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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

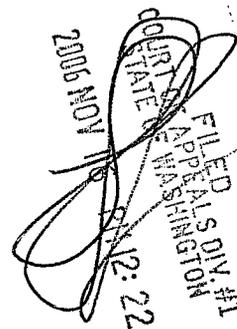
GERALD KINGEN, et ux., and SCOTT SWITZER, et ux.,

Appellants,

vs.

MORGAN, et al., individually and on
behalf of a Class of Employees,

Respondents/Cross-Appellants.



BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO	1
A. Respondents Assignments Of Error	1
B. Issues Pertaining To Assignments Of Error	1
II. STATEMENT OF THE CASE	2
A. Defendants Kingen And Switzer	2
B. Funsters Grand Casino	3
C. Conversion To Ch. 7 Bankruptcy	6
D. Defendants' Failure To Pay Wages For Last Two Pay Periods	7
E. Kingen And Switzer Refuse To Pay Employee Wages	9
F. Kingen And Switzer Have The Financial Ability To Pay	10
III. ARGUMENT	12
A. Defendants Are Individually Liable, As A Matter Of Law, For The Non-Payment Of Wages	12
1. Defendants Were Officers Who Directed And Controlled the Payment Of Wages When They Were Earned	12
a. Defendants Have No Defense To Their Failure To Pay Wages For The Second To Last Pay Period	13

b.	During The Final Pay Period, Defendants Were Directing And Controlling The Payment Of Wages At The Time They Were Earned.....	14
2.	The Defendants Have No Defense To Liability Under Washington Law	17
a.	The Non-Payment Of Wages Was Not The Result Of A Bona Fide Dispute Or Mistake.....	17
b.	There Is No "Good Faith" Defense, But Regardless, The Defendants' Conduct Epitomizes Bad Faith	20
3.	The Statute's Purpose Is To Hold Individual Officers Accountable For Non-Payment Of Wages.....	25
a.	The Trial Court's Decision Is Consistent With Supreme Court Precedent.....	25
b.	RCW 49.52.070 Is Consistent With Other Statutes That Impose Individual Liability In A Corporate Bankruptcy.....	30
4.	Bankruptcy Is Not A Defense To Individual Liability Under Washington Wage Statutes	32
5.	There Are No Genuine Issues Of Material Fact In Dispute.....	35
B.	Defendants Are Liable for Double The Amount Of Gross Wages Owed.....	38
1.	Limiting "Wages" To The Net, After Deductions Amount, Would Contravene The Statute's Clear Language And Purpose, And Undercompensate The Class.....	40

2.	The Statutory Doubling Provision Is Designed To Be Punitive In Nature, Not Compensatory	42
3.	Case Law Supports Doubling The Gross Wages.....	43
4.	The Plaintiffs Will Pay Taxes On The Award.....	44
C.	The Trial Court Abused Its Discretion By Reducing The Attorney Fees Incurred By 32%	48
1.	Interim Ruling On Damages & Costs/Attorney Fees	49
2.	Supplemental Fees Motion	49
D.	The Trial Court Abused Its Discretion By Not Awarding A Multiplier	50
IV.	CONCLUSION.....	52

TABLE OF AUTHORITIES

Cases

Washington Cases

Bates v. City of Richland,
112 Wn. App. 919, 51 P.3d 816 (2002)..... 39

Bowers v. Transamerica Title Ins. Co.,
100 Wn.2d 581, 675 P.2d 193 (1993)..... 50, 51

Bowles v. Washington Dep't of Retirement Systems,
121 Wn.2d 52, 847 P.2d 440 (1993)..... 16

Brandt v. Impero,
1 Wn. App. 678, 463 P.2d 197 (1969)..... 18

Carlson v. Lake Chelan Cmty. Hosp.,
116 Wn. App. 718, 75 P.3d 533 (2003)..... 50

Chelan County Deputy Sheriffs' Ass'n v. County of Chelan,
109 Wn.2d 282, 745 P.2d 1 (1987)..... 18

Chelius v. Questar Microsystems, Inc.,
107 Wn. App. 678, 27 P.3d 681 (Div. 1, 2001)..... 43

Drinkwitz v. Alliant Techsystems, Inc.,
140 Wn.2d 291, 996 P.2d 582 (2000)..... 39

Ellerman v. Centerpoint Prepress, Inc.,
143 Wn.2d 514, 22 P.3d 795 (2001)..... passim

Ethridge v. Hwang,
105 Wn. App. 447, 20 P.3d 958 (2001)..... 51

Flower v. T.R.A. Industries, Inc.,
127 Wn. App. 13, 111 P.3d 1192 (2005)..... 18

Hisle v. Todd Pac. Shipyards,
113 Wn. App. 401, 54 P.3d 687 (2002)..... 17

<i>Hume v. American Disposal Co.</i> , 124 Wn.2d 656, 880 P.2d 988 (1994).....	48
<i>Inniss v. Tandy Corp.</i> , 141 Wn.2d 517, 7 P.3d 807 (2000).....	35
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	25, 39
<i>Jones v. Jones (In re Estate of Jones)</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	25, 37, 39
<i>Pham v. City of Seattle</i> , 124 Wn. App. 716, 103 P.3d 827 (2004).....	50, 51
<i>Pope v. Univ. of Wash.</i> , 121 Wn.2d 479, 852 P.2d 1055, 871 P.2d 590 (1993).....	18
<i>Schilling v. Radio Holdings</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	passim
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	39
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	50
<i>Somsak v. Criton Technologies/Heath Tecna, Inc.</i> , 113 Wn. App. 84, 52 P.3d 43 (2002).....	51
<i>State v. Amurri</i> , 51 Wn. App. 262, 753 P.2d 540 (1988).....	38
<i>State v. Cortez</i> , 18 Wn.2d 590, 140 P.2d 298, <i>adhered to on</i> <i>rehearing</i> 18 Wn.2d 590, 142 P.2d 403 (1943).....	19
<i>State v. Hursh</i> , 77 Wn. App. 242, 890 P.2d 1066 (1995).....	38
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000).....	38

<i>State v. Red,</i> 105 Wn. App. 62, 18 P.3d 615 (2001).....	38
<i>State v. Roggenkamp,</i> 153 Wn.2d 614, 106 P.3d 196 (2005).....	38
<i>Steele v. Lundgren,</i> 96 Wn. App. 773, 982 P.2d 619 (1999).....	48
<i>Tift v. Professional Nursing Services, Inc.,</i> 76 Wn. App. 577, 886 P.2d 1158, <i>amended on reconsideration, review denied,</i> 127 Wn.2d 1007, 898 P.2d 309 (1995).....	35

Federal and Out-Of-State Cases

<i>Belcufine v. Aloe,</i> 112 F.3d 633 (3d Cir. 1997).....	33, 34
<i>Bennett v. Lambroukos,</i> 303 S.C. 481, 401 S.E.2d 428 (1991)	44
<i>Blim v. Western Elec. Co., Inc.,</i> 731 F.2d 1473 (10th Cir. 1984)	43
<i>Bowen v. United States,</i> 836 F.2d 965 (5th Cir. 1988)	37
<i>Brown v. First Nat'l Bank of Little Rock,</i> 748 F.2d 490 (8th Cir. 1984)	33
<i>Commercial Wholesalers, Inc. v. Investors Commercial Corp.,</i> 172 F.2d 800 (9th Cir. 1949)	31
<i>CSFM Corp. v. Elbert & McKee Co.,</i> 870 F. Supp. 819 (N.D. Ill. 1994).....	29
<i>Davis v. United States,</i> 961 F.2d 867 (9th Cir. 1992)	37
<i>DeBreceni v. Graf Bros.,</i> 828 F.2d 877 (1st Cir. 1987).....	34

<i>Edwards v. Commissioner</i> , 39 T.C. 78 (1962), <i>affirmed</i> , 323 F.2d 751 (9th Cir. 1963)	46
<i>Fegley v. Higgins</i> , 19 F.3d 1126 (6th Cir. 1994)	48
<i>Fischel v. Equitable Life Assur. Society of U.S.</i> , 307 F.3d 997 (9th Cir. 2002)	51, 52
<i>Glover v. S.D.R. Cartage Co., Inc.</i> , 681 F. Supp. 1293 (N.D. Ill. 1988)	34
<i>In re American Hardwoods, Inc.</i> , 885 F.2d 621 (9th Cir. 1989)	31
<i>In re Grove Peacock Plaza, Ltd.</i> , 142 B.R. 506 (Bankr. S.D. Fla. 1992).....	33
<i>In re Lowenschuss</i> , 67 F.3d 1394 (9th Cir. 1995)	31
<i>In re Martec Corp.</i> , 127 B.R. 65 (Bankr. S.D. Fla. 1991).....	33
<i>In re NMI Systems, Inc.</i> , 179 B.R. 357 (Bkrtcy. D. Col. 1995).....	29
<i>In re Sinclair's Suncoast Seafood, Inc.</i> , 140 B.R. 588 (Bankr. M.D. Fla. 1992)	31
<i>In re Sport Stations, Inc.</i> , 152 B.R. 335 (Bankr. M.D. Fla. 1993)	33
<i>In re Vadnais Lumber Supply, Inc.</i> , 100 B.R. 127 (Bankr. D. Mass. 1989)	33
<i>In Re Washington Public Power Supply Sys. Lit.</i> , 19 F.3d 1291 (9th Cir. 1994)	51
<i>Keiser v. Catholic Diocese of Shreveport, Inc.</i> , 880 So. 2d 230, (La. App. 2 Cir., 2004)	44

<i>Klotz v. United States</i> , 602 F.2d 920 (9th Cir. 1979)	37
<i>Maddrix v. Dize</i> , 153 F.2d 274 (4th Cir. 1946)	48
<i>Navarro v. U.S.</i> , 72 AFTR 2d 93-5424 (WD-TX 1993)	47
<i>Richards v. First Union Securities, Inc.</i> , 290 Wis. 2d 620, 714 N.W.2d 913 (2006).....	29
<i>Rivera v. Baker West, Inc.</i> , 430 F.3d 1253 (9th Cir. 2005)	45, 48
<i>Slodov v. United States</i> , 436 U.S. 238, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (2000).....	36
<i>Underhill v. Royal</i> , 769 F.2d 1426 (9th Cir. 1985)	31
<i>United States v. Gilbert</i> , 266 F.3d 1180 (9th Cir. 2001)	37
<i>United States v. Powell</i> , 955 F.2d 1206 (9th Cir. 1992)	37

Statutes

11 U.S.C. § 524(e)	30
11 U.S.C. § 547(b)	32
26 U.S.C. § 104(a)(2).....	47
26 U.S.C. § 3121(a)	41
26 U.S.C. § 3123	41
26 U.S.C. § 3306(b)	41
26 U.S.C. § 3401(a)	14

