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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Kelli Salazar, Wayne Carpenter, Rodney Lopez, and Gregory Hanna, individually and on behalf of other similarly situated individuals,

Plaintiffs,

v.

Driver Provider Phoenix, LLC; Driver Provider Leasing, LLC; Innovative Transportation of Sedona, LLC; Innovative Transportation Solutions of Tucson, LLC; Innovative Transportation Solutions, Inc. (Arizona); Innovative Transportation Solutions, Inc. (Utah); Innovative Transportation Solutions, LLC; Jason Kaplan; Kendra Kaplan; Stephen Kaplan and Barbara Kaplan, husband and wife; Barry Gross and Jane Doe Gross, husband and wife; and Does 1-10.

Defendants.

Case No.: CV19-05760-SMB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

Plaintiffs hereby oppose Defendants' Motion for Summary Judgment (Doc. 490).[1]

A. Defendants' AWA Arguments Are Factually and Legally Meritless.

Throughout this case, Defendants ("DP") have never argued Plaintiffs lacked a reasonable expectation to be paid for all the work DP required them to perform, including the pre- and post-trip work, which was "off the clock." Instead, DP has argued Drivers were already compensated for pre- and post-trip work under DP's so-called "commission plan," asserting "the putative class members' commission payments compensated them for pre-trip and post-trip activities" (Doc. 342 at 9) and that the commission plan "unambiguously sets forth Plaintiffs' and Driver Provider's mutual agreement that commission payments were compensation for all hours worked[.]" (Doc. 464 at 9).

DP's argument is the product of its own self-serving, fictionalized account of the relationship with its Drivers and unsupported by admissible evidence. In fact, the commission plan says *nothing* about payment for pre- and post-trip duties. There is no evidence employees agreed that payments under the commission plan covered all hours worked (the plan makes no mention of such) and the so-called commission plan was not the sole source of payments to Drivers. Defendants do not dispute that three of the four Named Plaintiffs *never even saw a commission plan while employed*. PSAF ¶14; PSCF ¶ 38. While Plaintiff Hanna signed a commission plan document purporting to be effective in 2019 (more than two years after he started employment),[2] DP failed to present any proof or argument directed to any text in that document that could be deemed to reflect mutual assent that the plan covered pre- and post-trip work or that it is the sole source of payment.[3] DP also failed to identify any consideration

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[1] Plaintiffs' Controverting Statements of Facts ("PSCF") and Plaintiffs' Statements of Additional Fact ("PSAF") are filed herewith. Plaintiffs also refer herein to their Facts in Support of Plaintiffs' MSJ ("PSF") (Doc. 499 (redacted) and Doc. 504 (unredacted version)).

[2] Mr. Hanna worked from November 2016 to March 2020. (Doc. 413 at ¶ 31).

[3] If construed as DP urges, the plan is illegal. Under the 7(i)-exemption claimed by DP, wages must exceed 1.5 times the applicable minimum wage in every pay period yet the plan says nothing about payment of such required guarantee nor about payment of guaranteed minimum wages and provides no disclosure of those requirements. Compare the 2012 Jackson Hole commission plan provided to the DOL investigator which states a minimum

or explanation provided to Mr. Hanna, the only Named Plaintiff to see a commission plan. (Doc. 38-4, Ex. B, at pg. 60-62/69). The court's observations in in Al*ston v. DIRECTV, Inc.*, 254 F. Supp. 3-D 765, 797 (D.S.C. 2017) are particularly apt under these circumstances:

> The Memorandum to which Defendants point provides no evidence of Plaintiffs' agreement or understanding. As an initial matter, Defendants have failed to produce any evidence demonstrating that any of the five Plaintiffs received or reviewed the Memorandum, let alone that they understood or agreed to it. Further, even if they had received and reviewed it, the Memorandum does not disclose or even hint that certain nonproductive hours will be compensated by wages earned for productive hours.

The fact that 3 of 4 Named Plaintiffs never saw a commission plan is not surprising. There is no evidence of any procedure for disclosing the plan to Drivers and obtaining agreement at the time of hire. There is also no evidence to support DP's assertion (DSOF 95) that the plan was "intended" to compensate Drivers for all hours worked. DP points to an inadmissible sentence in a *post-hoc* declaration from Defendant Kendra Kaplan to support their contention of what the plan was intended to cover. DSF ¶ 95 (citing Ex. 1 at ¶ 8, 491-2). Even ignoring the other evidentiary objections precluding admissibility of her declaration, Ms. Kaplan's unilateral, *post-hoc* assertion of intent is irrelevant and inadmissible. *See Eagle Eye Produce, Inc. v. Agricola Faader S.P.R. de R.L.*, No. 21-16274, 2023 WL 2570334, at *4 (9th Cir. Mar. 20, 2023) ("It is well settled that 'the undisclosed intent, motive or opinion of the signer is not admissible as evidence of the meaning of the written agreement.'" (quoting *Helena Chem. Co. v. Coury Bros. Ranches, Inc.*, 616 P.2d 908, 913 (Ariz. Ct. App. 1980)).[4]

Aside from the absence of mutual assent by the Drivers that the compensation plan covered pre- and post-trip work, there is abundant evidence that DP consistently failed to disclose its plan and actually misled Drivers about the compensation they were going to receive. In this regard, of the many dozens of job advertisements DP produced in discovery,

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wage guarantee (although also failing to comply with 7(i)), with 2019 commission plan lacking any such guarantees. PSCF ¶ 74; PSAF ¶ 19.

[4] The only other evidence DP cites in DSOF ¶ 95 is the testimony of its billing manager in response to a leading question from defense counsel, completely divorced from any context or proof regarding personal knowledge or involvement of any Driver and an unsolicited, gratuitous remark during the deposition of DP's controller (K. Kaplan's mother) similarly offered without context or proof of personal knowledge regarding intent.

not one mentions payment of wages by "commissions." PSCF ¶ 94. Just the opposite—the ads offer specific hourly rates or hourly rate equivalents. *Id.* Drivers thought they were to be paid on an hourly basis. PSAF ¶ 5; PSF ¶¶ 39; 106. There is no evidence to contradict or challenge the reasonableness of Plaintiffs' understandings. DP agrees that it would be reasonable for Drivers to understand such ads would pay an hourly rate for all hours worked. PSF ¶ 107. Drivers endeavored to obtain more information about their pay yet DP failed to provide any answers or clear explanations of the basis for determining their pay or the hours for which they were being paid. PSF ¶¶ 140-141; PSAF ¶¶ 13, 36.

DP also actively endeavored to coerce Drivers to refrain from questioning their compensation by including, *inter alia*, a statement in DP's "*Employment Manual*" under the heading "*Improper use of Company Property, materials, vehicles, or facilities* " that they should refrain from "*discussing your pay with fellow personnel or others outside the Company.*[5] The *Manual* also listed "*Causes for Immediate Dismissal*" that included the failure to keep "information of a confidential nature from other employees…" along with "deliberate violation of Company policy" and "anything that breaches the standards and procedures set forth in this manual." [Ex. 4 (Doc. 501) at DriverProvider130433-36)]. That Drivers were intimidated from asking about their pay is well illustrated by the testimony of Mr. Hanna. When questioned whether he asked anyone at DP how he was being paid he stated, "No. I was told that if you bring up things like that, you could get fired." (Doc. 499-1 at p. 446/650 at 33:3-12). Others continued working because some income, albeit less than they were entitled to receive, was better than none. (Doc. 477-3 at pp. 5,9/11 at 59:14-20; 82:1-14); (Doc. 332-3 at pp. 82-83/83, ¶¶ 10-11). DP was also well aware of numerous complaints by Drivers regarding their pay including that they were not being paid for their pre- and post-trip work and paid less than what DP promised they would receive, which one Driver termed a "bait and switch" in a complaint he filed with the Arizona Department of Industrial Relations). PSF ¶ 102-105.

