

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION**

JESSE PIERCE and MICHAEL PIERCE,	)	
on behalf of themselves and all others	)	
similarly situated,	)	CASE NO. 3:13-cv-641
	)	
Plaintiffs,	)	District Judge: Harry S. Mattice, Jr.
	)	Magistrate Judge: C. Clifford Shirley, Jr.
vs.	)	
	)	
WYNDHAM VACATION RESORTS,	)	COLLECTIVE ACTION COMPLAINT
INC., and WYNDHAM VACATION	)	FOR VIOLATIONS OF THE FAIR
OWNERSHIP, INC.,	)	LABOR STANDARDS ACT OF 1938
	)	
Defendants.	)	
_____	)	

**DECLARATION OF MARTIN HOLMES**

I, MARTIN HOLMES, do hereby state and affirm as follows:

1. I am one of the attorneys representing Plaintiffs, Opt-In Plaintiffs and the Putative Class in the above-captioned matter. I have personal knowledge of the information set forth in this Declaration and submit this Declaration in support of Plaintiffs' Motion to Compel Defendants to Produce Any Audio Tape Recordings of the October 17, 2013 Meeting Between Plaintiffs, Putative Class Members and Plaintiffs' Counsel.

2. I am a Member in the law firm of Dickinson Wright PLLC (hereinafter "DW"), which merged with the Nashville law firm of Stewart, Estes, & Donnell, PLC (hereinafter "SED") on January 1, 2009. Prior to the merger, I was a Member of SED. DW is a full-service law firm with a national practice, having approximately 350 attorneys in Michigan; Nashville, Tennessee; Phoenix, Arizona; Las Vegas, Nevada; Washington, D.C.; Columbus, Ohio; and Toronto, Canada.

3. I have been a duly licensed attorney in the state of Tennessee since 1986. I am licensed to practice before all courts of the State of Tennessee, as well as in the United States Federal

District Courts in Tennessee, the United States Sixth Circuit Court of Appeals, the United States Seventh Circuit Court of Appeals and the United States Supreme Court. In addition, I have been admitted *pro hac vice* to practice temporarily and handle specific cases in federal district and/or state courts in Illinois, Kentucky, Michigan, North Carolina, Ohio and Texas.

4. I am a member in good standing with the American Bar Association, and an active member of the Class Action and Derivative Suits Committee of the ABA Section of Litigation. I am also a member of the Federal Bar Association (President – Nashville Chapter), Tennessee Bar Association and Nashville Bar Association.

5. I graduated from Vanderbilt Law School in 1986. Following graduation, I was hired as an associate at SED. I became a partner at SED in 1993. SED merged with DW in January 2009, at which time I became a Member at DW, where I currently practice.

6. I have devoted my entire 27-plus year legal career to litigation and appellate practice. I have participated in approximately 25 – 35 jury trials tried to verdict during my career, serving as lead counsel in all but a few. Additionally, I have tried as lead counsel, well over fifty (50) bench trials of various kinds in federal and state courts in Tennessee. I have also been involved in arbitrations before the American Arbitration Association, including participation in a nationwide class action arbitration hearing lasting over 3 weeks.

7. I have successfully litigated a broad variety of complex federal and state civil litigation matters during my professional career, including many class and/or collective actions. For the past thirteen years, I have been heavily involved in class and/or collective action litigation on behalf of plaintiffs involving wage and hour, consumer law, product liability, employment discrimination and antitrust cases. During this time period, I and other members of SED and DW

have engaged in and focused on a nationwide class action and/or collective action practice. SED was named by Chambers USA as “America’s Leading Business Lawyers” 2003-2004, as one of the leading Tennessee firms in the area of labor and employment law. In addition, SED and DW have served as lead or co-lead counsel in numerous class and/or collective action cases, including several of the nation’s largest wage/hour class and/or collective action cases seeking overtime wages on behalf of plaintiffs.