26 U.S.C. § 3401, <i>et seq.</i>	41
26 U.S.C. § 3402(a)(1).....	45
26 U.S.C. § 61.....	14, 47
26 U.S.C. § 6672.....	31, 36, 37
26 U.S.C. § 6672(a).....	36, 37
26 U.S.C. § 7202.....	37
26 U.S.C. § 7215.....	37
26 U.S.C. § 911(d)(2) (1988).....	16
RCW 49.46.010(2).....	15, 39
RCW 49.46.020.....	21
RCW 49.46.090.....	1
RCW 49.48, <i>et. seq.</i>	25
RCW 49.48.010.....	13, 15
RCW 49.48.030.....	1
RCW 49.52.050.....	13, 32, 36
RCW 49.52.070.....	passim
RCW 82.32.145.....	30
RCW 9A.32.060.....	38
S.C. Code Section 41-10-80(C).....	44

Regulations

26 C.F.R. § 31.31.102-1(d).....	46
26 C.F.R. § 31.3401(a)-1(b)(5).....	41, 45

26 C.F.R. § 31.6302-1.....	45
29 C.F.R. § 1620.10 (1986).....	16
WAC 296-128-035.....	15

Other Authorities

Form W-2.....	14
Internal Revenue Service Publication 957.....	46
Samuel Berger, <i>Court Awarded Attorneys' Fees:</i> <i>What is "Reasonable"?</i> , 126 U. Pa. L. Rev. 281 (1977).....	51

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

The trial court entered a Judgment against Defendants, Gerald Kingen and Scott Switzer, based on a ruling that the Defendants are individually liable under Washington's wage statute, RCW 49.52.070, for double the amount of wages owed to the class of their former employees. The wages were earned while working for Defendants' company Funsters Grand Casino, Inc. Appellants have appealed the Judgment.

A. Respondents Assignments Of Error

Respondents/Cross-Appellants appeal the following errors made by the trial court:

1. The trial court failed to award the Class actual fees incurred as required by RCW 49.46.090, RCW 49.48.030, and RCW 49.52.070.
2. The trial court failed to award a multiplier to the Lodestar to account for the delay in payment, the risk of non-payment, and the results achieved.

B. Issues Pertaining To Assignments Of Error

1. Whether the trial court abused its discretion in reducing the attorney fee award by 32 %.
2. Whether the trial court abused its discretion by reducing the hourly rates of class counsel and paralegals despite evidence that the rates were within industry standard.
3. Whether the Court abused its discretion in not awarding any multiplier whatsoever or providing any explanation for its decision

when the case is risky, exceptional results were obtained, and there has already been an almost four year delay in payment.

II. STATEMENT OF THE CASE

A. Defendants Kingen And Switzer

Gerald Kingen ("Kingen") and Scott Switzer ("Switzer") were both officers of Funsters Grand Casino, Inc. (the "Casino"). Kingen was the Casino's President and CEO, while Switzer was the Casino's CFO. *CP 144, 27:16-25; CP 154, 81:23 – 82:9; CP 174, 59:17-21; CP 181*¹. Both Defendants were also owners of the Casino. Switzer held a 7% ownership interest while Kingen's ownership interest was 31%. *CP 140, 8:2-14.*

As CFO, Switzer managed the Casino's finances. *CP 141, 11:2-10.* In addition to his CFO duties, Switzer also acted as the Casino's General Manager during the last two months it remained in operation. *CP 141, 11:24 – 12:2.* In this capacity, Switzer operated the Casino. *CP 142, 14:3-5.*

As Casino President and CEO, Kingen had authority to hire and terminate employees, and he set compensation for senior employees. *CP 175, 65:20 – CP 176, 68:25.* Kingen worked closely with Switzer concerning casino operations and, according to the Company's policy manual, no employee could enter into an employment contract or make agreements inconsistent with written company policies unless Kingen signed these agreements. *CP 177, 71:5-8; CP 181.* In addition, Kingen

¹ Deposition page and line references appear directly after CP cites. e.g., 27:16-25 refers to page 27, lines 16-25.

attended ownership meetings and regularly attended management meetings. *CP 141, 11:11-17; CP 143, 22:22- 23:12.*

Most significantly, as owner/officers, Kingen and Switzer controlled the payment of wages to employees. Switzer testified:

Q: Was there ever a period of time when you and Mr. Kingen discussed the fact that you might not be able to pay [casino] employees?

A: We always felt that there would be enough to pay the employees.

Q: So you talked about it and you thought that there would be enough to pay them?

A: Well, paying the employees, paying the payroll was our first priority every month.

CP 162, 161:23 - 162:6. See also, CP 171, 26:24 - 27:2.:

We were always concerned with the company being able to pay its payroll. It's challenging, but we worked hard to accomplish that.

Switzer and Kingen had authority to prioritize the Casino's expenditures and pay employee wages.

B. Funsters Grand Casino

In August of 2001, Kingen and Switzer opened the Funsters Grand Casino in Sea-Tac. From the beginning, the Casino was in poor financial condition. The Casino opened late, its renovation cost more than expected, and, soon after its opening, it suffered significant losses due to the September 11, 2001, terrorist attacks. *CP 147, 38:10 - CP 148, 41:6.* As early as September of 2001, a month after the casino opened, Kingen was aware that payroll checks totaling \$95,658.73 were returned by the

bank to employees for insufficient funds. *CP 168, 17:15 – CP 169, 18:14.* And again in October, November, and December of 2001, Kingen knew that payroll checks continued to bounce, and that the total amount of checks returned for insufficient funds ("NSF") were increasing each month. *CP 169, 20:17 – 21:13; CP 170, 24:13 – 25:7.*

After operating for just over one year, the Casino filed for Chapter 11 bankruptcy on September 17, 2002. *CP 147, 37: 5-6.* The decision to file Chapter 11 bankruptcy was made by the company's owners: Gerald Kingen; Paul Merlino; and Scott Switzer. *CP 177, 73:6-13.*

The Casino's losses continued to mount even after it filed for bankruptcy. Throughout late 2002 and early 2003, the Defendants met each month to go over the monthly financial statements required by the Chapter 11 bankruptcy, and each month the Defendants elected to keep the casino open in the face of continuing, severe cash flow problems. *CP 149, 56: 22 – CP 150, 57:15; CP 150, 58:17 – 59:2.* Even vendors were not paid during this time frame. *CP 159, 128:17 – CP 160,132:6; CP 161, 134:19 – 135:6.* By November 22, 2002, the Casino's year-to-date net loss totaled 2.2 million dollars. *CP 156, 94:9 – 95:4.* Ultimately, the Casino suffered a 2.41 million dollar net loss for all of 2002. *CP 156, 96: 13 – CP 157, 97: 2.*

Despite these enormous losses, Kingen and Switzer chose to keep operating. *CP 157, 97: 7-12.* They based this decision upon speculation and hope that the Washington Legislature would allow non-tribal casinos

to have slot machines and upon the belief that Casino business would pick up in the fall. *CP 146, 36:20 – CP 147, 37:17*. In the hope of realizing a profit, the owners were willing to finance the casino with their own personal funds: Kingen estimated he loaned between \$150,000 and \$200,000 to the casino during the time frame of the Chapter 11 Bankruptcy. *CP 171, 29: 12-19*. When asked why the owners continued to infuse their personal funds into the business, Kingen responded:

We were optimistic that there was an opportunity to create a success in the company. The last couple months the improvement of the business was beginning to reflect the consequences of those efforts.

CP 171, 28:25 – 29:3.

When asked the same question, Switzer testified:

We believed that the company could become profitable. We believed that we had a good shot at getting slot machines, and in fact when we went into the hearing on September 7th *we were prepared to put up enough money to pay everything current for the company and provide operating capital to get it through the next 90 days thereafter*, so we did believe at that time that there was a good likelihood that this business could turn around.

CP 163, 166:24 – 167: 6 (emphasis added).

Ultimately, the owners' rosy predictions did not come to fruition, and the Casino continued to lose money at the beginning of 2003.

Switzer testified that as early as the spring of 2003, payroll checks from the casino were bouncing and that Kingen was aware of this fact. *CP 151, 72:2 – CP 152, 73:12; CP 168, 16:1-25*. Despite its mounting losses, by April 2003, the Casino continued to employ 189 employees. *CP 66, ¶ 5*.

C. Conversion To Ch. 7 Bankruptcy

On March 7, 2003, the U.S. Trustee overseeing the Casino's Ch. 11 bankruptcy moved to convert the Ch. 11 bankruptcy to a Ch. 7 liquidation. *CP 183-186*. The U.S. Trustee based its motion on the fact that the Casino was delinquent in providing monthly financial reports, was continuing to suffer significant losses, and had no ability to effectuate a Ch. 11 reorganization plan. *Id.* On March 13, 2003, the U.S. Attorney's office moved to dismiss the bankruptcy entirely because the Casino owed \$244,310 in post-petition tax obligations and \$1,656,715.32 in pre-Petition tax obligations. *CP 188-190*.

One *month* after the U.S. Trustee moved to liquidate the Company, on Monday, April 7, 2003, the bankruptcy court converted the Casino's Ch. 11 bankruptcy to a Ch. 7 liquidation. At the hearing, the Court gave the Casino's principals an opportunity to avoid Ch. 7 if they were willing to unequivocally pledge to provide the Casino with sufficient funds to satisfy its post-petition arrearages and continue on an ongoing basis. *CP 309, 11-310, 20*. But because Kingen, Switzer, and the other owners were not willing to make this commitment, the Court ordered the Casino into a Ch. 7 liquidation. *CP 194, 9-20 and CP 280-281*. That same day, the court-appointed Ch. 7 Trustee, Michael McCarty, closed the Casino.²

² Defendants were aware that they had the option to convert the Chapter 11 to a Chapter 7 bankruptcy at any time. *CP 153, 78:24 – 79:24; CP 178, 88:18 – 89:2*.

D. Defendants' Failure To Pay Wages For Last Two Pay Periods

Employees were paid every other Friday for work performed in the prior two week period ending on the preceding Sunday. *CP 145, 32:15 – CP 146, 33:3*. Happy Guests International ("HGI"), a separate entity, processed payroll for Funsters' Grand Casino. *CP 780, ¶ 1*.

There are only two "payroll" periods at issue in this lawsuit: (1) the March 28, 2003, payroll; and (2) the April 11, 2003, payroll. The unpaid portion of the March 28, 2003, payroll was \$23,268.11. *CP 65, 11-12; CP 68; CP 102; CP 143, 21: 16-22; CP 146, 33: 10-14*. Total payroll for the April 11, 2003, payroll was \$157,704.59.³ *CP 317, 2: 3-4*.