Regardless of whether DP intentionally or recklessly misled Drivers, Drivers were hired based on claims of compensation that was never paid. It was not just Drivers who were

[5] This is illegal. *See N.L.R.B. v. Main St. Terrace Care*, 218 F.3d 531 (6th Cir. 2000).

kept in the dark about DP's payment scheme. DP's managers and executives didn't know whether the commissions included payment for pre- and post-trip time. For example, DP's Regional Director asked in November 2017 "*Do we currently pay for pre/post trips*?" and DP's Director of Operations responded: "*Since we are not on hourly pay rates all the time, I am not sure we are capturing the pre- and post-trip time to pay the drivers.*" PSAF ¶ 6. These company officials didn't know whether the work was included in the commission payments, and they were in a far better position to determine how and what DP was paying Drivers than the Drivers themselves. When it comes to the Drivers, context also matters. Since at least 2002 and despite DP's express commitment in two DOL investigations to keep records of all hours Drivers worked, DP failed to track or report Drivers' hours, depriving Drivers of the ability to monitor or even understand how many hours they were being paid for and how much per hour they were receiving. PSF ¶¶ 78-88, 144-146; PSAF ¶¶ 30-32.

DP was the beneficiary of this pay scheme. While DP operated an opaque compensation system, it is nevertheless clear that DP knew exactly what it was doing. There are multiple emails from DP's managers and even DP's owner admitting that Drivers are not paid for pre- or post-trip work. (Doc. 464 at 9; PSAF ¶ 7) (admitting DP pays chauffeur commissions "only when they are driving"). *See* PSAF 7 (K. Kaplan email regarding Regional Manager Kaity Quinley, "…Kaity said in-times are a challenge because *chauffeurs do not get paid for that time*. Which team is Kaity playing on?"); (Doc. 501-5, Dep. Ex. 135) (Abassy: "Shane is unhappy that we did not pay him from 7 AM and only paid for a 5 hour round trip to Prescott and back. This is beyond frustrating because it involves compensation. *We don't pay chauffeurs for their in-time*…"). Defendants advertised and hired Drivers based on hourly rates that did not account for any of the pre- and post-trip work. PSF ¶ 106; (Doc. 477 ¶¶ 16-17); (Doc. 332-3 at Ex. II, page 79- 83/83, ¶¶ 6-11) (Howard Decl.); (Doc. 477-5 at Ex. 8). It was reasonable for Drivers to believe they would be paid at least those amounts for each hour worked. *See, e.g.* (Doc. 477-6 at Ex. 13 at 107:22-109:22); PSAF ¶ 8. Communications between Defendants and their attorney, almost a year *after* this lawsuit was filed, show Defendants still had not even determined whether to pay Drivers for their off-the-clock work. PSF ¶ 108.

What is objectively clear is that the commission plan is not and doesn't purport to be the exclusive method of compensation; there is no basis to conclude that the mere existence of this document demonstrates mutual assent that precludes payment for Drivers' straight time claims. Far from establishing the absence of a genuine dispute of material facts warranting judgment for DP, there is no colorable basis on which a reasonable trier of fact could conclude anything other than that DP is liable to pay for these unpaid working hours.

In apparent recognition of DP's own finding of minimum wage violations precludes finding the commission plans paid Drivers for their pre- and post-trip work, DP now attempts to shift additional burdens to the Drivers, asserting, that the Drivers should be required to prove an express agreement or other policy for payment for "*additional*" work beyond that covered by the commission plans. DP's argument is upside-down and an improper attempt to shift their burden. Like every employment contract in Arizona, an implied contract to pay arose once DP directed the work and Drivers performed. "[A]n informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." *Hishon v. King & Spalding*, 467 U.S. 69, 74. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 381 (1985) ("An implied-in-law term arises from a duty imposed by law where the contract itself is silent; it is imposed even though the parties may not have intended it, and it binds the parties to a legally enforceable duty, just as if they had so contracted explicitly") (citing A. Corbin, Contracts § 17, at 38 (1960)). It is settled law that an employee is entitled to wages under an implied contract when she provides services at the direction of the employer, and the employer receives the benefit of those services. *See e.g.*, 30 CJS Employer-Employee § 171 ("Once an employee provides services to an employer, he or she is entitled to wages in return. Contractual language between the parties cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts.") (citations omitted). As the court stated in an action to recover treble damages under A.R.S. § 23-355 in *Acevedo v. Phoenix Opportunities Industrialization Ctr.*, 551 P.2d 1322, 1324 (Ariz. App. 1976): "In the absence of an express agreement between the parties delineating the method of pay for comp time accumulated, we will imply a contract based on

the fact that appellant rendered services to appellee for which he had a reasonable expectation to be paid." There is no legal or evidentiary basis for DP's proposition that the Drivers have to prove an express agreement to pay for particular services like the "additional" payments argument upon which DP bases its motion. *See Martinez-Hernandez v. Butterball, LLC*, 578 F. Supp. 2d 816, 822 (E.D.N.C. 2008) (in a claim under North Carolina's wage payment statute, "[t]he cases upon which Butterball relies do not even remotely suggest that Butterball can be held to have violated N.C. Gen.Stat. § 95–25.6 only if it expressly agreed to pay the plaintiffs for donning and doffing time."). *See also id.* at 822, stating:

> Were the court to interpret § 95–25.6 as requiring plaintiffs to prove that their employer expressly agreed to pay them for particular services performed (such as changing into and out of protective gear required by the employer), an employer would be able to avoid payment of any wages to his employees by simply claiming that the services rendered, although for the benefit of the employer, were something other than "work."

In agreeing Drivers' pre-and post-trip work is compensable but asserting DP already paid for that time, DP has admitted Drivers had a reasonable expectation to be paid; the only dispute is whether they were in fact paid as DP asserted. Still, DP persists in its attempt to argue about reasonable expectations, relying on their baseless "additional payment" argument, and in derogation of settled law that courts employ an *objective* analysis,[6] DP presents a hodgepodge of inaccurate accounts of the Named Plaintiffs alleged *subjective* beliefs. The purported facts DP proffers in support of this argument lack admissible evidentiary support and/or are flatly contradicted by the record. Take for example DSF ¶ 38 asserting that "Drivers were typically provided with written commission plans." If this were true, one would have expected DP to produce commission plans signed and dated by hundreds of

[6] Williston on Contracts § 1:5 (4th ed.) ("In determining whether the parties' conduct implies a contract in fact, their conduct is evaluated from the perspective of a reasonable person, considering all of the attendant circumstances."); *Bike Fashion Corp. v. Kramer,* 202 Ariz. 420, 424 (2002) ("[A] party can breach the implied covenant of good faith and fair dealing both by exercising express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain."); *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 451 (Alaska 2009) (employees could reasonably expect employer to comply with wage laws regardless of individual understanding).

Drivers together with DP testimony to back up that claim. But there is no such evidence and in fact, that statement is demonstrably false as Plaintiff Hanna (who began work in 2016 (Doc. 38-4 ¶ 3), is the only Named Plaintiff who signed a commission plan, effective over two years after he started employment.[7] (*Id.* at Ex. B, pp. 60-63). None of the other Named Plaintiffs had ever seen, much less signed, commission plans during employment. PSAF ¶ 14; PSCF ¶ 38. DP points to the declaration of (Plaintiff Salazar to imply that she received a copy of the commission plan while employed, but her declaration merely attached a copy of Mr. Hanna's commission plan. *Id.*

DP next attempts in DSF ¶¶ 98 & 100 to claim the Named Plaintiffs either "understood" they would not be paid for "additional" hours worked or were never told that they would be. Like the proverbial "when did you stop beating your wife?" inquiry, DP's purported facts attempt to hide its failure of proof and to rely instead on the pretense of facts not in evidence - i.e. the fictional existence of an allegedly binding all-inclusive commission plan agreement for the payment of all work performed such that compensation for pre- and post-trip work could only be paid through some additional or separate agreement. The fallacy of DP's argument is self-evident; it does not hide DP's failure to prove the applicability or the exclusivity of the commission plan.

