



D. Plaintiffs adduced credible expert evidence of the compensatory damages suffered on a class-wide basis as of 120 days after their claim for wages and benefits.

E. Plaintiffs have proven that defendant W. Jack Kalins was an agent or officer of defendants Vacation Charters, Ltd. and W. Jack Kalins, Inc. during the class period, and was actively involved in the corporate policy making of defendants Vacation Charters, Ltd. and W. Jack Kalins, Inc., including corporate decision-making on matters of pay or compensation, and that Vacation Charters, Ltd., W. Jack Kalins, Inc. and W. Jack Kalins are jointly and severally liable as a joint employer of the class plaintiffs. 43 Pa. Stat. § 260.2a; Hirsch v. EPL Technologies, Inc., 910 A.2d 84, 88 (Pa. Super. 2006); Laborers Combined Funds of W. Pennsylvania v. Mattei, 518 A.2d 1296, 1300-01 (Pa. Super. 1986).

F. Defendants have not met their burden, under the Pennsylvania Wage Payment and Collection Law, of clear and convincing evidence that their dispute with plaintiffs' claims for wages and benefits made no later than August 28, 2008 (the date this action was filed) was made in good faith. Thomas Jefferson University v. Wapner, 903 A.2d 565, 575 (Pa. Super. 2006); Hirsch, 910 A.2d at 93 n. 9.

G. Plaintiffs have proven through credible evidence that the form independent contractor agreement (ICA) was void and unenforceable on its face by material and repeated reference to the salespersons as "independent contractors" when defendants stipulate that the class members were "employees" under Pennsylvania law. Moreover, key conditions precedent to the receipt of commissions, such as buyer credit score requirements, or the requirement of a 10% deposit, are not mentioned in the ICA. The designation of wages as "advanced commissions" is also not set forth in the contract. As a result, the agreements cannot be reformed by the court and the ICAs are void and unenforceable in their entirety. Stewart v.

GGNSC-Canonsburg, LP, 9 A.3d 215, 217-18 (Pa. Super. 2010); see also In re: Clouse, 2010 WL 5423712, \*11 (E.D. Pa. Bankr., Dec. 28, 2010).

H. Credible expert testimony, provided by plaintiff, has convinced this court of the amount of wages and benefits owing to the class during the class period, as detailed in exhibit P-72A, which shall serve as the basis for a Distribution Fund to allocate damages to ensure that no class member receives a double payment and the defendants receive a setoff for any holdbacks already paid to class members.

Accordingly, based upon the admitted evidence, the court's evaluation of the witnesses' credibility and in accordance with governing Pennsylvania law, it is hereby

**ORDERED**

that the following judgment is hereby entered in favor of the class plaintiffs and against the defendants, jointly and severally:

1. Declaratory judgment is hereby entered that the 259 class plaintiffs, as defined in this court's June 3, 2010 Class Certification Order and identified in plaintiffs' exhibit P-72A in evidence, were employees of the joint employer defendants during the class period and entitled to all wages and benefits under Pennsylvania's Wage Payment and Collection Law, 43 Pa. Stat. § 260.1, *et seq.*

2. Judgment is hereby entered in favor of plaintiff Whitehead and against defendants in the amount of \$10,585.39, plus pre-judgment lawful rate interest from March 1, 2009 until March 14, 2011 of \$1,294.61 with a per diem of \$1.74, and post judgment lawful rate interest.

3. Judgment is hereby entered in favor of plaintiff Miller-Orteneau and against defendants in the amount of \$3,452.94, plus pre-judgment lawful rate interest from March 1,

2009 until March 14, 2011 of \$422.30, with a per diem of \$0.57 and post judgment lawful rate interest.