Employees who worked anytime between Monday, March 10, 2003, and Sunday, March 23, 2003, were entitled to receive a payroll check on Friday, March 28, 2003. The Defendants admit that although payroll checks were issued, about 25% of them bounced. *CP 146, 33: 10-14*. Specifically, 26 employee wage checks totaling **\$23,268.11** were returned because of insufficient funds ("NSF"). *CP 68*. During this time, the company was in Chapter 11 bankruptcy under the direction and control of the Defendants.⁴

Employees who worked anytime between Monday, March 24, 2003, and Sunday, April 6, 2003, were entitled to a payroll check on

³ One employee on this payroll chose to "opt out" of the class, which brings the amount due to \$156, 366.78. *CP 65 ¶ 3 and CP 102*.

⁴ Contrary to Defendants' statements, there is no evidence that those employees waited until April 7, 2003, to cash their checks, and that they bounced because the Trustee had cleared out the bank accounts on April 7, 2003. The evidence from AEA Bank records establishes the exact opposite. *CP 1780-1790*.

Friday, April 11, 2003. During this time, *i.e.*, when the work was performed up to and including the last day of the payroll period on April 6, 2003, the company was in Chapter 11 bankruptcy. It was not until Monday, April 7, 2003, that the company was converted to a Chapter 7 liquidation. Although some employees worked on the morning of April 7, none of them have made any claim for wages for services rendered on that day. No employees worked on any subsequent days.

On April 11, 2003, the regularly scheduled payroll was not issued. Therefore, none of the 160 casino employees received any wages on April 11, 2003, for work performed prior to the closure, *i.e.*, the period from March 28, 2003, through April 6, 2003. The payroll for this period was **\$156,366.78**. *CP 143, 21:23 – 22: 12; CP 167, 11: 3-10; CP 317, 1-5*. According to the declaration of Michael McCarty, the funds seized from *Funsters premises* were approximately \$85,000. *CP 317, 1-5*. An additional \$15,000 was seized from *Funsters' bank accounts*. *CP 469, 8-14, CP 1290, 14-16*.⁵ This would not have covered even the last payroll.⁶

Based on the non-payments for the last two pay periods, the total gross wages owed to the class of former Casino employees was

⁵ This fact is undisputed. *CP 1290*.

⁶ Even if the seized funds had been used to meet their payroll obligations, Michael McCarty, the Trustee, admits that the employees would only have received approximately 46% of their owed wages. *CP 318, 19 – CP 319, 3*. Defendants speculate that the additional funds generated between April 7 and April 10 would have been sufficient to cover the entire payroll, but there is no evidence to support that claim.

\$179,634.89. *CP 65, ¶ 3; CP 102.* After deducting tips already paid out, that amount is **\$120,714.48.** *CP 2376, ¶ 21 and 22.* The employees earned all of these wages during the period of time that Kingen and Switzer were owners and officers operating and running the Casino.

E. Kingen And Switzer Refuse To Pay Employee Wages

After the Casino ended its operations, neither Kingen nor Switzer paid the wages owed the Casino employees.

On April 10, 2003, Mr. McCarty brought a motion seeking to subordinate the priority lien that owner Paul Merlino had on the Casino's available funds in order to use these funds to pay some of the outstanding wages owed the Casino employees. *CP 196-200.*⁷ Through his motion, Mr. McCarty sought to invalidate Mr. Merlino's priority rights to the Casino's funds in order to pay at least a portion of employee wages due and owing. *Id.* In response, Mr. Merlino pointed out that Mr. McCarty lacked any legal basis for subordinating his priority rights to the Casino's available funds. *CP 208-212.* Additionally, the U.S. Trustee objected to Mr. McCarty's request by noting that Mr. McCarty lacked authority to pay wage claims ahead of other Ch. 11 administrative claims. *CP 214-215.*

On April 11, 2003, when arguing his motion to subordinate Mr. Merlino's lien on the Casino funds to pay employees, Mr. McCarty, the Ch. 7 Trustee, represented to the Court that all of the Casino's

⁷ On November 14, 2002, the bankruptcy court had granted a super priority lien to persons who provided the Casino with Debtor In Possession financing necessary to continue its operations. *CP 202-206.* Following this, Paul Merlino advanced the Casino \$225,000 to continue its operations. *CP 209, 6-7.*

principals had *refused* his request to pay employee wages. CP 338, 25 – CP 339, 3. This is consistent with Kingen's testimony:

Q: After that point in time did you personally and/or your partners, Mr. Switzer, Mr. Merlino, offer to put capital in to pay the last payroll, or the portion of it, the difference between the \$85,000 that was left in the company and the \$159,000?

A: No.

CP 172, 46:17-24. And see, CP 391, 3:16.

Ultimately, the Court denied the Ch. 7 Trustee's motion because it lacked legal authority to grant his request and could not modify its prior November 14, 2003, order granting Mr. Merlino priority. CP 352, 5 – CP 353, 2. Thus, the employees were not paid any wages out of Casino funds.

F. Kingen And Switzer Have The Financial Ability To Pay

Although financial *inability* to pay is not a defense, Kingen and Switzer are both extremely wealthy with more than enough assets to pay the employees. While choosing not to pay their former employees, Kingen and Switzer had the resources to purchase the property upon which the Casino formerly operated. In September of 2003, just five months after Funsters was liquidated for failure to pay employment taxes to the IRS, a company owned by Kingen and Switzer, K&S Development, LLC, purchased the building complex in which the Casino formerly operated for **\$5.25 million**. CP 158, 112: 4-13. They, through K&S, also purchased the Casino's furniture, fixtures, and equipment for approximately \$250,000. CP 172, 49:17 – CP 173, 50: 8. Despite these

expenditures, Kingen and Switzer have continued to refuse to pay the employees their unpaid wages because Kingen believes it is not his responsibility.

A: . . . our feelings were that the corporation that owed the liability, if liquidated in an orderly manner, there would be plenty of capital there to take care of its responsibility.

Q: One year later the employees have still not been paid. Is it still your position that is not your responsibility?

A: Correct.

CP 172, 47: 1-8.

According to Kingen's September 1, 2002, personal financial statement, he has a net worth of \$32,096,300. *CP 230.* His West Seattle residence is worth \$5,750,000, and his Sun Valley residence is worth \$950,000. *CP 231.* Kingen's total stock ownership is worth \$13,190,000. *CP 230 and 234.* This includes his 100% ownership of three Salty's Restaurants (Alki, Redondo, and on the Columbia River, in Oregon). *Id.* The estimated 2000 sales for these three restaurants totaled \$19,138,383. *CP 234.* Kingen's total investment real estate holdings amount to another \$22,580,000.⁸ *CP 233.*

⁸ This includes, but is not limited to, his 100% ownership of a Delridge Commercial/Office Facility worth \$1,500,000, a 5,000 square foot warehouse worth \$400,000, the "Embers Property" worth \$1,950,000, the Happy Guests International Office building/Thai on Alki Restaurant, worth \$600,000, and the Harbor Avenue Alki Tavern, worth \$650,000. *CP 232-233.*

III. ARGUMENT

A. **Defendants Are Individually Liable, As A Matter Of Law, For The Non-Payment Of Wages**

The Defendants have tried to tell a moving tale of their efforts to start a Casino business in South King County, and the obstacles to success that were out of their control including the economic downturn, the 9/11 terrorist attacks, Governor Locke's proposed 10% tax on the gambling business, and the stymied efforts to get the slot legislation for non-tribal casinos. The Defendants' argue that they are the victims of decisions and events that were beyond their control. Fortunately for the unpaid employees, none of that is a defense to an officer's failure to pay wages that are owed to the employees for work performed.

Notably, the Defendants do not dispute the necessary elements of the claim that give rise to liability here: (1) the employees performed services; (2) they were not paid; (3) Defendants were officers in charge of and running the business; and (4) the non-payment was not the result of a bona fide dispute or mistake. Rather, the Defendants claim that they are not responsible for the employee wages because at the time the last payroll would have been issued, the U.S. Trustee had converted their Chapter 11 bankruptcy to a Chapter 7. Because officer liability is incurred *when the wages are earned*, this is not a defense to liability.

1. **Defendants Were Officers Who Directed And Controlled the Payment Of Wages When They Were Earned**

When an employee is discharged or otherwise ceases to work for the employer, wages *due* to the employee *shall be paid* at the end of the

established pay period. RCW 49.48.010. Any officer, vice principal, or agent of an employer is guilty of a misdemeanor and liable to the employee in a civil action for twice the amount of wages withheld plus attorney fees. RCW 49.52.050; RCW 49.52.070. The Defendants do not dispute that they were both officers who ran the company, and that the employees performed services, are owed wages for those services, and were not paid. Their sole defense is that they were not in control of the payment of wages when they were due. This argument fails because when the wages were earned, the officers were in control of the company.⁹

a. Defendants Have No Defense To Their Failure To Pay Wages For The Second To Last Pay Period

The Defendants have admitted that many employees were not paid in the second to last pay period: "About 25% of the employees did not get paid for the second to last pay period." *CP 443, footnote 2. And see,* Appellants' brief at page 16, verifying that on April 7, there was "approximately \$14,500 in outstanding payroll checks that had been issued the preceding March 28, 2003, payday." These admissions are in stark contrast to Defendants exhortation throughout their brief that "there never was a time that Funsters' employees did not get paid," or that "at the time of the Chapter 7 Trustee's takeover of the business and its assets,

⁹ CP 980 is a demonstrative exhibit that demonstrates when the subject wages were earned, the payroll date for such wages, and the date of conversion to a Chapter 7.

Funsters was entirely current with respect to its payroll obligations." *See*, Appellants' brief at 17.¹⁰

Defendants' claim, that the checks bounced because employees waited to cash them until after the Chapter 7 liquidation, is easily proven false. The April, 2003 bank statement from Funster's payroll account shows the majority of the employees tried to cash their checks *prior* to the April 7 conversion and seizure of funds by the Trustee. *CP 1780-1790* (Declaration of AEA Bank's Operations Officer and Records Custodian). Furthermore, the Trustee testified that he only obtained about \$15,000 from Funsters' bank account. Obviously, that amount was not sufficient to cover the \$23,268.11 in NSF payroll checks.

b. During The Final Pay Period, Defendants Were Directing And Controlling The Payment Of Wages At The Time They Were Earned

Payroll was not issued for the last pay period, and no employees were paid. *CP 166, 7: 6-12*. The Defendants contend that the wages were not owed until April 11, 2003, and at that time the wages were no longer under their direction and control because the company was in Chapter 7 liquidation. Defendants' statement that "Funsters was forced involuntarily into a Chapter 7 bankruptcy and was not allowed to pay wages," *CP 443, 13-14*, ignores the fact that *the Defendants chose* to do the following: (i) seek the Bankruptcy Court's protection by filing for

¹⁰ In this regard, the Defendants repeatedly refer to "wages owed" or "payroll obligations" as only the net, after taxes and voluntary contributions, amount. As the IRS or any employee will attest, that is simply incorrect: "wages" are the employee's entire gross compensation. 26 U.S.C. § 61, § 3401(a); Form W-2.