The Drivers uniformly and repeatedly testified that they thought they were supposed to be paid based on hourly rates or hourly equivalents—so that there would have been no "additional" pay to discuss if all their time had been paid (and their work time was never provided to them). Drivers also stated they did not understand DP was not paying them hourly, several attempted multiple times (without success) to get DP to explain and clarify their pay, and that they thought payment was supposed to begin from the time they got to

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[7] Defendant Kendra Kaplan also attached a 2021 compensation plan to her declaration (Doc. 490 Ex. 1 (a)), but Defendants offer no evidence regarding the relevance, distribution or implementation of that document dated over two years after this case was filed and long after all the Named Plaintiffs stopped working. While purporting to move only against Named Plaintiffs, DP cites the declaration of Driver Gene Knitter (not a Named Plaintiff) with no pin cite, (Doc. 38-5), that says nothing about receipt of a commission plan or that he ever saw one.

work until the time they left. Contrary to DP's misleading claims regarding Drivers' understanding, Mr. Simmons testified he was led to believe he "was being paid from the time I got there to the time I finished" and that he believed he would be paid for his pre-trip and post-trip work as "part of my hourly compensation or added on." PSAF ¶¶ 5, 12. When directly confronted by Mr. Simmons that he was being paid only $14 dollars per hour instead of the promised $18 per hour, DP's manager assured Mr. Simmons that the rumor that DP was only paying $14 was incorrect and that Mr. Simmons was being paid $18 per hour. This was untrue. He was being paid only $14 per hour if his unpaid pre- and post-trip hours were included. PSF ¶ 100. The same duplicitous assurances and untruths are shown *over and over*, including those made to Ms. Howard and others. *E.g.,* PSF ¶¶ 102-103; PSAF ¶ 36. In fact, when asked to explain what Drivers are told about payment for pre-and post-trip work, Barry Gross, the DP Executive Director who interviewed and hired Drivers, stated he could not recall. PSAF ¶ 38. Ms. Salazar stated that on at least three separate occasions she attempted to get an explanation of her pay – which she was told would be hourly—from Defendant Steve Kaplan. PSAF ¶ 5, 11.

DP's cited cases do not aid them. Plaintiffs have not argued that legitimate commission plans can never contain provisions making them the exclusive basis for payment. In *Valenzuela v. Bill Anderson* No. 15-00665, 2017 WL 1326130, at *6 (D. Ariz. Apr. 11, 2017), the plaintiff was a salaried employee who signed a plan that made it clear all work was covered by the written plan and guaranteed the sales employees would receive not less than minimum wage for all hours worked against the paid commissions. Even then, the court denied summary judgment finding the employer failed to show the commission payments exceeded the corresponding unpaid wages and overtime claimed. *Maturani v. Exhibit Fair Int'l*, 2009 WL 10673084, at *1 (D. Ariz. June 17, 2009) involved a written "Commission Sales Policy" the plaintiff signed specifying timing and circumstances for commissions where, unlike here, neither party challenged that the policy controlled. In *Zavaleta v. OTB Acquisition*, No. 19-04729, 2021 WL 824419, at *5 (D. Ariz. Mar. 4, 2021), the employee was paid a guaranteed salary without regard to hours of work and admitted that much of the work at issue was

covered by his guaranteed salary. The court found no additional amount was owed including because the employee admitted he expected payment "non-monetarily."

B. The Taxicab Exemption Does Not Apply.

29 U.S.C. § 213(17) excludes from the FLSA's overtime provisions "any driver employed by an employer engaged in the business of operating taxicabs." The Act does not define what it means to be "an employer engaged in the business of operating taxicabs" and the parties dispute the applicable definition. Where the FLSA does not speak directly to an issue, DOL regulations, opinion letters and other forms of guidance "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and are "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Plaintiffs submit that the Court should follow the DOL's guidance[8] and the vast majority of courts, including multiple Courts of Appeal and the District of Arizona, that have relied on the FOH factors or similar factors in applying the exemption.[9] Under this well-developed body of law DP is not an employer engaged in the business of operating taxicabs.

Courts applying the exemption uniformly look to the nature of the employer's business. That inquiry requires "evaluation of all relevant facts and circumstances," there is "no precise formula[.]" *Chao*, 2001 WL 37131280, at *4 (considering, inter alia, "whether *the company* operates on fixed or non-fixed routes (with the assumption that taxicabs do not operate on fixed routes))"; "whether *the company* provides on-demand transportation or pre-scheduled service"; "whether *the company* uses a variety of vehicles to transport passengers;

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[8] DOL Field Operations Handbook ("FOH") § 24h01; Opinion Letter, 1998 WL 852774

[9] *See, e.g., Chao v. Am. Serv. Sys., Inc.*, No. 98-0174, 2001 WL 37131280, *4 (D. Ariz. Oct. 9, 2001); *Abel v. S. Shuttle Servs.*, 301 F. App'x 856, 859 (11th Cir. 2008); *Wirtz v. Cincinnati, Newport & Covington Transp.*, 375 F.2d 513, 515 (6th Cir. 1967); *Airlines Transp. v. Tobin*, 198 F.2d 249, 252 (4th Cir. 1952); *Blan v. Classic Limousine Transp.*, No. 19-807, 2021 WL 1176063, at *5 (W.D. Pa. Mar. 29, 2021); *Crespo v. Kismet Exec. Limousine Serv.*, No. 15-5706, 2018 WL 3599738, at *5 n. 6 (D.N.J. July 27, 2018); *McKinney v. Med Grp. Transp.*, 988 F. Supp. 2d 993, 1002 (E.D. Wis. 2013); *Powell v. Carey Int'l, Inc.*, 483 F. Supp. 2d 1168, 1179 (S.D. Fla. 2007); *Rossi v. Associated Limousine Servs.*, 438 F. Supp. 2d 1354, 1364 (S.D. Fla. 2006); *Chao v. Barker Bros., Inc.*, No. 04-1764, 2005 WL 8174446, at *11 (W. D. Pa. Nov. 22, 2005); *Herman v. Brewah Cab*, 992 F. Supp. 1054, 1059-60 (E.D. Wis. 1998).

whether *the company* uses a taximeter or similar method for charging fees based on mileage); *Abel,* 301 F. App'x at 860 ("Our determination necessarily turns on the specific facts presented."); FOH § 24h01 (describing attributes of a "taxicab business"). Even the court in *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, 904 F.3d 208, 216-17 (2d Cir. 2018), the case DP cites, considered the company's vehicle fleet, whether it operated fixed routes, the extent and "magnitude" of its corporate contracts, and whether the company served the local needs of the community.

Here, most of DP's fleet (63%) are large vehicles that could never qualify as taxicabs, including 73 buses (35 "city" buses, 21 "mini" buses, 17 full coach buses, & 3 shuttle buses) and 3 "Textron Tugs" (think Disneyland tram) with 10 tug trailers, and 16 luxury sprinter vans. PSF ¶14. DP asserts that its "target consumers are corporate travel managers, event planners, conference services professionals, and buyers of bulk or contract transportation services such as schools or government institutions." *Id.* ¶ 12. Consistent with its target customers, the vast majority of DP's revenue is from sales of services purchased in substantial quantities, often pursuant to contracts, that far exceed the quantity purchased by members of the public. PSF ¶¶ 26, 27, 30-33; PSAF ¶¶ 1-4; 25-26. From 12/6/2106 through 2022, DP had more than [redacted] in revenue and that the *vast* majority was derived from corporate clients ($2[redacted]), other transportation companies ($1[redacted]), destination management companies ($[redacted]), hotels ($[redacted]), and wholesalers ($[redacted]). Only **1.1%** was from individuals.

Business Segment	Amount	Percent
Corporate, e.g. [redacted] campus shuttle	$[redacted]	37.5%
Affiliates,[10] e.g., [redacted]	$[redacted]	17.7%
Wholesale, e.g. [redacted]	$[redacted]	12.1%
Retail[11]	$[redacted]	11.1%
DMC, e.g. [redacted]	$6[redacted]	8.1%
Hotel, e.g. [redacted] Scottsdale	$5[redacted]	7.5%
Individual	$[redacted]	1.1%

[10] This also includes revenue derived from transportation provided by *other companies*, whereby DP merely acts as a "middle" man in contracting for those services. PSF ¶ 23.

[11] The majority of revenue here are corporate clients, *e.g.*, [redacted], a DMC ($[redacted]), [redacted] (flight crew members) ($[redacted]); [redacted] Resort and Spa ($[redacted]), and revenue from DP's public Yellowstone National Park tours ($[redacted]). PSAF ¶ 2.