8. In early October 2013, Plaintiffs Jesse Pierce and Michael Pierce, current Sales Representatives for Defendants in Sevierville, Tennessee, retained Dickinson Wright PLLC (hereinafter “Plaintiffs’ counsel”) to represent them to assert wage and hour claims against Defendants for unpaid overtime. At that time, we were advised that other current and former Sales Representatives of Defendants who worked at Defendants’ Tennessee properties were also interested in seeking legal advice about their potential legal rights for unpaid overtime.

9. In response to these requests, we reserved a large meeting room at the Governor’s Inn in Sevierville, Tennessee, and scheduled a meeting on October 17, 2013. At the front door to the meeting room, we placed a Sign-In Sheet for individuals attending the meeting titled “Wyndham Resorts Meeting 10/17/2013 Sign-In Sheet.” Prominently displayed at the top of the Sign-In Sheet was the following language: “By signing in, you acknowledge that you are here to seek legal advice concerning your right to overtime pay from Wyndham.” Individuals in attendance signed-in with their names, e-mail addresses and telephone numbers.

10. At the very beginning of the meeting, we reiterated our understanding that everyone in attendance at the meeting was there seeking legal advice, and indicated that if anyone in attendance was not seeking legal advice, they should leave. We stated that because the individuals in attendance

were seeking legal advice, that they were legally considered “clients” under the law and, therefore, that what was discussed at the meeting was protected by the attorney-client privilege. We further indicated that if anyone was present on behalf of Wyndham, or there to tape record the meeting, they should leave. No one left the meeting.

11. After these introductory remarks, we discussed issues related to the attendees’ potential overtime claims against Wyndham, including the nature of the law as applied to the duties performed by Wyndham’s current and former Sales Representatives, the framework in which legal action would be taken against Wyndham, the collective action provisions of the Fair Labor Standards Act and its “opt-in” provisions, as well as other legal matters. We and those in attendance engaged in an interactive dialogue discussing the facts and the law, in which many questions were asked by those in attendance and answered by us. Some of those in attendance also spoke about their specific situation and other facts relevant to potential claims against Wyndham.

12. There were forty-four (44) current and former Sales Representatives in attendance at the meeting. At the meeting, or shortly thereafter, forty-two (42) attendees signed consents to opt-in to the forthcoming lawsuit being filed against Wyndham.

13. Six days after the October 17, 2013 meeting, Plaintiffs instituted this action on October 23, 2013, on behalf of themselves and other similarly situated current and former Sales Representatives of Defendants. Contemporaneously with the filing of the Complaint, forty-six (46) signed consents were filed on behalf of current and former Sales Representatives of Defendants, which included the consents signed by those in attendance at the October 17, 2013 meeting.

14. Currently, over one hundred (100) signed consents have been filed on behalf of current and former Sales Representatives of Defendants; thus, currently there are more than one

advice. In view of the foregoing, Plaintiffs' counsel took the position that what was discussed at the meeting was protected by the attorney-client privilege, and as such, that it was not only impermissible for Defendants or their counsel to listen to the tape, I formally requested that the tape (and any copies), be forwarded to them immediately. *See Ex. 1.*

18. In response, defense counsel sent a second e-mail on December 3, 2013, stating that in light of these facts, defense counsel would "not review until we decide what our position is which *should be this week.*" *See Ex. 1.* (emphasis added).

19. I responded that same day as follows:

In addition, given that the meeting with our clients occurred almost seven weeks ago and this has been brought to our attention for the first time today, we are extremely concerned about what has transpired prior to your emails. We are requesting the following information: 1) the name of the individual who "dropped off" the recording; 2) the date it was "dropped off;" 3) the manager who received the recording; 4) the chain of custody of the recording, including the names of the individuals in possession of it and the date(s) of transfer; 5) whether any copies were made; and 6) the identity of any and all persons who have listened to the recording (or a copy). While in your e-mail, you indicate that "we" have not listened to the tape, we assume that the word "we" is referring to defense counsel only and not agents or employees of Wyndham.