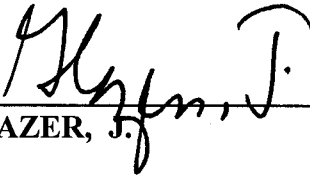
4. Judgment is hereby entered in favor of the remaining 257 absent class members and against the defendants in the amount of \$1,628,382.63, plus pre-judgment lawful rate interest from March 1, 2009 until March 14, 2011 of \$196,994.80 with the per diem of \$267.68, and post judgment lawful rate interest.

5. Judgment is hereby entered in favor of plaintiffs and against the defendants in the amount of \$407,095.66 pursuant to 43 Pa. Stat. § 260.10 and post judgment interest at the lawful rate.

6. Judgment is hereby entered in favor of plaintiffs and against defendants for the plaintiffs' reasonable attorneys' fees and costs in accordance with 43 Pa. Stat. § 260.9a(f). Class counsel appointed by this court's June 3, 2010 order shall submit an affidavit of reasonable fees and costs to this court within ten (10) days of the entry of this order; defendants shall file any objection to the plaintiffs' affidavit of fees and costs within ten (10) days of plaintiffs' submission to the court. Thereafter, this court shall enter an order quantifying the reasonable attorneys' fees and costs as part of this judgment in accordance with 43 Pa. Stat. § 260.9a(f).

7. Within five (5) days of the entry of this order, approved class counsel shall file and submit to the court a proposed Notice to the Class of this order for the court's approval. The proposed Notice shall include a proposed Plan of Distribution of the Judgment Sum of \$1,628,382.64 to the 257 absent class members plus interest and liquidated damages pursuant to 43 Pa. Stat. § 260.10. Defendants shall file any objection to the Proposed Class Notice with Plan of Distribution within ten (10) days of plaintiffs' filing.

**BY THE COURT:**

  
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GLAZER, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

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<b>ALBERT WHITEHEAD &amp; AUSTIN</b>	:	
<b>MILLER-ORTENEAU, on behalf of</b>	:	
<b>themselves and others similarly situated</b>	:	<b>August Term, 2008</b>
	:	
<b>v.</b>	:	<b>NO. 3764</b>
	:	
<b>VACATION CHARTERS, LTD.,</b>	:	<b>CLASS ACTION</b>
<b>W. JACK KALINS, INC. &amp;</b>	:	
<b>W. JACK KALINS</b>	:	

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**FINDINGS OF FACT**

AND NOW, this *29<sup>th</sup>* day of *April*, 2011, it is hereby

**ORDERED**

that this court finds as follows:

1. Defendants own and operate vacation resorts in the Poconos including the Split Rock Resort which, in part, are owned by persons who purchase a time-share interest in a unit. (N.T. 1/28/11, p. 8; P-42).

2. Defendants sell timeshares, also known as vacation ownership interests, either on a deed or Right-to-Use basis for a fully furnished vacation residence, generally for the same one week period each year, in perpetuity for a deeded interest and for a specific number of years for a Right to Use License. (P-42).

3. During the class period, defendants were controlled by defendant W. Jack Kalins, a real estate broker who managed defendants Vacation Charters Ltd. and W. Jack Kalins, Inc. (N.T. 1/28/11, pp. 29-30).

4. When a timeshare purchaser cancels a timeshare contract for a certain week, the defendants are able to re-sell the same timeshare week to another purchaser. (N.T. 1/28/11, p. 34). Defendants, however, retain all of the customer's deposit money (even if paid over several months) if the notice of cancellation is after the seven day statutory rescission period for cancellation of sales. Defendants rarely receive a cancellation within the rescission period. (P-42; N.T. 1/28/11, pp. 34, 42, 158).

5. Defendants hired salespersons to sell these timeshare interests to the general public in one-on-one presentations at the resorts or in storefront locations. (N.T. 1/25/11, pp. 38-39).

6. Defendants controlled all aspects of the class members' work schedules, dress codes, marketing protocols and day-to-day services through scripts, providing written company rules that required the salesperson's signatures and setting penalties for noncompliance with company rules. (P-10; P-11; P-12; P-26; P-27; P-35; P-36; P-40; P-44; P-48).