Schools	$ [redacted]	0.8%
Weddings	$ [redacted]	0.5%
Broker (Dept. of Defense)	$ [redacted]	0.4%

PSAF ¶ 1. The revenue report produced by DP for April 2022 to December 2022, shows even a smaller percentage of revenue derived from individuals – a mere 0.5%. The balance of DP's revenue for this time period included 56.5% derived from corporate clients (which includes multi-million-dollar contracts with [redacted] to operate its employee shuttle (including using tram-trailers and tow-tugs) and [redacted] to shuttle construction workers to a construction site using 35 City Buses. PSF ¶ 26. *See* PSAF ¶¶ 2-4.

For the entire period, 2016-2022, over 35% of DP's revenue was derived from just 10 customers, including [redacted], [redacted], the [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. PSAF ¶ 2. During this time, DP performed over 24,000 trips for the Four Seasons, over 17,000 trips for [redacted], over 12,000 trips for the Mountain States Express interstate bus route and over 10,000 trips for [redacted]. PSAF ¶ 3.

DP's stated competitors include limousine and charter bus companies; event logistics is "a particular area of expertise" for DP. DP also provides corporate event, and other group transportation. PSF ¶15. DP is a USDOT registered interstate motor carrier, with 820,000 reported miles driven in DOT registered vehicles in 2020 alone. *Id.* ¶16. DP operates a variety of fixed routes including, but not limited to, employee shuttles at corporate campuses and construction sites, school bus routes, interstate tours (for other companies), and National Park tours. *Id.* ¶17. DP receives federal grants to operate the interstate Mountain States Express bus service (between UT and WY) which is also pursuant to a contract with the Wyoming Department of Transportation. *Id.* ¶ 17; PSAF ¶ 4. DP also provides fixed route shuttle transportation services including in vans and buses pursuant to corporate contracts with companies such as [redacted], [redacted], and [redacted]. PSF ¶ 20. DP's National Park tours provide food, commentary, and visual aids, and other tours "anywhere our client would like to go" as well as transportation for other interstate tour operators, including [redacted]. *Id.* ¶ 18. DP provides transportation services for the Department of Defense and derives business

through formal bid procedures employed by federal, state, and local governments. *Id.* ¶ 19.

All of DP's trips are prearranged, and Drivers are not permitted to "cruise" for passengers or pick up passengers who "hail" them on the street. *Id.* ¶63. None of DP's vehicles have taximeters, dome lights, or say "taxi." *Id.* ¶¶60,70. DP does not advertise as a "taxi" company. *Id.* ¶ 60. Fares are not posted inside the vehicles. *Id.* ¶ 65. DP is not licensed to operate taxicabs, although that is required in each of DP's operating locations. *Id.* ¶66, 70.[12] Fares are not determined by the distance, but instead are flat-rate or hourly *Id.* ¶59. DP's fares are significantly higher than those charged by recognized taxi companies in the local area, e.g., $136.25 for the same trip performed by Yellow Cab for $33.40 (including a 15% tip) both in sedans. *Id.* ¶ 68; (Doc. 499 ¶¶ 206-207). DP does not operate taxi stands. PSF ¶61. DP's business does not serve the everyday needs of the community. *Id.* ¶15-26). DP includes in its contracts exclusivity provisions that expressly allow the use of taxis. *Id.* ¶75.

Contrary to DP's unsupported assertions (at 3, 7), the exemption does not turn on employee-by-employee inquiries. Rather, the exemption is one of several in Section 213 of the FLSA that focus on the nature of the employer's business. *See Avila v. Turlock Irrigation Dist.*, No. 1:06, 2006 WL 3437549, at *8 (E.D. Cal. Nov. 27, 2006) ("The difference in terminology employed by Congress evinces Congress' intent to make exemptions dependent upon employment by nature of the employer, the capacity of employment, [or] employment in a particular industry.") (citing *Mitchell v. Stinson*, 217 F.2d 210, 214 (1st Cir. 1954)). *See Mitchell*, 217 F.2d at 214 ("Thus, where the words…'any employee of an employer engaged in the business of operating taxicabs' are used, it is the nature of the employer's business which is determinative[.]"). DP's suggestion that the Court disregard the panoply of facts related to the nature of DP's business and instead focus only the activities of Named Plaintiffs is directly contrary to the statute.[13] There are 85 Opt-in Plaintiffs in this case who are entitled

[12] *See* Salt Lake Ord. Ch. 5.18, at § 5.18.080, 090; A.R.S. §§ 28-9505, 28-9506(B).

[13] DP's red herring reference the number of times Named Plaintiffs drove shuttles and to § 786.200 (permitting the exemption to apply even if some non-exempt work is also performed) are irrelevant and put the cart before the horse. They're not relevant divorced from the reality of DP's business and where DP has not shown the exemption applies in the first place.

to overtime and there is no authority to pretend DP is in the business of employing only the four Named Plaintiffs—if that's DPs position then summary judgment for all of the other Drivers should granted.[14] DP's position is merely a ploy to avoid addressing the facts that overwhelmingly show that DP is not "engaged in the business of operating taxicabs."

DP in no way considers itself to be a taxicab company and only asserted the exemption after this lawsuit was filed as a *post-hoc* rationalization based on the decision in *Munoz*, which Defendant J. Kaplan described to other board members of the National Limousine Association as a "potential huge loophole for us regarding Overtime." (SF ¶ 176). *Munoz*, however, is not a "loophole" available to DP. On the contrary, *Munoz* is readily distinguishable and should not be followed. In *Munoz*, the fleet primarily consisted of "small" vehicles. *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, No. 15-9368, 2017 WL 2973980, at *1 (S.D.N.Y. July 12, 2017). Specifically, there were only 18 "Town Car" sedans that held four passengers plus the driver, with a glass partition separating the driver. *Munoz-Gonzalez v. D.L.C. Limousine*, No. 17-2438 (Second Cir.), Brief for Defendants-Appellees (Doc. 59) at 4-5, 7-8 (Feb. 16, 2018). Only a negligible amount of revenue was "generated from contracts with other corporate entities." 2017 WL 2973980, at *6 ("The two recurrent contracts in this case—which made up *less than two percent* of the Defendants' business—are insufficient to infect the entire business.") (emphasis added).[15] The company also operated an airport "taxi stand" and *did not operate fixed routes* or schedules. 904 F.3d at 216. Here, in stark contrast, most of DP's vehicles are larger, the vast majority of revenue is from corporate clients, and DP operates numerous fixed routes and from fixed termini.

In *Blan*, 2021 WL 1176063, at *1, the court found that even considering the factors in *Munoz*, the employer did not satisfy the exemption based on facts that are also present here.

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[14] There is no support for DP's attempt to focus only on the Named Plaintiffs just because it moved to decertify the Collective. (Doc. 490 at 3 & n. 1, 4). "[E]ach 'plaintiff who opts in to a collective action has party status.'" *Wilkerson v. Walgreens*, No. 21-01427, 2022 WL 15520004, at *5 (D. Ariz. Oct. 27, 2022) (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018). DP nonetheless argues (at 3 n.1) the exemptions should apply to all Opt-ins.

[15] The Second Circuit references less than 5%, but the record provided less than 2%.

Specifically, "a non-negligible portion" of business was from fixed routes—about 20% of revenue from employee shuttles—and "a large percentage" of the business was from recurrent contracts, 35-40%. *Blan*, 2021 WL 1176063, at *7, *1. The company was not authorized to operate taxicabs by the regulating authority, did not advertise as a taxi company, the vehicles were not metered and did not have vacancy signs, numerous vehicles carried more than eight passengers, service was generally prearranged, and drivers were not allowed to pick up passengers on demand or trade trips without involving dispatch. *Id.* These facts are also present here and in stark contrast to those in *Munoz*.

