
4 cannot come. You got his name on your list?

5 THE COURT: Is that V-I-T-I-K-O-S?

6 MR. CONNELL: Yes, sir.

7 THE COURT: Yeah, his name was - I called his name
8 out as a potential witness.

9 MR. CONNELL: He's, he's going to be off the list.
10 He's not coming.

11 THE COURT: Okay.

12 MR. CONNELL: Mr. Reed, I talked to him Sunday. He
13 said he was in Florida. I told him if he was not here by
14 Wednesday he would not be - his case would be off. I haven't
15 heard from him. I'm going to call him again and see if he's
16 coming but I do not anticipate him coming.

17 THE COURT: All right.

18 MR. CONNELL: Let's see here. This afternoon we would
19 have the following, Timothy Zinn, Cynthia Reilly, Laura
20 Arrington, Bradley Bray and my understanding is Mr. D'Amico is
21 going to try to be here and we have Mr. Haynes ---

22 THE COURT: All right.

23 MR. CONNELL: --- back in the back and I think that
24 would be all we'd have for this afternoon. So, I really think

1 we'll be finished based on what's happened tomorrow morning,
2 tomorrow by lunch.

3 THE COURT: All right, good.

4 MR. CONNELL: Okay.

5 THE COURT: All right, anything before we bring the
6 jury back in? Anything from the Plaintiff before we bring the
7 jury in?

8 MR. CONNELL: No, sir.

9 THE COURT: Anything from the Defense?

10 MR. WILKERSON: No, Your Honor.