7. From 2002 until June 30, 2005, defendants classified their timeshare salespersons as employees. (N.T. 1/28/11, pp. 15-16).

8. In 2005, defendants began construction of a 48,000 square foot water park at their wholly owned Split Rock Resort. (N.T. 1/28/11, p. 53).

9. As a result of financial difficulties (due to the erosion of the cash position of the company and "other circumstances"), defendants announced that effective June 30, 2005, "timeshare sales representatives will return to the status of Independent Contractors rather than company employees." (P-3).

10. Defendants hired plaintiffs Whitehead and Orteneau as “salespersons” in their Philadelphia storefront selling timeshares for Vacation Charters and W. Jack Kalins, Inc. in June and July 2006. (N.T. 1/25/11, pp. 36-37; P-1; P-2).

11. Defendants’ internal records confirm that at least 259 persons, including the named plaintiffs, worked as “salespersons” during the class period of July 1, 2005 until December 31, 2008. (P-72A).

12. As a mandated condition of employment, defendants required each member of the class to sign an Independent Contractor Agreement (ICA) if they wanted a job as a salesperson. (N.T. 1/25/11, pp. 41-42; P-1; P-2).

13. During the class period, every person who sold timeshare interests for defendants signed an ICA. (N.T. 1/28/11, p. 136).

14. Plaintiffs could not negotiate any terms of the ICA and defendants’ agent told plaintiff Whitehead that the language regarding independent contractor status was necessary because “that’s the way the lawyers want it.” (N.T. 1/25/11, p. 44).

15. Defendant Kalins created the uniform ICA based on forms he used in his builder/contracting business with subcontractors. (N.T. 1/28/11, pp. 25-26).

16. The ICA is a form contract, the terms of which are identical or substantially and substantively similar for every class member.

17. The ICA states that the plaintiffs are not “employees” for federal, state or local tax purposes and that, as independent contractors, the plaintiffs are solely responsible for federal, state and local income taxes that may be assessed against them. (P-1 at ¶¶ 1, 7).

18. The ICA also states that the salesperson will indemnify, defend and hold defendants harmless from any tax liability, including penalty or interest that might be claimed by

the taxing authority against the defendants arising from the payment of commissions to the salesperson. (P-1 at ¶ 7).

19. Defendants' exclusively prepared ICA describes some but not all terms of a "holdback" on wages and a chargeback penalty on wages. (P-1 at ¶ 6).

20. Defendants' form ICA did not state that wages are "advances" on commissions. (P-1).

21. The defendants' form ICA provides that the defendants will holdback ten percent (10%) of wages earned by the class for a sale financed on a deferred payment basis. (P-1 at ¶ 6).

22. The defendants' form ICA required the "holdbacks" in a reserve account to be withheld up to a maximum of \$1,000.00. Id.

23. In fact, these "holdback" wages were held in defendants' commingled general operation account without the payment of interest. The moneys are not placed in an escrow account but are spent. (N.T. 1/28/11, pp. 143-44, 155).

24. Further, the defendants had an undisclosed policy of holding back fifty percent (50%) of plaintiffs' wages when the buyer of a financed timeshare had a low credit score. (N.T. 1/28/11, pp. 93-94). The remaining fifty percent (50%) of wages were then paid in monthly increments, over a six month period, contingent upon the buyer making their own monthly installments. (See e.g., P-18; P-19).

25. Defendants required (but did not disclose in the ICA) a ten percent (10%) deposit by the purchaser before they paid wages to the salesperson during the class period. A. 263 at pp. 153-54. Defendants further admitted that there is no disclosure in the ICA requiring a 10% deposit before the wage is earned. (N.T. 1/28/11, p. 154).