Chapter 11 bankruptcy; (ii) fail to pay taxes (which gave the U.S. Trustee no other option than to foreclose); and, (iii) keep the Casino open rather than close or voluntarily convert to a Chapter 7 at an earlier date. *CP 153, 78:24 – 79:24; CP 178, 88:18 – 89:2.*

Furthermore, this lawsuit is not against Funsters Grand Casino; it is against the officers in their individual capacity, and the status of the corporate entity is irrelevant. Even if the corporation's Chapter 7 were a defense to individual liability (and Plaintiffs do not concede that it is), the wages are owed for the time period in which the wages were earned and not on the payroll due date.

Under Washington law, the definition of "wage" is: "compensation due to an employee by reason of employment." RCW 49.46.010(2). Washington law also states that "wages due [the employee] on account of his employment" shall be paid and specifies that wages "due" shall be paid at the end of the established pay period. RCW 49.48.010; WAC 296-128-035. *And see, Schilling v. Radio Holdings*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998):

In RCW 49.48, the Legislature mandated that employers pay employees all wages due upon the conclusion of the employment relationship and banned all withholding or diversion of wages by employers **unless specifically approved by statute.**

Thus, the statute distinguishes between wages that are "due" and the payment date for those wages.

Similarly, in a case involving the calculation of retirement pensions, the Washington State Supreme Court held: "Leave, just like

'salaries and wages', is earned **when the employee performs the personal services.**" *Bowles v. Washington Dep't of Retirement Systems*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993) (emphasis added). The court explicitly rejected plaintiff's argument that the employees' leave cashout was earned at the termination of the employee's service. *Bowles*, 121 Wn.2d at 63-64. Wages, like leave, are earned when the employee performs work, not when payment is received. Under Washington law, wages are owed when earned despite the fact that the payment date may be at the end of the employment relationship or at some pre-established time.

Federal law is consistent. Under the Equal Pay Act, for example, "the term 'wages' generally includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation *irrespective of the time of payment, whether paid periodically or deferred until a later date.*" 29 C.F.R. § 1620.10 (1986). The Internal Revenue Code also defines the term "earned income" as "wages, salaries, or professional fees and other amounts received, as *compensation for personal services actually rendered.*" 26 U.S.C. § 911(d)(2) (1988) (emphasis added).

Without citing any legal authority, the Defendants urge the court to rule in their favor because Funsters ceased to exist as of April 7, 2003, when it was converted to a Chapter 7. Therefore, Defendants reason, they were not officers of an "employer" at the time of the bankruptcy and subsequent payroll. According to Defendants, if the bankruptcy absolves the corporation of liability, it necessarily absolves the "officers" of the

employer. They argue, essentially, that holding them personally liable would pierce the corporate veil and carve out an exception to the protection that corporate status provides to owners of companies. That is *exactly* why the statute was enacted; it creates an exception to the general rule that owners are not personally liable for corporate debts, and it ensures that employees get paid. Otherwise, any time an employer filed for bankruptcy, employees would have no recourse, and the statute would be rendered superfluous.¹¹ The legislature enacted the statute to prevent that result.¹²

2. The Defendants Have No Defense To Liability Under Washington Law

a. The Non-Payment Of Wages Was Not The Result Of A Bona Fide Dispute Or Mistake

Defendants' interpretation of willfulness is not supported by a single Washington case. Willfulness is defined as follows:

Nonpayment of wages is willful **in the context of these statutes** [RCW 49.52.050 and RCW 49.52.070] when it is the result of knowing and intentional action [as opposed to inadvertent] and not the result of a bona fide dispute as to the obligation of payment.

Hisle v. Todd Pac. Shipyards, 113 Wn. App. 401, 54 P.3d 687 (2002)

quoting, Chelan County Deputy Sheriffs' Ass'n v. County of Chelan, 109

¹¹ Wage claims are not paid until after secured claims. In this case, there is no possibility that any employees will get paid anything in the bankruptcy proceeding. *CP 494-495*.

¹² Defendants' newest argument, at footnote 9 of their brief, that any debate over this particular legal issue (their status as an employer) would give rise to a "bona fide dispute" over their obligation for wages was rejected by the *Schilling* court. 136 Wn.2d at 161-162 (Court rejected Bingham's argument that there was a bona fide dispute because he thought Buyer, as new employer, had obligation to pay).

Wn.2d 282, 300-301, 745 P.2d 1 (1987) (emphasis added); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160-61, 961 P.2d 371 (1998) ("there are two sets of circumstances in which an employer's failure to pay wages has been deemed by our courts as not willful: the employer was careless or erred in failing to pay, or a bona fide dispute existed between the employer and employee regarding payment of wages."); *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491 n.4, 852 P.2d 1055, 871 P.2d 590 (1993) ("lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute"); *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005).¹³

The courts interpretation is consistent with the Websters II Dictionary definition of willfulness as "being in accord with one's will: deliberate; inclined to impose one's will." Willful simply means volitional and, under Washington case law, is defined by what does not constitute willfulness. It is not a stringent standard. *Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969).

The Defendants' critique of the Plaintiff class representatives' testimony as not establishing willfulness, because they could not describe why the Defendants chose not to pay, establishes nothing. Ms. Morgan testified that Kingen did not pay the employees, even as of one year later, and that he had the ability to do so as CEO of Funsters:

¹³ In the 67 years since the statute was enacted, no Washington court has ever held differently.

A: Because you asked me if I have evidence that Mr. Kingen, you know, have an intent not to pay us, and I said yes, because until now – it's over a year now we haven't get paid. And just because he is the president and CEO of the company, of Funsters, he had the control when to pay us and how to pay us.

CP 503, 80:10-15. Ms. Pitchford aptly stated the obvious evidence of willful failure to pay, *i.e.*, that if Kingen had intended to pay the wages, knowing full well that they were due, he would have done so. *CP 506, 70:6-14.* Mr. McGillivray similarly echoed the same sentiment when he indicated that it was wrong for Switzer not to pay him out of his own pocket. *CP 427, 74: 18-20.*¹⁴

It is undisputed that Kingen and Switzer were officers of the company, who ran the business in a Chapter 11 bankruptcy despite foreseeable signs of abject financial failure.¹⁵ Defendants knew that payroll was around the corner, yet took no steps to ensure that employees were paid their wages. Both Kingen and Switzer admitted the predicates of liability: the non-payment was not the result of inadvertence or a bona fide dispute; the wages were owed; and they did not pay them. *CP 143, 21:2 – 22:12; CP 166, 6:22 – 7: 5 and 7:25 – 8: 6.*

¹⁴ The legislature could not have intended for employees, who have performed work without compensation, to engage in costly litigation with "fact finding" hearings, as proposed by the Defendants, to demonstrate malice on the part of those officers who have clearly failed to pay for reasons other than inadvertence or bona fide dispute. *State v. Cortez*, 18 Wn.2d 590, 140 P.2d 298, *adhered to on rehearing* 18 Wn.2d 590, 142 P.2d 403 (1943) (Act is primarily protective measure rather than strictly corrupt practices statute).

¹⁵ *See*, Appellants' brief at pg. 44: "the uncontroverted evidence established that Funsters was in serious financial straits from the moment '9/11' occurred and that for the next two years, it was engaged in a continuous and unremitting struggle for survival."

b. There Is No "Good Faith" Defense, But Regardless, The Defendants' Conduct Epitomizes Bad Faith

The Defendants argue that holding them accountable is a "strict liability" theory of imputed liability and that the Plaintiffs must also demonstrate "scienter" or "mens rea." Defendants have no legal authority whatsoever to support their novel "good faith" defense. In this vein, the Defendants allege that they really wanted the bankruptcy court to prioritize employee wages over the priority lien held by Mr. Merlino. Of course they wanted this to occur, knowing that under Washington law, they were individually liable for any amounts left unpaid. *See* Statement of the U.S. Trustee, William L. Courshon: "Under State law, the debtor's officers and directors are personally liable for those wages." *CP 344, 20-23*. The Defendants have failed to pay employees without any justification other than a corporate bankruptcy defense that does not exist.

Funsters Grand Casino's lawyer stated on September 26, 2002, after the Defendants put the company into a Chapter 11 bankruptcy and long before the conversion to a Chapter 7, that employees would suffer *significant hardship* if their wages were not paid. *CP 449, 4-9, CP 243-246*. At that point, it was reasonably foreseeable that continued operation of the company would risk non-payment of employees' wages. *CP 1287,6-10, CP 1288, 6-11*. Yet, the Defendants made a deliberate choice

to continue to run a business that consistently issued NSF checks to employees rather than cease operations.¹⁶

In the April 7, 2003, hearing on the motion to dismiss, strenuously opposed by the Defendants, Kingen offered to contribute significant funds to keep his business going. "As indicated in the beginning of the hearing, Kingen is committed to \$300,000 this week and \$200,000 to come in as he is able to liquify those funds." *CP 309, 20-23*. Even *part* of these funds would have paid the employee class their wages, *in full*. After deducting tips already paid, the \$179,634.89 payroll for both periods represents only 24% of the money that Kingen was willing to invest to keep his business running in the "hopes" of turning a profit. When asked why he did not simply use those funds to pay the employees, he replied that it was a "corporate liability." *CP 174, 58:21 – 59: 5*. Switzer's testimony was even more illuminating:

Q: So my next question is: If the owners were prepared to put more money into the company to make sure that employees got paid, their personal funds, why after April 7th didn't the owners take that money and use it to pay the employees?

A: At the point in time when it was converted to a Chapter 7 it's no longer our company.

Q: I understand that. There is nothing in the law that would prohibit you from writing a check to the employees for what they are owed.

¹⁶ Defendants emphasize that employees knew about the Chapter 11 bankruptcy and the company's precarious financial condition. Even if correct, they certainly did not agree to work for free: a violation of the minimum wage statutes. RCW 49.46.020.

A: Correct. There is nothing that would prohibit you from doing it.

Q: Right, except that I'm not an agent or officer or a vice principal who under the statute has personal liability for nonpayment of wages.

CP 153, 77:10-25. Mr. McCarty informed the Court at the April 7, 2003, hearing that he had tried to get the principals to pay the wages, but none of them agreed to do so. *CP 338-339.*

No evidence suggests that Defendants "went out of their way to advocate on behalf of the employees." *See*, Appellants' brief at 40.¹⁷ In fact, the Court aptly emphasized in the later April 11, 2003, hearing, the Defendants' lack of concern for the employees:

There wasn't a word about differential impact of an immediate conversion as distinct from a few days in the future when I made my ruling. **Nobody mentioned the employees.**

CP 345, 25 – CP 346, 3 (emphasis added). Defendants' constant refrain that they worked day and night to keep the paychecks coming is outlandish; they received compensation from multiple other sources and could, and chose to, gamble with the investment they made into a business they created.

Meanwhile, employees went 2-4 weeks without payment for services rendered to maintain the Defendants' business. Yet, Defendants' financial status has been unaffected. *CP 222-238.*¹⁸ Kingen and

¹⁷ The "super priority" claim that Kingen and Switzer wanted subordinated was that of their investor, Mr. Melino, and not their own.