DP's reliance on *Munoz* for the argument (at 8) that the amount of its "business from recurrent contracts and corporate clients," 904 F.3d at 217, is irrelevant if DP can provide services to members of the public is misplaced as that was not the holding. *See Alabsi v. Savoya, LLC*, No. 18-06510, 2019 WL 1332191, at *11 (N.D. Cal. Mar. 25, 2019) ("While Defendant argues that Plaintiff does not allege that members of the general public are prohibited from doing business with Defendant, *Munoz-Gonzalez* does not require a complete prohibition."). Instead, the *Munoz* court noted that the company's recurrent contracts "constituted a negligible amount" (2% of its business) and contrasted the facts with those in *McKinney v. Med Grp. Transp. LLC*, 988 F. Supp. 2d 993, 1002 (E.D. Wis. 2013) in which 95 to 98 percent of the company's business was derived from recurrent contracts. *Munoz* did not provide a bright line test.[16] In contrast to *Munoz* where only a "negligible" amount of business was derived "recurrent contracts and corporate clients," the *exact inverse* it true here and is consistent with *McKinney* and *Blan*: only a negligible amount of business (1.1%) (.05% in DP's 2022 disclosure) is from individual members of the public and the vast majority (96.3 to 98.9%)[17] are derived from recurrent contracts or business from other corporate clients (or their equivalents, like

[16] DP addresses only what it claims to be business from recurrent *written* contracts (which is unsupported), but *Munoz* looked to both "business from recurrent contracts and corporate clients," 904 F.3d 208, 217, which DP does not address.

[17] DP identified $[redacted] or 2.6% of its revenue as simply "credit card." Even allocating all of this revenue to members of the public, DP's revenue would still be more than 95% from recurrent contracts and corporate clients. PSAF ¶ 1.

schools). This includes at least 30% of revenue from written contracts, although the relevant inquiry does not consider only *written* contracts. PSAF ¶ 4.

Munoz is also unpersuasive for other reasons. First, the court disregarded or relegated important factors, like the presence of taximeters and the type of vehicles, based on its purported understanding of the plain language of the statute, despite noting that multiple dictionary definitions and the Motor Carrier Act (1935) reference taximeters and a small number of passengers. 904 F.3d at 214 and n.6. The court erred by disregarding dictionary definitions it determined placed "too much emphasis on the presence of a taximeter" and violated a fundamental canon of construction by ruling that "taxicab" should be interpreted based on what a "reasonable reader" would understand, as opposed to what the word meant when the statute was written. *Id.* "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019) (citations omitted). In a recent decision, the Court was called upon to interpret DOL regulations for a Section 213 exemption and reviewed the definition as defined in 1949 and its similar definition today. *Helix Energy Sols. Grp., v. Hewitt*, 143 S. Ct. 677, 686 (2023). Here, when the FLSA was enacted, the term "Taxicab" was "short for Taximeter cab." Taxicab, The Oxford English Dictionary (1933) (MSJ Decl. Ex. Y-2).[18] The core attributes of a taxicab—presence of a taximeter and taxi licensing—continues to define the term today. *See* Taxicab, Oxford English Dictionary, Third Edition ("A motor car fitted with a taximeter and licensed to transport passengers to destinations of their choice in return for payment of a fare.").[19]

Rejecting DP's claimed exemption from overtime as a taxicab company is not only mandated by the plain meaning of the statute but is the only conclusion consistent with Congressional intent. Taxicab companies were exempted because they were already highly regulated and because the nature of the work made overtime impracticable. *See* Pls.' MSJ

[18] Scalia & Garner, Reading Law: The Interpretation of Legal Texts 419-20 (2012) ("The OED is one of the "most reliable sources for historical terms" and the 1933 version is one of the "most useful and authoritative for the English language and the law").

[19] https://www.oed.com/view/Entry/198280 last visited on June 27, 2023.

(Doc. 497 at 16) (citing *Helena Glendale Ferry Co. v. Walling*, 132 F.2d 616, 619 (8th Cir. 1942) and *Airlines Transp. v. Tobin*, 198 F.2d 249, 252 (4th Cir. 1952)). Applying strict wage and overtime requirements in the taxicab context was deemed impractical and likely to conflict with state and local regulations. *Id.* Here, in stark contrast, DP's Drivers work pursuant set schedules or "shifts" and transport passengers on a prearranged basis (where and when DP directs) and therefore generally only work when DP's revenue is guaranteed, i.e. a trip has been "booked." *See Airlines Transp*, 198 F.2d at 252 (contrasting taxi drivers with limousine drivers who "do the work laid out for them at a point of time"). There is nothing impracticable about requiring overtime pay in this context. Moreover, as noted, taxicab companies were (and are) extensively regulated by state and/or local governments. *United States v. Yellow Cab*, 332 U.S. 218, 230 (1947). The exemption recognizes that such regulations make federal regulation unnecessary. *See Jones v. Giles*, 741 F.2d 245, 249–50 (9th Cir. 1984) ("Taxicabs, unlike interstate trucking firms, are usually subject to municipal regulation."). DP is *not* regulated as a taxicab company, even though each location in which it operates regulates taxicabs including, *inter alia*, mandating taximeters, signage, posting of rates. PSF ¶ 60; n. 11, *supra*. In short, like many other similar companies, including its partners like Carey Limousine (n. 6, *supra*), the nature of the business, the working conditions of Drivers, and the purpose of the exemption all show the taxicab exemption does not apply.

Although DP's sole focus on the Named Plaintiffs is incorrect (and based on substantial misstatements and/or unsupported assertions),[20] all DP's motion establishes is that they operated smaller vehicles in addition to larger ones (like 15-passenger vans) for part of their work, which does not, in any context, establish applicability of the exemption. Even if the inquiry were employee-specific (and it isn't), DP fails to identify or in any way address the proportion of Plaintiffs' trips performed for corporate clients or pursuant to oral or written contracts and agreements for recurrent business, including, *e.g.*, the Four Seasons.

[20] *E.g.,* DP's assertion (at 6) that Named Plaintiffs "admit" they "rarely operated on a fixed schedule, fixed route, or fixed termini," is unsupported and false. PSAF ¶¶ 34-35.

While DP concedes (at 7) they did operate fixed routes,[21] it disregards that a substantial portion of their work also involved a fixed termini (expressly excluded from the applicable definitions) including trips from the so-called Four Seasons "stand" and from other hotels pursuant to contracts, where Drivers are stationed on shifts at the hotels, as if employed by the hotels,[22] as required by the contracts. (Doc. 501 at Dep. Ex. 251). Those services are not for the public and began (and generally ended) at the hotel, the fixed terminus.[23] For example, over 35% of Plaintiff Salazar's trips began or ended at the Four Seasons and she worked there 47% of her workdays. PSAF ¶¶ 34-35. DP's attempt to exploit what it believes is a "loophole" to avoid paying overtime to Drivers does not pass the "smell test," let alone show this *post-hoc* claimed exemption "plainly and unmistakably" applies. *Ader v. SimonMed Imaging*, 465 F. Supp. 3d 953, 960 (D. Ariz. 2020). Rather, the evidence shows the exemption does not apply.

K. Kaplan's Declaration is Inadmissible and Does Not Create a Genuine Dispute

As set forth summarily in PSCF, the Kaplan Defendants' multiple declarations are inadmissible on numerous grounds. Kenda Kaplan's assertion in her March 27, 2023 declaration that "[s]ince December 2016, The Driver Provider has received approximately 25% or less of its revenue through work performed pursuant to written contracts" (Doc. 451-1, ¶ 4) is unsupported and cannot defeat summary judgment. She fails to identify what "financial records" she claims to have reviewed, what written contracts she considered, or how she arrived at her conclusion. *See In re Lyon & Lyon, LLP*, No. 04-1239, 2005 WL 6960226, at *7 (B.A.P. 9th Cir. June 30, 2005) ("It is axiomatic that testimony concerning

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[21] Although DP concedes that the Named Plaintiffs operated fixed routes, they nonetheless rely (at 6) on the Court's statement in its 12(b)(6) order (Doc. 44 at 6) that DP does not operate fixed routes, which is disingenuous. That conclusion was not supported by the allegations in the original Complaint (as DP knows) and appears to have been based on DP's false assertion in briefing that "Plaintiffs do not dispute that they had no fixed schedule, fixed route, or fixed termini." (Doc. 32 at 4). The evidence is beyond challenge that Drivers operate that DP operates numerous fixed routes and that it also operates from fixed termini. *See, e.g.,* Doc. 422 (admitting DP operates "fixed routes").