*Ex. 1.*

20. In response, Defendants' counsel sent a third e-mail on December 3, 2013. Defendants refused to provide the requested information other than to state that the tape was given by an unnamed opt-in Plaintiff to "a manager," who gave it to "the HR director" who, in turn provided it to Defendants' counsel when he was retained. While Defendants' counsel represented that neither the HR director nor anyone in defense counsel's office listened to the audio tape, it is telling that Defendants' counsel did not represent that the undisclosed "manager" who was initially provided the tape had not listened to it and/or allowed other Wyndham personnel to do so before

giving it to the HR director. In addition, it is telling that Defendants' counsel did not provide 1) the name of the individual who "dropped off" the recording; 2) the date it was "dropped off;" 3) the manager who received the recording; 4) the chain of custody of the recording, including the names of the individuals in possession of it and the date(s) of transfer; 5) whether any copies were made; and 6) the identity of any and all persons who had listened to the recording (or a copy). Defendants' counsel indicated that he would "get the information you want tomorrow." *Ex. 1.*

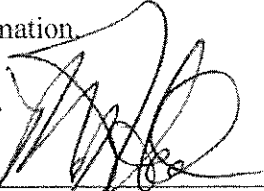
21. Although Defendants' counsel promised the additional information on December 4, 2013, and indicated that Defendants should have an answer regarding their position by Friday, December 6, 2013, no additional information was provided.

22. On Friday, December 13, 2013, counsel for the parties had a conference call to discuss a possible case management order. During the conference call, the issue regarding the tape recording was discussed again. At that point, Defendants' counsel refused to identify the name of the person (or persons) who provided the audio tape to Defendants, but did identify the manager as "John Geissberger." Defendants' counsel indicated that they should have an answer regarding Defendants' position the following week – the week of December 16-20, 2013.

23. At the time of this filing, Defendants have not modified their earlier position that they are entitled to listen to the audio tape recording, have refused to give the tape and any copies to Plaintiffs' counsel, and have refused to provide the requested information outlined above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and information.

Executed this 2<sup>nd</sup> day of January, 2014.



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MARTIN HOLMES

# EXHIBIT 1



## Martin D. Holmes

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**From:** Mulroy, James R. (Memphis) <MulroyJ@jacksonlewis.com>  
**Sent:** Tuesday, December 03, 2013 3:56 PM  
**To:** Martin D. Holmes  
**Cc:** Darrell L. West  
**Subject:** RE: Pierce et al v Wyndham--Audio tape

That would be our thinking as well. Perhaps the magistrate judge would be quicker. We can talk about it before anything is done. I will get the information you want tomorrow. But it is my understanding that the tape was given by a manger to the HR director who then provided it to me when I was retained. I sought the advice of the Board of professional responsibility informal opinion process. I know the HR director did not listen to it and no one in our office listened to it. It is on a microcassette tape.

James R. Mulroy II ("Jim")  
Managing Shareholder - Memphis  
**Jackson Lewis P.C.**  
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**From:** Martin D. Holmes [mailto:MDHolmes@dickinson-wright.com]  
**Sent:** Tuesday, December 03, 2013 3:46 PM  
**To:** Mulroy, James R. (Memphis)  
**Cc:** Darrell L. West  
**Subject:** RE: Pierce et al v Wyndham--Audio tape

Jim,

Thanks for the additional information.

In your e-mail, you state that "[w]e will not review until we decide what our position is which should be this week." If your position remains unchanged and you believe that it is permissible to listen to the recording, we need the opportunity to have this issue addressed by the Board of Professional Responsibility or the Court. If you decide not to send us the recording and any copies, and further, decide that (in your opinion) it is permissible for you to listen to the recording, please confirm whether you will agree not to listen to it until the issue is resolved by the Board or the Court.

In addition, given that the meeting with our clients occurred almost seven weeks ago and this has been brought to our attention for the first time today, we are extremely concerned about what has transpired prior to your emails. We are requesting the following information: 1) the name of the individual who "dropped off" the recording; 2) the date it was "dropped off;" 3) the manager who received the recording; 4) the chain of custody of the recording, including the names of the individuals in possession of it and the date(s) of transfer; 5) whether any copies were made; and 6) the identity of any and all persons who have listened to the recording (or a copy). While in your e-mail, you indicate that "we" have not listened to the tape, we assume that the word "we" is referring to defense counsel only and not agents or employees of Wyndham.