¹⁸ The employees had a statutory right to picket one of Kingen's other businesses (Salty's) in protest. Kingen's decision not to pay the employees their wages in light of

Switzer's decisions clearly evince a concern for themselves only and not their employees. When it was evident that their company was shut down and they could no longer profit from it, Defendants wrote off the employees wages as not their responsibility.

Rendering the Defendants' actions and decisions even less sympathetic is the fact that they ran the company, in the face of obvious cash flow problems, for over a year and a half. The hearing to convert or dismiss the case on April 7, 2003, was not a surprise to the Defendants; a month earlier, the U.S. Trustee had filed a similar motion, on March 7, 2003, that the Defendants only narrowly avoided. In the meantime, the Defendants were late in filing required reports, lost approximately a million dollars, operated on a negative cash flow basis, and accrued approximately 2 million dollars of tax debt. *CP 289:7-10 and 24-25; CP 292: 5-11*. As stated by the Assistant Attorney General for the State of Washington:

It's one thing to be in the gambling industry, it's another thing to be gambling with the tax payer's money. **And it's a lesson that was not learned and which has repeated itself.** You've only seen formally the issues before the Court. You're not taking evidence now, but believe me when I say this thing has been on a close watch and **this isn't the first incident of concern on the part of the state or the federal government.** In some instances the money involved was trust fund money; in some instances it's not.

CP 293, 9-19 (emphasis added).

their picketing is a patent violation of the National Labor Relations Act and yet another example of "bad faith." *CP 155, 85:14 – 87:12*.

And again, **it's non-responsive to the issue of why they felt they had the ability to take money from taxing funds in the first place. They had a history of it coming in.** It should never have been repeated, and **it's not being repeated in insignificant sums.** Mr. Brouillard will speak to the amounts that have been taken from the IRS post-filing, but they're in the hundreds of thousands of dollars.

CP 294, 24 – CP 295, 6.

Unlike most Americans who pay their taxes in a timely fashion, the Defendants do not believe that they should be held to the same standard or that they should have to pay their employees. The Defendants intended to keep their Casino open rather than close the Casino on a date certain and pay the employees through their last day. Defendants chose to have employees work for, in some cases, up to one month in the face of obvious cash flow deficiencies. Defendants acted consciously in the face of a foreseeable result.

Defendants rely solely on the conversion as a defense. But, had the conversion not occurred, they would have been liable because there was no evidence that Funsters had sufficient funds to meet the last payroll, particularly given their failure to meet the second to last payroll.

Even though we were fairly close to the payroll, apparently there was not enough money in the bank to cover it. And it's somewhat speculation to know whether the debtor would be able to cover it or not.

CP 346, 8-12. It cannot be the case that individual liability would occur in such an instance but not when a Chapter 7 bankruptcy is imposed *because of the officers repeated failure to meet their payroll obligation.*

As the trial court aptly stated, the Defendants should bear the consequences of those actions:

All of their actions would have probably led to the reaping of great profit on their investment if all transpired according to their vision. However, that risk would never have led to some similar upside payoff for the employees. . . . so it's one thing for an investor to take such risks in exchange for potentially big returns and it's another thing to risk the non-payment of wages for the employees. . . .

CP 1336, 21-25.

3. The Statute's Purpose Is To Hold Individual Officers Accountable For Non-Payment Of Wages

a. The Trial Court's Decision Is Consistent With Supreme Court Precedent

When interpreting statutory language, the court's goal is to carry out the intent of the legislature. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 518-519, 22 P.3d 795 (2001). Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *Jones v. Jones (In re Estate of Jones)*, 152 Wn.2d 1, 93 P.3d 147 (2004). Interpreting RCW 49.48, *et. seq.*, the court held that the "plain meaning rule" requires courts to derive meaning from the wording of the statute itself. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002).

The wage statutes were enacted in 1939 and "should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Ellerman*, 143 Wn.2d at 520; *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d at 159 (emphasis added). The Supreme Court has clearly set forth the purpose of the statute:

The fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. **The act is thus primarily a protective measure, rather than a strictly corrupt practices statute.** In other words, **the purpose and aim of the act is to see that the employee shall realize the full amount of the wages** which by statute, ordinance, or contract he is entitled to receive from his employer, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages.

Ellerman, 143 Wn.2d at 520; quoting *Schilling*, 136 Wn.2d at 159 (emphasis added).

In *Schilling*, the Supreme Court affirmed a *summary judgment* for the employee. *Schilling*, 136 Wn.2d at 154, 166. In doing so, the Court ruled explicitly that insolvency of a company is not a defense:

. . . Apparently, Bingham's [the defendant in *Schilling*] argument is he could not have willfully withheld Schilling's wages if his failure to pay was caused by Radio Holdings' [the employer] insolvency.

The most troublesome issue with respect to Bingham's "financial inability" argument is his failure to articulate any standard for such "financial inability." **No published Washington appellate decision has held an employer's financial status renders refusal to pay wages nonvolitional**

The Legislature is, of course, free to add a further exception to the double damages provisions of RCW 49.52.070 if it so chooses. **However, we are not free to engraft such an exception to the statute where the plain language of the statute is to the contrary.** (footnotes and citations omitted).

Schilling, 136 Wn.2d at 164-165 (emphasis added). The Supreme Court has decided that the meaning of the words "willfully and with intent to

deprive" means failure to pay that is not the result of inadvertence or bona fide mistake, and there are no "exceptions" to this rule. Contrary to Defendants' interpretation, that does not engraft an exception to the statute — their interpretation does.

Defendants distinguish the obvious impact of the case on their ultimate insolvency defense (the bankruptcy) because Mr. Schilling did not declare bankruptcy and elected to pay creditors and finance settlement of a lawsuit rather than pay employees. However, Mr. Bingham did make a bankruptcy defense; he argued that if he had declared bankruptcy, the employees would not have received any wages. The Court still ruled against him, thus demonstrating that the Supreme Court had an opportunity to consider the bankruptcy defense and rejected it. *Schilling*, 136 Wn.2d at 164. And, even though Mr. Bingham's company, Radio Holdings, had been bought by another company that assumed the obligation for payment of wages after the closing date, the Court did not find that Bingham was "legally divested" of his responsibility for wages earned while he was the employer. *Schilling*, 136 Wn.2d at 155-156.

Finally, Kingen and Switzer were no different than Mr. Bingham: they made choices about how to spend the company resources and paid off multiple lawsuits against themselves and the company. *CP 159, 128:17 – CP 160, 132:21*. Even at the end, the Court gave the Defendants the opportunity to cure delinquent tax liabilities to prevent the conversion to a Chapter 7. They were not able or inclined to do so, and that is why the case was converted:

If there's any delinquency in taxes, I'm going to convert the case at that point or perhaps dismiss it. But it's not going to be something that we can do every few months and have one of these hearings and wait and see what the legislature does in the aftermath of whatever it might do. **So if the principals aren't willing to commit to that right now, there's just no point.** Because we're not going to be in this situation yet again. **I mean, this is the second time around. And if they're not willing to – if they want to bet on the legislature, they're going to have to bet with their own dollars.**

CP 306, 25 – CP 307, 12.

At the April 7 hearing, the judge converted the company to a Chapter 7 because Switzer and Kingen were "gambling" with the taxpayers money by putting its resources towards staying open rather than paying employment taxes, i.e., wages. The judge offered to allow the business to stay open if the owners were willing to personally guarantee all of the outstanding tax liabilities, but the owners declined. This alone establishes the Defendants did have control over the use of corporate resources that led to the Chapter 7 liquidation.

Defendants state that in *Ellerman*, the court had occasion to interpret the meaning of the words "willfully and with intent to deprive the employee of any part of his wages" and added another layer of "control." But the issue in *Ellerman* was whether the defendant was a vice-principal within the meaning of the statute that subjects officers, vice-principals, and agents to liability (she was not an officer of the company). *See, Ellerman*, 143 Wn.2d at 519:

Thus, the issue before us is whether Handley falls within the aforementioned statutes as a vice-principal or an agent of Centerpoint who had liability for the withholding of Ellerman's wages.

In analyzing the issue of whether Handley was a vice-principal, the Court reverted to common law principles and held that a "vice principal" is not just anyone involved in business, but, rather, a vice-principal who exercised control over the payment of the funds and acted pursuant to that authority. *Ellerman*, 143 Wn.2d at 521. Similarly, the court held that an "agent" subject to liability under the statute is one who had "some" control over the payment of wages. *Ellerman*, 143 Wn.2d at 523. The Court was describing the class of people subject to the Act, and not the basis for liability under it. The Court concluded that if the person's job involved authority over payment of funds, they are subject to the Act.

Here, Kingen, the President and Chief Executive Officer of the company, and Switzer, the Chief Financial Officer, were officers.¹⁹ As such, the analysis applicable to agents and vice-principles, limiting their common law liability, is not even applicable to them. Officers, by definition, are those individuals running the company who have authority over the payment of employee wages.²⁰ Furthermore, their testimony repeatedly established that their job descriptions included the payment of

¹⁹ Defendants have never contended that they were not running the Company or named some other culpable person.

²⁰ An officer is "a person charged with important functions of management such as a president, vice president, treasurer, etc." *Richards v. First Union Securities, Inc.*, 290 Wis. 2d 620, 639, 714 N.W.2d 913 (2006); a person who occupies "a high position within the corporation making him active in setting overall corporate policy or performing other important executive duties." *In re NMI Systems, Inc.*, 179 B.R. 357, 369 (Bkrcty. D. Col. 1995); "a person charged with important functions of management such as a president, vice president, treasurer, etc." *CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp. 819, 833 (N.D. Ill. 1994).

wages, they did control the payment of wages, and they maintained that responsibility throughout the period of time the wages subject to this lawsuit were earned (March 10 through April 6).²¹

The Defendants argue that the Supreme Court's decision in *Schilling* and *Ellerman* did not foreclose the possibility of yet another, judicially created exception. But the Supreme Court stated quite the opposite when discussing the fact that RCW 49.52.070 contains a specific exception to liability when the employee "has knowingly submitted to such violations":

This exception evidence is the legislature's understanding of its ability to carve out exceptions to the double damages provision of the statute. It did not do so for the employer's precarious financial status.

Schilling, 136 Wn.2d at 165, n.6.

b. RCW 49.52.070 Is Consistent With Other Statutes That Impose Individual Liability In A Corporate Bankruptcy

The Washington wage statute is not unique. There are numerous situations where individual officers or directors are held personally liable, despite the bankruptcy of their corporation, for corporate debts. In fact, the Bankruptcy Code itself provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).²²

²¹ Mr. Merlino was not an officer of the company or active in the management of the company. His role was solely that of financier. *CP 346, 15 – CP 347, 11.*

²² *And see*, the Washington State retail sales tax statute, RCW 82.32.145 (Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, or other person having control or

Every single case the Defendants cite for the proposition that the Chapter 7 "legally divested" them of any and all authority over the management of the business and the payment of its obligations, refers *exclusively* to property of the "debtor." *See*, Appellants' brief at page 24 and cases cited therein. Here, the "debtor" is Funsters who is not a party to the suit. Even the Assistant Attorney General highlighted in the April 7 hearing that the Defendants' personal guarantees were inconsistent with satisfying their individual liability for the tax debts:

THE COURT:

So there are potential claims against the principals, the managers?