26. Defendants' uniform ICA also imposes a liability upon the class member to have their "holdback reserve account" wages charged back when a customer defaults on his account by having made less than four monthly payments. (P-1 at ¶ 6B).

27. Although not disclosed in the ICA, there is no time limit in the application of chargebacks. (N.T. 1/28/11, p. 133).

28. Defendants' uniform ICA sets forth the requirements for the payment of commissions to terminated class members. (P-1 at ¶ 8).

29. Following his termination in September 2008, plaintiff Whitehead never received his holdback funds held or any recovery of the chargebacks. (N.T. 1/25/11, p. 175).

30. On October 14, 2009, defendants paid plaintiff Miller-Orteneau \$2,359.19 which they represented was the amount of his holdbacks dating from 2006. Plaintiff Miller-Orteneau testified that he had "to fight for two years" to get this check for holdbacks. (N.T. 1/25/11, pp. 216, 244; P-20).

31. Defendants did not explain why it took over two years to pay these wages admittedly owed to plaintiff Miller-Orteneau. (N.T. 1/28/11, p. 36).

32. The failure by defendants to pay the holdbacks and by deducting the chargebacks and not paying their employer share of the employees' social security taxes had an adverse effect on the amount class members are eligible to receive in retirement because all of the earnings are not counted in gross earnings. (N.T. 1/25/11, pp. 187-88).

33. On February 26, 2008, as a result of these uniform policies and the defendants' control and direction over its salespersons, the Internal Revenue Service held that plaintiff Miller-Orteneau was defendants' employee and was not an independent contractor. (P-4).

34. As defendants knew no later than February 26, 2008, the IRS' detailed findings of "employee status" "may be applicable to any other individuals engaged by the firm under similar circumstances." (P-4). Nevertheless, despite his counsel's admission to the contrary, defendant Kalins testified at trial that he still believes that the salespeople were not misclassified as independent contractors. (N.T. 1/25/11 pp. 22-23; 1/28/11 p. 24).

35. Subject to determination during this court's distribution of wages from the Distribution Fund, defendants likely owe FICA, Medicare and FUTA to the Internal Revenue Service on behalf of the class members.

36. In September 2008, the Pennsylvania Department of Labor and Industry issued a Notice of Determination that plaintiff Whitehead was an "employee" under Pennsylvania law and entitled to unemployment compensation benefits. (P-8).

37. On November 19, 2008, Pennsylvania's Unemployment Compensation Board of Review affirmed that plaintiff Whitehead was an "employee" entitled to unemployment compensation. Id.

38. To date, defendants have not changed the Independent Contractor Agreement. (N.T. 1/28/11, p. 63).

39. Defendants opened their business-critical water park in the fourth quarter of 2008 with a construction cost of approximately \$19,900,000, with the defendants incurring, as of December 31, 2007, approximately \$9,382,000 in out of pocket costs. (P-73).

40. During the class period, defendants' financial statements reflected timeshare sales processed in excess of \$100 Million. (P-14; N.T. 1/28/11, p. 156).

41. As of July 27, 2009, the defendants continued to retain reserve holdback accounts in excess of \$1,000 for several class members. (N.T. 1/28/11, pp. 139-40).

42. Defendants agreed in opening statements on the first day of trial, January 25, 2011, that the class members were, during the class period, defendants' employees. (N.T. 1/25/11, pp. 22-24).

43. During defendants' case in chief at trial on January 28, 2011, defendants referred to an updated two page summary sheet to show that they had paid some of the holdback reserve accounts to the class members, but still had not paid the holdback wages to most employees. (D-5).

44. Plaintiffs also presented forensic evidence of the wages that they should have received, or been paid on their behalf, as "employees" during the class period based on defendants' internal payroll records. (P-72A).

45. Plaintiffs' accounting expert, James D. Gazonas, CPA, analyzed the defendants' internal payroll records including defendants' 1099 records and Accounts Payable Cash Disbursement Journals for the class period, and prepared P-72A as a calculation of funds owing to the class members as of the close of the class period. (N.T. 1/26/11, pp. 15, 18-20).