[22] On occasion, Drivers attended trainings conducted by the hotels. PSAF ¶ 37.

[23] A "terminus" is "either end of a transportation line." https://www.merriam-webster.com/dictionary/terminus

business records must refer to records being proffered into evidence") (controller's testimony regarding "books and records" does not meet business records hearsay exception); *Ghuman v. Nicholson*, No. 20-02474, 2022 WL 11255648, at *8 (D. Ariz. Oct. 19, 2022) (declarations are properly faulted for lacking support in corroborating evidence when it is obvious such evidence would exist). Her assertion is also contradicted by the record. PSAF ¶ 4. Even if considered, the declaration is insufficient to create a genuine dispute, both because it is belied by the record and because the relevant inquiry does not look only to *written* contracts. *See Norman v. Rancho Del Lago Cmty. Ass'n*, No. 22-15111, 2023 WL 21461, at *1 (9th Cir. Jan. 3, 2023) ("[C]onclusory statements that are unsupported by the record are not sufficient to defeat a motion for summary judgment."); *Salas Avocado SPR de RL v. SA&E Enterprises LLC*, No. 20-00046, 2022 WL 60623, at *4 (D. Ariz. Jan. 6, 2022) (statement contradicted by documentary evidence is insufficient to create genuine dispute).

C. The 7(i) Exemption for Retail or Service Establishments Does Not Apply.

As set forth in Plaintiffs' MSJ (Doc. 497 at 2-13), DP's business lacks a retail concept and DP failed to satisfy the two-part requirement for each establishment and each year (2016 to present) that 75% of the services sold are "recognized as retail sales" in the industry and are not "sales for resale." 29 U.S.C. §779.411. PSF ¶ 47. Even if DP could disregard these threshold requirements, it would still fail to qualify for the 7(i) exemption because it has never paid Drivers bona fide commissions, (Doc. 497 at 10-12), has consistently violated the compensation requirements of the exemption (an element DP does not address in its motion). *Id.* at 12-13. Because DP cannot meet any of the exemption's requirements for any establishment for any year, it resorts to arguing that the Court should disregard the requirements. DP's arguments are unavailing and contrary to controlling precedent. Nonetheless, DP persists in arguing (at 13-14) that because the statute does not separately define "retail or service establishment" it somehow satisfies the first element of 7(i) merely because it provides a "service." This argument was foreclosed long ago. *See* cases cited at Doc. 497 at 2-3; *see also Walling v. Thompson*, 65 F. Supp. 686, 689 (S.D. Cal. 1946) ("[T]he word 'retail' is held to modify the word 'service' regardless of the use of the word 'or' between

them, so that the Act is to be interpreted as if Congress, instead of saying as it did, 'retail or service establishment', had actually said 'retail selling or retail servicing establishment.'").

DP also continues the meritless claim (at 14) that because Congress repealed the intrastate overtime exemption in Section 213(a)(2) in 1989, "Congress intended to change" the definition of "retail or service establishment" in 207(i) and the Court should not apply the controlling precedent in *Gieg v. DDR, Inc*, 407 F.3d 1038, 1047 (9th Cir. 2005) (applying 29 C.F.R. §779.411), and a wealth of additional authority. In *Gieg*, the court held "[w]hen Congress enacted § 207(i) it intended the term 'retail or service establishment' to have the same meaning" as it did in Section 213(a)(2). *See Reich v. Delcorp, Inc.*, 3 F.3d 1181, 1183 (8th Cir. 1993) (recounting history and holding that "any construction of the term as defined in § 213(a)(2) became a part of the definition of the term as found in § 207(i)"). *See* 29 C.F.R. § 779.312 (explaining that legislative history of § 7(i) indicated the same meaning of "retail or service establishment" (established in the 1949 amendments) was to continue to apply) (citing Senate Report 145, 87th Cong., first session p. 27 & House Report 75, 87th Cong., first session p. 9). *Partida v. Am. Student Loan Corp.*, No. 07-0674, 2008 WL 190440, at *2 (D. Ariz. Jan. 18, 2008) ("29 U.S.C. § 213(a)(2), though repealed, continues to supply the definition of a 'retail or service establishment.'"); *Kelly v. A1 Tech.*, No. 09-962, 2010 WL 1541585, at *10 (S.D.N.Y. Apr. 12, 2010) (collecting cases). DP's argument ignores this lengthy history and controlling precedent and violates fundamental canons of statutory construction. *See* Scalia & Garner, Reading Law: The Interpretation of Legal Texts 170 (2012) ("The presumption of consistent usage also applies when different sections of an act or code are at issue."). DP's attempt to rely on *Alvarado v. Corp. Cleaning Services, Inc.*, 782 F.3d 365, 369 (7th Cir. 2015), despite its conflict with *Gieg,* must be rejected. *Gieg* is controlling authority that applied the definition of retail or service establishment set forth in the applicable regulations. *See Diggs v. Ovation Credit Servs., Inc.*, 449 F. Supp. 3d 1280, 1286 n. 7 (M.D. Fla. 2020) (refusing to follow *Alvarado* given the "overwhelming authority" "reaching the opposite conclusion….").

DP's argument that 100% of its sales are retail is belied by its own records that show only a *small* portion of revenue is considered retail. PSF ¶ 24-5; PSAF ¶¶ 1-4. Moreover, the

relevant inquiry is whether the sales are recognized as retail *within the industry*, which is not determined by the employer. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 204-05 (1996); § 779.324. Here, there is no evidence DP's sales are recognized as retail within the industry. This is also fatal to DP's defense. *See* Doc. 497 at 4-8.

Similarly, DP's attempt to focus on what it calls "end-users" (a term not found in the statute nor any cited regulation) disregards that the relevant inquiry looks to DP's sales. "Typically a retail or service establishment is one which *sells* goods or services *to the general public*…" § 779.318 (listing examples). *See Sydney v. Time Warner Ent.*, No. 513-286, 2020 WL 1530793, at *3 (N.D.N.Y. Mar. 31, 2020) (even where *sales* were to general public end-users, failure to produce evidence that 75% of sales were to the general public barred summary judgment). While sales of services to other businesses are not *per se* excluded from being considered "retail," DP has failed to show that its sales to businesses are not for resale and that they are in the quantities purchased and prices paid by members of the public required to qualify as retail. *See* Doc. 497 at 4-10. The undisputed facts show most of DP's revenues are from sales of substantial quantities of services, often pursuant to contracts and recurrent business arrangements, that do not reflect the quantity purchased by a member of the general public, are not for retail, include discounts not applied to the general public and/or are in large part for resale. Doc. 497 at 8-9; Doc. 498 ¶¶ 26, 27, 30-33; PSAF ¶¶ 1-4; 25-26. DP also admits it derives revenue from affiliate transportation companies that perform the transportation services and then pay DP a fee. PSF ¶ 21-23.

DP's effort to rely on the 2012 investigation is unavailing for numerous reasons. *See* Doc. 497 at 24-27. Even ignoring the serious questions regarding that investigation,[24] DP's argument ignores that 7(i) is an *establishment*-specific exemption based on meeting *annual* revenue and compensation requirements. DP provides no evidence nor authority to support any claim that the determination for a single establishment employing 18 drivers in 2012 could apply at DP's five different locations employing 475+ Drivers from 2016 to the present. *See*

[24] *See* Expert Report of Randall G. O'Neal, Doc. 499-4 at pg. 11-64; PSF ¶ 150-164, 168-170.

PSCF ¶ 58, 75.[25] The evidence also belies DP's claim its services are not resold. PSF ¶ 30-33.

DP Cannot Meet the *Bona Fide* Commission Requirement

As set forth in Plaintiffs' MSJ (Doc. 497 at 10-11), DP's compensation lacks every feature present with a bona fide commission. While the parties disagree as to the applicable test, DP has not and cannot meet the bona fide commission requirement even under its own cited cases. As an initial matter, it is undisputed that Drivers are paid a variety of ways, including straight hourly wages or per-trip flat rates, most, if not all of which DP nonetheless repackages as "commissions" that are paid to employees to escape overtime. PSF ¶ 51. The hourly compensation, both with respect to assignments that pay a straight hourly rate (like working the Intel shuttle or Four Seasons "stand") and hourly trips (where Drivers' pay is merely their hourly rate multiplied by the number of hours billed to the customer) clearly do not constitute bona fide commissions. Yet DP, that has the burden to prove the exemption, makes no effort to identify or explain how the compensation received by the Named Plaintiffs meets the definition or the percentage and value requirements of 7(i).