MR. MOSNER:

Yes, there are. The individuals who are the current shareholders have stepped up a tremendous amount of debt recently where they have undoubtedly personally guaranteed it. So it's fair to say that if the IRS or the State were now to go after the control officers, if the pot isn't empty, certainly it's been emptying at an alarming rate as to individuals who might be found accountable under state or federal law.

supervision . . . *shall be personally liable* for any unpaid taxes and interest and penalties on those taxes, if such officer or other person *willfully fails to pay or to cause to be paid any taxes due* (emphasis added); *In re Sinclair's Suncoast Seafood, Inc.*, 140 B.R. 588, 592 (Bankr. M.D. Fla. 1992) (officer and director personally liable for a corporation's unpaid trust fund; "in a Chapter 7 case, the Bankruptcy Code was not enacted to enable non-debtor responsible parties to alleviate their liability under Section 6672 of the Internal Revenue Code."); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995) *citing inter alia In re American Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989) (bankruptcy court had no jurisdiction or power to permanently enjoin enforcement of judgment against non-debtor guarantor); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) (principal shareholder's liability for debtor's security violations not discharged through purported release in plan of reorganization); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 801 (9th Cir. 1949) (bankruptcy court has no power to relieve non-debtor parties from debts or obligations).

CP 293, 20 – CP 294, 5. *And see*, statement from counsel for the Creditor Group at the April 7 hearing:

I would like to see this case basically kept on a very short leash so that it's clear to the principals that they are going to have to fund this thing if they want to get to the point where they can perhaps save their own bacon in terms of this entity and in terms of the potential personal liability.

CP 299, 17-22.

Numerous statutes impose personal liability in many contexts, including, but not limited to, non-debtor liability, corporate securities violations, employee trust fund taxes, and obligations guaranteed by a principal of a corporate entity. Where a corporation has failed to meet these types of obligations and files for bankruptcy, the individual, non-debtor obligor's liability is not affected, reduced, or relieved in any way.

4. Bankruptcy Is Not A Defense To Individual Liability Under Washington Wage Statutes

Bankruptcy is not a defense, and none of Defendants' case law establishes it as such. Funsters Corporation had no ability to pay the employees after April 7, 2006, but that has no bearing on the ability of the individual defendants to pay. Defendants' claim that payments from their personal funds could constitute an unlawful preference is wrong because a preference relates only to corporate obligations; per RCW 49.52.050 and .070; the payment of wages is an individual obligation. Even if the liability for wages were construed as a corporate debt, a transfer is not an avoidable preference unless the funds used are the debtor's. 11 U.S.C. § 547(b). Payment by a non-debtor third party towards a debtor's creditor

is not preferential because the funds are not the property of the debtor's bankruptcy estate and, thus, the amount of the debtor's property available for distribution to other creditors is not reduced. *Brown v. First Nat'l Bank of Little Rock*, 748 F.2d 490 (8th Cir. 1984); *In re Sport Stations, Inc.*, 152 B.R. 335, 336-337 (Bankr. M.D. Fla. 1993); *In re Grove Peacock Plaza, Ltd.*, 142 B.R. 506, 513-514 (Bankr. S.D. Fla. 1992); *In re Martec Corp.*, 127 B.R. 65, 66 (Bankr. S.D. Fla. 1991); *In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 133 (Bankr. D. Mass. 1989).

Washington's statute has a different purpose and different language than *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir. 1997), where the court held that the officers of a company have no control over company resources once bankruptcy is filed.²³ Specifically, the *Belcufine* court held that the officers could not be liable for paychecks that were due after the corporation filed for bankruptcy because liability arises under the Pennsylvania statute only where there is a failure to pay wages that are "due and payable," and the officers had no control over the payment of wages after bankruptcy was filed. Under Washington law, even if a corporation is unable to pay because of a bankruptcy, the corporate officers are jointly liable for wages unlawfully "withheld." There is no reference whatsoever to the payroll date as in the Pennsylvania statute. Furthermore, Washington's statute specifically states that any employer or

²³ Furthermore, Pennsylvania law has no persuasive or controlling effect in Washington.

"officer, vice-principal, or agent" is liable, thus differentiating between an employer (the corporation) and the individuals running the company.²⁴

The other cases cited in the brief with regard to the bankruptcy issue involve totally different statutory schemes. In *DeBreceni v. Graf Bros.*, 828 F.2d 877 (1st Cir. 1987), the Court distinguished the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA") from the Fair Labor Standards Act ("FLSA"). Under the MPPAA, individual liability against corporate officers is only allowed under the general principles of corporate law by piercing the corporate veil. The court declined to adopt the broader "economic reality" test applied to the FLSA where corporate officers maintain control over the day to day operations of a business. It reasoned that unlike the FLSA, corporate officers are not included in the definition of employer under the relevant provisions of MPPAA or ERISA.

The *DeBrecini* court emphasized that the FLSA provision for individual liability has the desirable affect of encouraging employers to favor employee debts over other creditors, whereas there is no such benefit to imposing individual liability under the MPPAA, which would only serve to discourage employers from participating in multi-employer pension plans.²⁵ Here, Washington's statute states very plainly that

²⁴ Also, unlike the officers in *Belcufine*, the Defendants had "room to behave strategically" when the wages were earned.

²⁵ The third case cited by the appellants, *Glover v. S.D.R. Cartage Co., Inc.*, 681 F. Supp. 1293 (N.D. Ill. 1988) is completely off point for the same reasons. As with *DeBrecini*, *Glover* held that corporate officers can be liable under the MPPAA only by piercing the corporate veil under general principles of corporate law.

individuals *are* liable. Thus, the Court need not apply the economic realities test or pierce the corporate veil to impose individual liability.²⁶

5. **There Are No Genuine Issues Of Material Fact In Dispute**

Defendants admit that the issues of "control" and "authority" are "strictly legal." Appellants' brief at pg. 38. Yet, in contrary fashion, Defendants contend that the statute requires a subjective, individualized assessment of the actor's mental state and a factual finding of "mens rea." Supreme Court precedent simply does not support their claim. In *Schilling*, the Supreme Court held that Mr. Bingham was liable *as a matter of law*.²⁷ In any event, a factual finding most certainly would not apply here, in a case where no reasonable juror could conclude that the Defendants did not act willfully.

Defendants agreed that this case should be decided as a matter of law, as evidenced by their cross motion for summary judgment, and never mentioned a trial on the issue of willfulness or intent. Furthermore, contrary to Defendants' claims, the record shows that the trial court did find that the Defendants acted knowingly, voluntarily, and "willfully"

²⁶ Given the facts of this case and the similar purpose between the Washington wage statute and the FLSA, if the economic realities test were applied, the Defendants would likely be found liable. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000); *Tift v. Professional Nursing Services, Inc.*, 76 Wn. App. 577, 886 P.2d 1158, *amended on reconsideration, review denied*, 127 Wn.2d 1007, 898 P.2d 309 (1995) (Because Minimum Wage Act is based upon FLSA, federal cases and interpretations are deemed to be persuasive but controlling upon Washington courts).

²⁷ Defendants' statement at page 30 of their brief that Mr. Bingham "had engaged in conduct that **as a matter of fact** was found to be both deliberate and flagrantly calculated to deprive the company's employees of wages" is a gross misstatement of the case.

within the meaning of RCW 49.52.070. *CP 1296, 17-22, CP 1297, 18-CP 1298, 4, CP 1334-CP 1338, 7, CP 1342,9-CP 1344, 1.*

Defendants infer from the fact that RCW 49.52.050 criminalizes the same conduct for which the defendants are civilly liable under RCW 49.52.070 that proof of "mens rea" is required, i.e., something beyond a knowing and voluntary action on the part of the officer or agent. *See* Appellants' brief, p. 32. Appellants cite no authority to justify this heightened standard of evil intent or maleficent purpose, and the plain language of the statute does not support such a construction.²⁸

RCW 49.52.050 and RCW 49.52.070 are not the only instances under the law where both criminal and civil liability result from the exact same conduct without a showing of an evil intent or bad purpose on the part of the wrongdoer. Take, for example, the responsible person penalty under Internal Revenue Code Section 6672:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempt in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

²⁸ In *Slodov v. United States*, 436 U.S. 238, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (2000), cited by Defendants, the Court merely held that an individual who takes over control of a company is not responsible for payment of delinquent taxes incurred by prior management. The case has no similarity or relevance to the present one.

Section 6672 liability is determined under a two prong test:

1) whether the individual against whom the assessment is made is a "responsible person"; and 2) whether said "responsible person" acted "willfully" in failing to collect or pay over the withholding taxes. *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994). Cases construing the responsible person penalty have consistently held that willfulness is proven if the responsible person acted voluntarily and consciously in not paying withholding taxes, with no need to establish that the responsible person had a bad motive or evil intent. *See, e.g., Davis v. United States*, 961 F.2d 867, 871 (9th Cir. 1992) *citing Klotz v. United States*, 602 F.2d 920, 923 (9th Cir. 1979); *see also, Bowen v. United States*, 836 F.2d 965 (5th Cir. 1988).

Moreover, Section 6672 has its criminal counterparts in the Internal Revenue Code, namely, Sections 7202 (a felony violation) and 7215 (a misdemeanor violation). The test for a violation of Section 7202, *a felony*, is exactly the same as a violation of Section 6672, i.e., to prove a violation of Section 7202 for failing to pay employment taxes, willfulness is defined as a voluntary, intentional violation of a known legal duty, and there is no need to show an evil intent or a bad purpose. *See, United States v. Gilbert*, 266 F.3d 1180, 1185 (9th Cir. 2001) *citing, United States v. Powell*, 955 F.2d 1206, 1210 (9th Cir. 1992) ("willfulness in the context of criminal tax cases is defined as a voluntary, intentional violation of a known legal duty . . . [it] need not include bad faith or bad purpose.") These Federal tax statutes and cases illustrate a similar area of law where

the existence of a criminal counterpart to the same civilly proscribed conduct does not, in and of itself, heighten the standard for proving civil liability. Even criminal statutes do not always require proof of "intent" as defined by the Defendants.²⁹

B. Defendants Are Liable for Double The Amount Of Gross Wages Owed

RCW 49.52.070, which provides for the doubling of wages owed, "must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Schilling*, 136 Wn.2d at 159. Yet, Defendants urge an interpretation allowing only for doubling of the net, after taxes, amount. RCW 49.52.070 mandates:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 *shall be liable* in a civil action by the aggrieved employee or his assignee to *judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages*, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section

²⁹ *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (Washington's vehicle homicide and vehicle assault statutes do not require proof of intent, but rather only require proof that the defendant operated vehicle in a rash or heedless manner with an indifference to the consequences); *State v. Perez-Cervantes*, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000) (there is a "presumption that an actor intends the natural and foreseeable consequences of his conduct," and that a "jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability"); *State v. Red*, 105 Wn. App. 62, 66, 18 P.3d 615 (2001) (manslaughter under RCW 9A.32.060 does not require the specific intent to kill); *State v. Hursh*, 77 Wn. App. 242, 248-49, 890 P.2d 1066 (1995) (the mental state of "willful or wanton disregard" of safety in operating a vehicle can be proven by inference from the defendant's conduct, such as showing defendant drank six to eight beers and was dozing off before the collision); *State v. Amurri*, 51 Wn. App. 262, 265-66, 753 P.2d 540 (1988) (the mental state of "willful or wanton disregard" can be proven by inference from the defendant's conduct, such as a showing that the defendant was exceeding the speed limit).

shall not be available to any employee who has knowingly submitted to such violations.