46. Plaintiffs' expert opined, based exclusively on defendants' payroll records in the class period, that the defendants owe employee wages under seven categories: social security taxes (FICA); Medicare; federal unemployment (FUTA); pro rata share of workers compensation insurance premiums; pro rata share of unemployment compensation premiums; holdbacks not returned to the class members as of December 31, 2008; and chargebacks. (P-72).

47. Plaintiffs' expert only included wages that were due and owing under statutory obligations (federal tax and Pennsylvania employer requirements) and based on the premise that the ICA (and its references to holdbacks and chargebacks) was unenforceable. (N.T. 1/26/11, p. 24).

48. Plaintiffs' expert calculated the amount of funds that the class members paid, or presently owe, to the Internal Revenue Service for FICA was \$498,733.93; for Medicare was \$117,267.63; and, for FUTA was \$23,115.92. (P-72A).

49. Conversely, the defendants have unjustly retained and admittedly spent the money required to be paid to the IRS on the employees' behalf. (N.T. 1/28/11, pp. 143-44).

50. Plaintiffs' expert testified that defendants did not pay unemployment compensation insurance premiums for the class members during the class period based upon his analysis of the defendants' internal payroll records produced during discovery. (N.T. 1/26/11, p. 57).

51. Plaintiffs' expert calculated that the amount of funds that the defendants unjustly retained, by failing to pay unemployment compensation insurance premiums for the class members, was \$117,474.53. (P-72A).

52. Plaintiffs' expert calculated that defendants failed to pay \$39,628.37 for workers compensation insurance. (A. 151).

53. Plaintiffs' expert calculated the wages due in column identified as "holdbacks" by relying solely on the defendants' recordation of "regular commission" as noted by "RC" on the disbursement journals and then calculating the wages held back. Plaintiffs' expert further subtracted everything not labeled "RC" from the column of "total 1099s;" further, any items identified as "draw" or otherwise were not included in "total 1099s." (N.T. 1/26/11, pp. 38-40).

54. Consistent with their ICA, defendants admit that commissions and "overrides" paid to managers are the same "RC" (regular commission) for purposes of wages/commissions. (N.T. 1/28/11, pp. 149-50).

55. Plaintiffs' expert calculated that defendants failed to return holdbacks, as of the close of the class period, in the amount of \$439,623.55. (P-72A).

56. On January 28, 2011, defendants referred to a summary chart purporting to show wages paid to the class members since the class period. (N.T. 1/28/11, p. 104; D-5).

57. Plaintiffs' expert calculated the amounts due in the column identified as "chargebacks" by relying on the defendants' recordation of "CB" for chargebacks detailed on defendants' disbursement journals. (P-14; P-32).

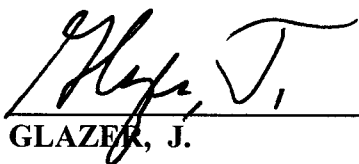
58. Plaintiffs' expert detailed the chargebacks owed to plaintiff Miller-Orteneau by deducting only those numbers identified as a "CB" on the defendants' payroll records and using a color coding system to account for chargebacks that were not voided. (P-14; N.T. 1/26/11, pp. 41-43).

59. Plaintiffs' expert calculated that the defendants withheld and penalized \$392,538.72 in wages through chargebacks during the class period. (P-72A).

60. By way of further example, plaintiffs' expert's calculation and opinion was a net sum of wages, as some class members are admittedly not entitled to any more wages. (N.T. 1/26/11, pp. 48-49; P-72A).

61. Calculated by the plaintiffs' expert, as a result of this miscalculation of its employees as independent contractors, defendants did not pay \$1,628,382.64 in wages and benefits during the class period. (P-72A).

**BY THE COURT:**

  
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GLAZER, J.