Similarly, the compensation paid for flat-rate trips is merely a per-trip fee paid to the Drivers that does not fluctuate based on what the customer paid. PSF ¶ 54; PSAF ¶ 22. Those amounts are also not bona fide commissions, which is confirmed by DP's own cited cases. *See, e.g., Wilks v. Pep Boys*, No. 02-0837, 2006 WL 2821700, at *16 (M.D. Tenn. Sept. 26, 2006), *aff'd*, 278 F. App'x 488 (6th Cir. 2008) (no reasonable juror could find flat-rate compensation was bona fide commission where there was no evidence the amount paid correlated to the "overall customer price"). Just like the employees in *Wilks* (cited by DP at 19), "[P]laintiffs merely earn a predetermined amount for each task they complete and that this amount does

[25]DP's citation of 29 U.S.C. § 259, a newly concocted defense Plaintiffs have moved to strike (Doc. 432), provides no support that the 2012 investigation permits applicability of 7(i) in future years or other locations without regard to the ongoing requirements of 7(i). Even if that defense is not stricken, it would be inapplicable: § 259 is a *reliance* defense requiring proof of reliance, conformity, and good faith that must be based on *written* administrative regulations, orders rulings of "the Administrator" of the WHD. DP had no such written findings on which to rely (PSF ¶ 161) and the defense would otherwise fail because they failed to act in conformity and in good faith. PSF ¶ 144-179. *See, e.g. Lacurtis v. Express Med. Transporters, Inc.*, 189 F. Supp. 3d 903, 912 (E.D. Mo. 2016), *aff'd*, 856 F.3d 571 (8th Cir. 2017).

not fluctuate in tandem with the amount charged to the customers." *Id.* at *18. In fact, DP has admitted that its compensation scheme "does not have anything to do with what the [customer] is paying." PSF ¶ 52. Drivers' compensation does not have the proportionality to the ultimate price paid by the purchaser that is present for bona fide commissions. See cases and Opinion letter cited at Doc. 497 at 10.

DP falsely *implies* (at 21) that the amounts paid to the oilfield workers in *Corman v. JWS of New Mexico, Inc.* were not based on the ultimate amount paid by the customer—they were. *See* 356 F.Supp. 3d 1148, 1194 (D.N.M. 2018) ("The Plaintiffs always made twenty-five percent of each charge to the customer; this rate is a consistent percentage of the price that JWS New Mexico charged the customer."). In *Corman* when the customers were charged more, the employees were paid more. That proportionality is entirely absent from DP's scheme.[26]

DP's assertion (at 19) that the commissions are "directly tied to the quality of Drivers' performance" is false. The pay for each trip is predetermined. PSAF ¶ 22. DP merely describes the fact that Drivers' rate of pay (for some trips) can be based on a Driver's assigned "level" which, like any non-contractual pay structure in any business, allows DP to consider the Drivers' experience and job performance in setting the rate of pay-like any other job. The claim that items like performance reviews somehow qualify as bona fide commission characteristics is transparently meritless. The pay structure here provides absolutely no incentives characteristic of bona fide commissions, like the ability to increase income through selling more transportation contracts or charging customers higher prices. *See Parker v. NutriSystem*, Inc., 620 F.3d 274, 282 (3d Cir. 2010) (cited by DP at 19) ("NutriSystem's payments to employees are based on consumer preference and the ability of the sales associate to persuade a customer to purchase a meal plan. Unlike the alarm installer who is paid a flat

[26] DP's cites (at 21) *Gustafson v. SAP Am., Inc.*, No. 4:14-1497, 2015 WL 1526352 (E.D. Mo. Apr. 3, 2015) which involved a Missouri state statute that separately defined "commission" and did not involve any analysis regarding a bona fide commission under the 7(i) exemption. DP also cites 29 C.F.R. § 778.117, which likewise does not address commissions under the 7(i) exemption, but merely reflects the requirement that commission payments be included in determining an employee's regular rate. These are inapposite.

fee per installation…"). The other cases DP relies on for their claim Drivers have performance-based incentives involve service technicians that were incentivized and had the ability to work more efficiently. *See Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505 (7th Cir. 2007) (auto repair technicians); *Owopetu v. Nationwide CATV*, No. 10-18, 2011 WL 883703 (D. Vt. Mar. 11, 2011) (cable service technician). In contrast, Drivers have no ability to work faster—the timing and length of any given trip is determined by factors outside the control of Drivers, including, e.g., pickup locations, pickup time, "in time," traffic, speed limits, etc. (*See, e.g.*, Doc. 28-2 at pg. 36, 42/69 (setting driving standards)). In addition, many of the assignments are specifically scheduled for set amounts of time, e.g., the Four Seasons "stand."

In order for a commission to be bona fide it must be decoupled from actual time worked—which is "[t]he hallmark of a commission-based system[.]" *Almanzar*, 175 F. Supp. 3d at 275 (citations omitted). Like the two drivers whose rates were tied to time worked in *Jackson v. R&A Towing*, No. 21-0618, 2023 WL 2433977, at *7 (S.D. Tex. Mar. 9, 2023), the only way Drivers here can earn additional compensation is by being more available and being assigned more trips, which is entirely at DP's discretion. SF ¶¶ 54-57. This is in stark contrast to the furniture salesman in *Lee v. Ethan Allen Retail,*, 651 F. Supp. 2d 1361 (N.D. Ga. 2009) (cited by DP at 20) whose commission "depend[ed] on the volume of her sales" and where she had the ability to "impact her compensation by increasing sales." *Id.* at 1367. DP also has failed to prove payment of legitimate commissions because the payments are comingled with invoiced discretionary gratuities that are not permitted to be counted as wages or commission payments. (Doc. 497 at 12; SF ¶ 49-51, 76-88). *See* MSJ Decl. Ex. V-1 Doc. 499-4 (O'Neal Report at ONE000036-41). Lastly, DP's claim (at 21) that Drivers work irregular hours is unsupported by any facts whatsoever and contradicted by the record. PSF ¶¶ 56, 127-128.

D. Defendants' Conduct Was Willful.

Plaintiffs demonstrated that DP's conduct was willful warranting application of the three-year statute of limitations under 29 U.S.C. § 255(a). (Doc. 497 at 23-29).[27] Conduct is

[27] Plaintiffs also sought summary judgment on willfulness under Arizona's Minimum Wage Act, A.R.S. § 23-364(H); DP has not moved for summary judgment on that issue.

willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). DP provides no statement of fact denying actual knowledge that its pay practices violated the FLSA and even if there were, such statement would be in conflict with undisputed facts. Despite commitments made in two DOL investigations to remedy its failure to accurately track all hours worked, DP persisted for 20 years in its failure to track actual hours worked by its Drivers making it exceedingly difficult, if not impossible, for Drivers to understand their compensation. PSF ¶ 77,87, 144-149, 169; PSAF ¶ 36.

While having no objective basis to claim application of the 7(i) exemption, and despite actual knowledge of the 7(i) requirement to pay employees in excess of 1½ times the applicable minimum wage for all hours worked and to ensure that more than half of employee compensation represents bona fide commissions, DP failed to track and record hours actually worked and failed to pay bona fide commissions and in so doing, paid Drivers less than they were entitled to receive. PSF ¶ 49-51, 77,87, 144-149, 164, 169; PSAF ¶ 36. Furthermore, beginning in 2015, DP commingled discretionary gratuities paid via invoice with the "commissions" it paid to Drivers with no breakdowns between these legally independent categories. PSF ¶ 49. This not only violated 7(i) and underpaid Drivers but also concealed violations of minimum wage. PSF ¶ 104, 140-141; PSAF ¶ 36. DP attempts to brush aside its long history of these FLSA violations with mere "acknowledge[ment] there is a fact dispute" regarding "which weeks Drivers earned 1.5 times the federal minimum wage." (Doc. 506 at 5 n.2). *See* Driver Complaints regarding payment of gratuities. E.g., PSF ¶ 140. DP had actual knowledge that it was required to pay more than 1.5 times the applicable minimum wage in order to claim the 7(i) exemption, (PSF ¶ 147, 160, 162, 164-166, 168), and as their counsel conceded, for any week in which Drivers did not make more than 1.5 times the applicable minimum wage, the exemption does not apply. PSF ¶ 162, 166. Tracking actual hours worked is a necessary precondition for compliance with the 7(i) requirement to pay in excess of 1.5 times minimum wage in every pay period. Given DP's knowledge of this requirement, DP's violations are willful. Further, DP offers no excuse for its failure to correct or seek leave of

court to correct the violations DP itself has uncovered. PSF ¶ 91. See AWA Section above. *See also* PSF ¶ 89, 91; PSAF ¶ 7.