(Emphasis added.)

The term "wages" is broadly defined as "compensation due to an employee by reason of employment." RCW 49.46.010(2). Given the liberal construction doctrine, Washington courts have broadly defined "wages or salary" to include back pay, front pay, commissions, and reimbursements for sick leave. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *see also, Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002) (finding "wages" includes unpaid pensions).

In this case, the statute is clear: Defendants "shall be liable . . . for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages." The statute does not limit the "amount of wages unlawfully withheld" to net wages. Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *Jones v. Jones (In re Estate of Jones)*, 152 Wn.2d 1, 93 P.3d 147 (2004).³⁰

As discussed above, Defendants unlawfully withheld \$120,714.48 in wages from the Plaintiff class. This figure reflects the deduction of tips

³⁰ "When interpreting statutory language, the goal of the court is to carry out the intent of the Legislature." *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986)). "In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute." *Seven Gables*, 106 Wn.2d at 6. Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

already paid. The trial court doubled this amount to \$241,428.96, according to the plain language of RCW 49.52.070.

1. Limiting "Wages" To The Net, After Deductions Amount, Would Contravene The Statute's Clear Language And Purpose, And Undercompensate The Class

Washington law authorizes "judgment for twice the amount of the wages." As Defendants admit, "[t]here is no debatable issue that the base amount of compensation claimed by Plaintiffs is, indeed, wages." *CP 736, 6-7*. Gross wages represent the total earnings by an employee. Awarding less would under-compensate the Plaintiff class and defeat the purpose of the statute: to ensure that employees are paid all compensation due to them by reason of employment.

Net wages are the funds an employee receives in a paycheck after all deductions, if any, are made from the gross wages. This formula can vary greatly due to the variety of potential deductions. Authorized deductions may or may not include charitable donations, insurance premiums, IRA or 401k contributions, health care benefit premiums, union dues, parking fees, and potentially many others. All of these deductions are benefits to the employee and constitute "compensation due by reason of employment."³¹

Mandatory deductions, such as federal income tax withholding, Social Security, Medicare, contributions under the Federal Insurance

³¹ If such deductions were excluded from "wages," a plaintiff would not recover amounts that the employee would have received had the employee not elected to make those voluntary deductions. Consequently, a defendant would benefit from wage withholding.

Contributions Act (FICA), and state and federal unemployment taxes, are no different. Employees earn the amounts deducted for government taxes just as they earn the amounts they choose to have paid on their behalf to various entities. Although an employer is required to withhold taxes in some circumstances under 26 U.S.C. § 3401, *et seq.*, the Internal Revenue Service still treats the amounts deducted as part of an employees "wages" (which, for federal tax purposes, includes "all remuneration for services performed by an employee for his employer"):

Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress, or the law of any State . . . requires or permits such deductions and the payment of the amounts thereof to the United States, [or] a State.

26 C.F.R. § 31.3401(a)-1(b)(5). *And see*, 26 U.S.C. § 3123 (when an amount is deducted from the remuneration of an employee to pay the United States or a state, or any political subdivision thereof . . . the amount so deducted shall be considered to have been paid to the employee at the time of such deductions). While an employer may deduct amounts to pay state and federal taxes, those amounts are still earned by the employee. *See* 26 U.S.C. § 3121(a) and § 3306(b) (when calculating wages for purposes of FICA and the Federal Unemployment Tax Act). The amount of any deductions clearly remains part of the employees' compensation by reason of employment.

Defendants were officers who withheld \$120,714.48 in wages, including the taxes that should have been deducted from that amount. Defendants even admit that the employees' share of employment taxes of approximately \$250,000, and income taxes of approximately one million dollars, has not been paid to the Department of Revenue or Internal Revenue Service. *CP 945, 18:4 – 19:5.*

Because the legislature does not define or even refer to net wages, there is no way to determine which deductions, if any, should be subtracted from gross wages when calculating wages withheld or doubling those wages. This uncertainty establishes that the legislature did not intend to subtract any deductions from an award of the wages actually withheld or the portion imposed as exemplary damages. The gross amount is the compensation owed to the employee by reason of employment, and, therefore, the "wages withheld" from the Plaintiff class for purposes of RCW 49.52.070.

2. The Statutory Doubling Provision Is Designed To Be Punitive In Nature, Not Compensatory

RCW 49.52.070 is punitive, and not compensatory, in nature. The statute explicitly provides for twice the amount of damages unlawfully withheld "*by way of exemplary damages.*" Doubling the gross wages simply does not result in a "windfall" for the Plaintiff class. First, the back wages owed are subject to all the normal wage withholdings. *See* Section 4 below. Second, with respect to the "doubled" amount, the enabling provision is not strictly compensatory; it acts as a deterrent to

underpayment of employees, an incentive to employees to protect their legal right to payment, and a penalty for those who violate it. If "wages" are construed as anything but gross wages, *Defendants* would receive a windfall by avoiding the payment of all compensation earned by Plaintiffs, including taxes.

3. Case Law Supports Doubling The Gross Wages

Washington case law supports the Plaintiffs' contention that one doubles the gross amount of wages owed. In *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 681, 27 P.3d 681 (Div. 1, 2001), the court recognized that the plaintiffs were entitled to unpaid Social Security and Medicare taxes. The court then affirmed the trial court's holding that the individual owners, as well as the employing company, were liable for exemplary damages and attorneys' fees for unlawfully withholding "wages" from the plaintiffs. *Chelius*, 107 Wn. App. at 685. *And see, Blim v. Western Elec. Co., Inc.*, 731 F.2d 1473, 1480 (10th Cir. 1984) (back pay award for damages and an equal liquidated amount should include lost social security benefits that the plaintiffs would have been entitled to had their employment continued).³²

Decisions from other jurisdictions support doubling the gross amount withheld from the class.³³ In a Louisiana wage and hour case, the

³² The Court of Appeals has previously held, in an unpublished decision, that under RCW 49.52.070 the gross wages owed should be doubled absent evidence that the employer *had already paid the taxes*. Here, the evidence is that the Defendants have *not* paid the taxes. Thus, wages clearly includes the deducted amounts under Washington Law, and those amounts can be doubled.

³³ Copies of the out-of-state cases are at CP 577- 602.

court held that all of the gross unpaid wages belonged to the plaintiff, and the plaintiff was "entitled to the **gross amount** of her wages withheld." *Keiser v. Catholic Diocese of Shreveport, Inc.*, 880 So. 2d 230, 235-36, n.1 (La. App. 2 Cir., 2004) (emphasis in original). Similarly, the Court of Appeals of South Carolina reversed a circuit court's decision that allowed a deduction from the gross wages owed to an employee. *Bennett v. Lambroukos*, 303 S.C. 481, 483-84, 401 S.E.2d 428 (1991). The court went on to hold that a magistrate did not err in trebling the gross wages due and awarding attorneys' fees in accordance with a statute similar to RCW 49.52.070.³⁴ *Bennett*, 303 S.C. at 484.

These holdings confirm that the class is entitled to receive the full benefit of their wages, including the amount that would have been deducted for social security and other deductions had wages been paid, as scheduled, directly by Funsters.

4. The Plaintiffs Will Pay Taxes On The Award

Defendants contend that they are entitled to deduct income and employment taxes from the judgment. They reason that awarding gross wages would result in a double liability to them and windfall to Plaintiffs because Defendants have been "personally assessed by the IRS for the outstanding employment tax liabilities of Funsters. Inc." *CP 730, fnote 4.*

³⁴ The South Carolina law relied upon reads, "In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." S.C. Code Section 41-10-80(C).

Defendants do not submit evidence or even allege that this assessment includes taxes for the unpaid wages from the last two payrolls.³⁵

Defendants claim that Plaintiffs will unfairly receive money that they would not otherwise have received because the trial court's judgment results in the employees recovering the amount of employment taxes payable on their wages "three times over" is erroneous. Settlements for back wages are subject to withholding taxes. *Rivera v. Baker West, Inc.*, 430 F.3d 1253, 1258 (9th Cir. 2005). In fact, as to the portion of the judgment attributable to back wages (i.e., \$120,714.48 or one-half of the principal judgment), Defendants are required to withhold federal income taxes as well as "employment taxes" (i.e., employee's portion of social security tax and Medicare) from the portion of the settlement award attributable to back pay. *See* 26 U.S.C. § 3402(a)(1); 26 C.F.R. § 31.6302-1; *See also, Rivera*, 430 F.3d at 1259.

Defendants are correct that the employees receive "credit" for federal income taxes and employment taxes withheld. However, there must be *actual withholding* of these taxes from the wage payment to receive such credit, even though the IRS could collect from the Defendants if it chose to do so. *Edwards v. Commissioner*, 39 T.C. 78, 84

³⁵ It absolutely could not pertain to the last payroll period because payroll was never issued. Thus, the Class has not yet received any income, and the government does not consider them to have received taxable income until they are paid and the taxes are properly withheld by the employer. *See* 26 C.F.R. § 31.3401(a)-1(b)(5). The IRS is not assessing Defendants for employment taxes for the wages sought in this suit, but, rather, is seeking long unpaid taxes by the Defendants. CP 945, 18: 4 – 19:5 (admitting that one million dollars is still owed to the IRS for employee income taxes).

(1962), *affirmed*, 323 F.2d 751 (9th Cir. 1963). Here, the portion of the judgment representing back pay for the last payroll period is for wages that the respondent employees never received. Thus, the employees could not receive a credit for taxes paid as Defendants assert. Nor is there any evidence in the record that the employees have received "the full and intended benefit of the amounts at issue in the form of a credit with the Internal Revenue Service," as Defendants claim at page 49 of their brief.