At the present time, we have no plans to amend our complaint. If that changes between now and December 5 when the responsive pleading is due, we will let you know.

If you would like to discuss further, please let us know. Thanks.

**Martin D. Holmes** Member

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Suite 1401  
Nashville TN 37219

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Mobile 615-347-9949

Fax 615-256-8386

Email [MDHolmes@dickinsonwright.com](mailto:MDHolmes@dickinsonwright.com)

[Profile](#) [V-Card](#)

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**DICKINSON WRIGHT** FLLC

MICHIGAN ARIZONA NEVADA OHIO TENNESSEE WASHINGTON D.C. TORONTO

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**From:** Mulroy, James R. (Memphis) [<mailto:MulroyJ@jacksonlewis.com>]

**Sent:** Tuesday, December 03, 2013 1:40 PM

**To:** Martin D. Holmes

**Cc:** Darrell L. West

**Subject:** RE: Pierce et al v Wyndham--Audio tape

It was a blank form. Let me review our position in light of these facts Martin and I will get back to you. We will not review until we decide what our position is which should be this week.

There is a rumor that you may be amending your complaint, if that is the case I have an answer due this week. Do we need to make any changes to the schedule at this point?

James R. Mulroy II ("Jim")  
Managing Partner-Memphis  
Attorney At Law

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**From:** Martin D. Holmes [<mailto:MDHolmes@dickinson-wright.com>]

**Sent:** Tuesday, December 03, 2013 1:35 PM

**To:** Mulroy, James R. (Memphis)

**Cc:** Darrell L. West

**Subject:** RE: Pierce et al v Wyndham--Audio tape

Jim,

Contrary to the statement in your e-mail, we did not conduct an "open meeting" on October 18, 2013. Instead, we were contacted by Wyndham employees and asked to meet with them for the purpose of discussing their legal rights and possible representation of them. On October 17, 2013, attorneys and staff from our office met with putative class members, who specifically acknowledged that they were there seeking legal advice before we met with them.

Further, in your e-mail, you affirmatively state that the individual who dropped off the recording of the meeting is a plaintiff in this action.

Based on the foregoing, it is our position that the meeting and what was said at the meeting is a privileged communication protected by the attorney/client privilege. As such, it is our position that not only is it impermissible for you to listen to the tape, but we are formally requesting that the tape (and any copies that exist), be forwarded to us.

As to the opt-in form, it is unclear whether the form was completed by an individual or provided "blank" to the HR director. Please advise who dropped off the form, whether he/she is a current or former Sales Representative, and whether the form is completed or not. If completed, we would ask that you forward it to us as soon as possible for filing with the Court.

If you would like to discuss further, please let us know. Thanks.

**Martin D. Holmes Member**

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**DICKINSON WRIGHT** LLC

MICHIGAN ARIZONA FLORIDA OHIO TENNESSEE WASHINGTON D.C. TORONTO

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**From:** Mulroy, James R. (Memphis) [<mailto:MulroyJ@jacksonlewis.com>]

**Sent:** Tuesday, December 03, 2013 12:16 PM

**To:** Martin D. Holmes  
**Subject:** Pierce et al v Wyndham--Audio tape

Martin,

We understand you conducted an open meeting for sales representatives on October 18, 2013. The meeting was recorded and the recording was dropped off with one of the managers of the company. The individual who dropped it off disclaimed any interest in the lawsuit but we understand he is now an opt in plaintiff. On October 22 another individual dropped off an opt in form from your office with the HR director. Again the individual did not identify himself as a party to a lawsuit.

It is my understanding of the law that it would be permissible for us to listen to the tape , we have not done as yet, we would like to know your position on this matter.

James R. Mulroy II ("Jim")  
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Attorney At Law  
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