Insofar as the employees received a credit for employment taxes relating to the March 28, 2003, payroll period because "on paper" it appears they have been paid, those employees will not receive double credit when they receive their back wages for that payroll period. Defendants are required to report back wages paid to the Social Security Administration on a Form W-2, Wage and Tax Statement, with an accompanying special report that correctly identifies the amount of wages, paid during the subject back pay period, that are subject to social security and/or Medicare taxes. *See*, Internal Revenue Service Publication 957. Accordingly, since no wages were in fact paid for the March 28, 2003, payroll period, Defendants will need to disclose as much on their special report to avoid double-counting. *Id.*

Moreover, if Defendants fail to withhold employment taxes from the portion of the award attributable to back pay, the employees will not receive credit for such withholding and will still be on the hook for the income taxes and employment taxes attributable to such wages. *See, Edwards*, 323 F.2d at 752; *see also*, 26 C.F.R. § 31.31.102-1(d) ("Until

collected from him the employee also is liable for all the wages received by him"); *Navarro v. U.S.*, 72 AFTR 2d 93-5424 (WD-TX 1993) (finding failure of taxpayer's employer to collect employee portion of social security and/or Medicare taxes did not relieve taxpayer employee from ultimate liability for the tax).

Defendants argue that the use of gross compensation as the measure of damages under RCW 49.52.070 unjustly enriches the respondent employees from an employment tax perspective. As articulated above, this argument is without merit because the law clearly places the employees in the same position as if they had received their wages in a timely fashion by subjecting back pay awards to withholding.³⁶

As to the portion of the judgment which consists of punitive damages, namely one-half of the \$241,428.96 (or \$120,714.48), such amount, while not subject to withholding, is included in the respondent employees' gross income. *See*, 26 U.S.C. § 61 (including all income from whatever source derived unless excluded); 26 U.S.C. § 104(a)(2) (excluding personal injury awards from taxation except as to punitive damages). The employees have not received a windfall from a tax perspective as Defendants illogically assert.

³⁶ When such withholding and corresponding payment to the IRS actually occurs, presumably, the Defendants' individual liability for unpaid taxes would be extinguished.

C. The Trial Court Abused Its Discretion By Reducing The Attorney Fees Incurred By 32%

Plaintiffs requested \$129,422.50 in their original motion for attorney fees (before any upward adjustment) based on 688.1 hours of attorney and paralegal time, for hourly rates as set forth in the firm's invoice at *CP 618*. The trial court cut \$37,654.89, 29% of the attorney fees incurred, for a total award of \$91,767.61. *See, CP 1396-1411 and 1815*. In Plaintiffs' subsequent motion for fees, Plaintiffs requested a supplemental fee award of \$44,761.50. *CP 1436*. The trial court cut \$17,904.60, 40% of the attorney fee request, for a total award of \$26,856.90. *CP 2415*. Thus, of the total fees requested (\$179,184), the trial court only awarded 68%, or \$118,624.57.

Courts must award the actual fees in order to ensure effective access to the judicial process, encourage the vindication of congressionally identified policies and rights, and provide the wronged employee their full wages plus the penalty without incurring any expense for legal fees or costs. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994); *Steele v. Lundgren*, 96 Wn. App. 773, 784-785, 982 P.2d 619 (1999), *quoting Rivera*:

In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on the case.

And see, Fegley v. Higgins, 19 F.3d 1126, 1134 (6th Cir. 1994); *Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946).

The trial court abused its discretion by cutting $\frac{1}{3}$ of the total fees incurred. Specifically, the trial court abused its discretion in the following ways:

1. Interim Ruling On Damages & Costs/Attorney Fees

The trial court lacked a reasonable basis for presuming that successfully prosecuting a class action wage case should have taken less time and deducting time accordingly.³⁷ *CP 1396-1411*. And, the trial court lacked any rational basis for ruling that the firm's hourly rates are not consistent with industry standards. *See, CP 1743-1761*.

2. Supplemental Fees Motion

The Court deducted \$17,904.60 with no explanation and abused its discretion in doing so.³⁸ Much of the time spent in this category involved drafting Findings of Fact and Conclusions of Law required by the Court and demanded by Defendants on multiple occasions. *CP 1410, 1818, 11-*

³⁷ (a) \$8,394.50 for all work not directly related to proving the Plaintiffs' wage claim; (b) \$2,598.00 from Mr. Crisera's work responding to Defendants' Motion to Set Aside the Default Judgment; (c) \$3,546.30 from Ms. Kilbreath's and Mr. Crisera's time requesting attorney fees incurred resisting the motion to set aside the default judgment; (d) \$2,882.15 from time spent on maintaining and updating the class member database ((i) Ms. Moynan's hourly rate cut from \$145 to \$70, and (ii) number of hours cut in half), (e) \$17,744.42 (two-thirds) from time spent to bring Plaintiffs' successful Motion for Summary Judgment and respond to Defendants' Cross Motion for Summary Judgment; (f) \$1,843.00 for all of Mr. Crisera's time spent attending depositions; and (g) \$646.00 from Mr. Crisera's time spent drafting the Amended Complaint.

³⁸ Such work included: (a) Determining the amount of wages owed when Defendants had access to that information and should have, but did not, produce it in discovery; (b) Responding to Defendants' Motion to Vacate made on the grounds that Findings of Fact and Conclusions of Law were necessary; (c) Drafting the Findings of Facts and Conclusions of Law and working with Defendants to reach agreement on same. (The trial court had ordered the Defendants to prepare such findings, which they never did); and (d) Drafting Motion for Supplemental Attorney Fees. *CP 1421-1475*.

20, 1358, 11-20. Yet, subsequently, Defendants requested that the Court not enter Findings of Fact and Conclusions of Law, and the Court declined to enter them. *CP 2405-2410*.

D. The Trial Court Abused Its Discretion By Not Awarding A Multiplier

In cases where the attorney's compensation is contingent on success, the court may consider the necessity of adjusting the lodestar figure to account for the risk factor. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598-99, 675 P.2d 193 (1993).

Plaintiffs requested an upward adjustment of 50% based upon the contingent nature of success, the risk of non-payment, and the quality of the work performed. Despite the overwhelming authority mandating such a result, the trial court denied a multiplier of any amount. *See, Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 743, 75 P.3d 533 (2003), approving multiplier of 1.5, or 50% upward adjustment to the lodestar fee award, based upon the contingent nature of success and quality of work, stating:

The court concluded that the case was contingent, Mr. Carlson proceeded at considerable risk, defense counsel granted no concessions, and there was no assurance of recovery.

And see, Pham v. City of Seattle, 124 Wn. App. 716, 103 P.3d 827 (2004) (denial of multiplier was abuse of discretion); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342-43, 54 P.3d 665 (2002) (awarding 1.5 multiplier because of risk involved for the class counsel); *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 99, 52 P.3d 43

(2002) (superior court did not abuse its decision by applying 1.5 multiplier to the contested fee); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) (multiplier of 1.25 because of risk of losing, difficulty of case, and quality of work).

An attorney cannot afford to represent clients on a contingency fee basis, where the risk of non-payment is present, by charging the same rate and receiving the same compensation for an hour of time, as she would from a client who pays by the hour on a regular monthly basis, where the risk of non-payment is not a factor. *Bowers*, 100 Wn.2d at 598 (quoting Samuel Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 324-25 (1977)); *Pham*, 124 Wn. App. at 723.

Unless an attorney representing a plaintiff owed wages receives compensation for the risk involved in undertaking a wage claim on a contingency fee basis, few attorneys would be willing to serve in the role contemplated by the Legislature in providing for an award of actual fees and costs of litigating. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002), quoting *In Re Washington Public Power Supply Sys. Lit.*, 19 F.3d 1291 (9th Cir. 1994):

It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Washington Public*, 19 F.3d at 1299; see also *Vizcaino*, 290 F.3d at 1051. This provides the "necessary incentive" for attorneys to bring actions to protect individual rights and to enforce public policies.

In *Fischel*, the court held that a trial court abuses its discretion by not applying a multiplier for risk, where:

(1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail; (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky.

Fischel, 307 F.3d at 1008 (internal cites omitted).

Each of the three criteria set out by the Court in *Fischel* are present here: (1) plaintiffs' class counsel took the case on a contingency fee basis with the expectation of an enhancement, if they prevailed, above their normal hourly fee; (2) the plaintiffs' class counsels' hourly rates are reasonable for the work performed and are the rates set by the firm for performing work on a non-contingency basis for an hourly fee paying client; and (3) Plaintiffs' counsel has proceeded at considerable risk and there has been no assurance of recovery as demonstrated by the fact that the lawsuit was filed three and a half years ago, in June of 2003, and the appeal process has only just begun. *CP 605*, ¶ 8.

Moreover, Plaintiffs' class counsel took on the representation of 182 individuals with wage claims in amounts that made it difficult, if not impossible, for those employees to obtain legal representation. Plaintiffs' counsel has now succeeded in obtaining for each employee the amount of wages owed, plus double that amount in punitive damages, prejudgment interest, and attorney fees. Given the contingent nature of the recovery, the delay in payment, and the quality of the work performed by Plaintiffs' counsel, the modest multiplier requested of 50% is reasonable.

IV. CONCLUSION

Under the Defendants' reasoning, an entire class of employees should go unpaid for, in some instances, an entire month, solely because

they ran their company so ineffectively that the U.S. Trustee was forced to close down their business. That result is inconsistent with the plain language of the wage statute, the policy considerations behind its passage, and the case law authority directly on point. The wages were earned during a period in which the Defendants were in control of their company. They bear the risk of the foreseeable consequences of their actions: not the employees. Respondents/Cross-Appellants respectfully request that the Court affirm the judgment and remand for a determination of reasonable attorney fees and a multiplier to account for the contingent nature of the case, the risk of non-payment, the delay in payment, and the results achieved.

RESPECTFULLY SUBMITTED on October 16, 2006.

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NO. 57938-0-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

GERALD KINGEN, et al.,

Appellants/Cross Respondents,

v.

EUFEMIA "EMMA" MORGAN, et al.,

Respondents/Cross-Appellants.

CERTIFICATE OF SERVICE

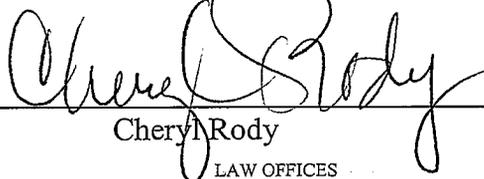
Cheryl Rody, under penalty of perjury under the laws of the State of Washington, hereby certifies that:

1. I am employed in the offices of Short Cressman & Burgess, PLLC attorneys for Respondents/Cross-Appellants in the above-captioned matter. I am a United States citizen over the age of 18 years and not a party to this action.

2. On November 16, 2006, I caused a copy of **Brief of Respondents/Cross-Appellants** to be hand delivered via legal messenger to following attorneys of record:

W.K. McInerney, PLLC
1000 Second Avenue, Suite 1760
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SIGNED this 16th day of November, 2006, at Seattle, Washington.


Cheryl Rody

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