DP's assertion that its conduct was not willful is based entirely on an advice of counsel defense and purported reliance on a 2012 DOL Wage and Hour Division investigation which DP claims is supported by DSOF ¶ 30-36, 74-76. (Doc. 506, at 29-30). However, these paragraphs do not establish DP's defense as a matter of law as explained in Plaintiffs' MSJ.[28] With respect to its advice of counsel defense, DP says nothing about what DP actually discussed with its counsel in the purported "multiple conversations," nor any information DP provided to its counsel or how DP did anything other than develop a commission plan with counsel, and ask and receive an answer about the 7(i) exemption. (DSF ¶30-36, 76). These conclusory recitations devoid of specific facts and admissible evidence to support DP's motion are insufficient. *See* cases cited at Doc. 499 at 27-29; *see also Greene v. Tyler Techs., Inc.*, 526 F. Supp. 3d 1325, 1351 (N.D. Ga. 2021) (denying summary judgment to employer on willfulness where employer "presented no evidence of what information was supplied to outside counsel in support of his exemption determination, no evidence of his investigation, and no records in connection with his review or determination.").

While DP failed to adequately support its summary judgment motion, the evidence adduced in discovery detailed in Plaintiffs' MSJ demonstrates that DP's conduct was willful, *inter alia*, because it failed to follow its own attorneys' legal advice including with respect to tracking of hours and confirming its payments to Drivers met 7(i) requirements. Plaintiffs also demonstrate that DP tethers its 7(i) defense to a hope and a prayer of overturning controlling legal authority. (Doc. 497 at 27-29). DP's knowing assumption of such risks and its reckless disregard of 7(i) requirements is the very embodiment of willfulness under the FLSA.

DP attempts to rely on factually and legally distinguishable cases. (Doc. 506 at 29-30).

[28]DP's willfulness and good faith defenses are limited to the claimed 7(i) exemption. DP asserts no such defenses to Plaintiffs' minimum wage claims nor based on DP's asserted post-hoc taxicab exemption nor could it.

Radford v. Berg Homes LLC, No. CV-18-00287-PHX-DWL, 2020 WL 619697, at *4 (D. Ariz. Feb. 10, 2020) held that the allegation that the employer was once sued for violating the FLSA was insufficient to establish willfulness on summary judgment. Two cases cited by DP held that no liquidated damages were appropriate in the context of collective bargaining where the employees were represented by counsel that negotiated and approved agreements that were later challenged. E.g., *Featsent v. City of Youngstown*, 70 F.3d 900, 907 (6th Cir. 1995); *Ivey v. Foremost Dairies, Inc.*, 106 F. Supp. 793, 798 (W.D. La. 1952), aff'd in part, rev'd in part, 204 F.2d 186 (5th Cir. 1953).[29]

DP's reliance on the 2012 investigation is equally unavailing as fully discussed in Plaintiffs' Motion for Partial Summary Judgment. (See Doc. 497 at 25-27; PSF ¶ 77, 88, 144-145,149, 156-158, 168, 169; DSF ¶ 62).

E. DP Does Not Meet Its Burden on Liquidated Damages.

Because the facts show DP's actions were willful, summary judgment denying DP's MSJ is warranted on liquidated damages, which are "'mandatory' unless the employer can overcome the 'difficult' burden of proving both subjective 'good faith' and objectively 'reasonable grounds' for believing that it was not violating the FLSA." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909–10 (9th Cir. 2003), aff'd, 546 U.S. 21 (2005)). *See Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) (quotations omitted), holding:

> Thus, before the district court's discretion may be invoked, the employer has the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict. In the absence of such a showing, the district court has no discretion to mitigate an employer's statutory liability for liquidated damages.

"An employer's misunderstanding of the FLSA's requirements is similarly not a reasonable ground." *See, e.g., Boyer v. Celerity Sols. Grp., LLC*, 482 F. Supp. 3d 1122, 1135 (D. Colo. 2020).

[29] DP also relies (at 30) on cases that in a sentence or two affirm lower court denials of liquidated damages where the lower court cases are not available and it is difficult to glean any underlying facts from the affirming decisions. *See Hill v. J. C. Penney Co.*, 688 F.2d 370, 375 (5th Cir. 1982); *VanDyke v. Bluefield Gas Co.*, 210 F.2d 620, 622 (4th Cir. 1954).

DP makes no attempt to establish that it subjectively acted in good faith and this failure alone defeats its motion for summary judgment on liquidated damages. Neither DP's' Statement of Facts nor the supporting Kaplan declarations suffice. (Ex. 1 and 8 to DSF, Doc. 491-1, 491-8). They do not recite that they believed that they were in compliance with the law. And they provide no "objectively reasonable grounds" for believing that their conduct did not violate the FLSA.

In order to meet their burden to show that liquidated damages should not be awarded based on a defense of advice of counsel and/or an investigation, "Defendants must show they 'actively endeavored to ensure compliance,' and evidence of simply asking and receiving an answer, without more, is insufficient." *Ader v. SimonMed Imaging Inc.*, 465 F. Supp. 3d 953, 973 (D. Ariz. 2020) (quoting *Flores v. City of San Gabriel*, 824 F.3d 890, 905 (9th Cir. 2016)). *See Mumby v. Pure Energy Servs. (USA), Inc.,* 636 F.3d 1266, 1270 (10th Cir. 2011) ("court's operative inquiry focuses on the employer's diligence in the face of a statutory obligation, not on the employer's mere knowledge of relevant law."); *E.E.O.C. v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985) ("First Citizens' evidence of good faith is limited to bald assertions that the officers thought that they were in compliance with the Act"); *Randolph v. PowerComm Const., Inc.*, 309 F.R.D. 349, 366 (D. Md. 2015) (granting plaintiffs' motion for summary judgment: employer's recollections of when and what was discussed with counsel "are vague and general. … The discussions presented are simply insufficient to persuade the Court to exercise its discretion to eliminate liquidated damages."); *Diaz v. City of Plantation, Fla.*, 524 F. Supp. 2d 1352, 1369 (S.D. Fla. 2006) (conclusory testimony that was not sufficiently developed on communications with counsel precluded employer's summary judgment motion on liquidated damages).

As with the willfulness arguments, other than vague reference to "discussions" with its counsel and development of a commission plan (just one of several 7(i) exemption requirements), DP does not address how the Defendants purportedly endeavored to ensure compliance with the FLSA 7(i) overtime exemption requirements they claim in this litigation.

The record as a whole precludes any finding that liquidated damages should not be awarded. DP's motion should be denied.

F. There Was No Good Faith Dispute under Arizona Law.

DP's assertion that the Court should rule on summary judgment that Plaintiffs are not entitled to treble damages under A.R.S. § 23-355 has no merit. There can be no good faith dispute as a matter of law if DP had no good faith basis for withholding wages as Plaintiffs have shown. DP's motion also distorts the appropriate standard. The AWA provides that if an employer fails to pay wages due, the employee may recover treble damages for violations of the wage statutes. A.R.S. § 23-355(A). A.R.S. § 23-352(3) provides that an employer may assert a defense to treble damages where it can establish that "[t]here is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the employee." Neither the statute nor caselaw limits the availability of treble damages to the claimed standard DP asserts of a "deliberate failure to pay wages due beyond a reasonable dispute." (Doc. 506, at 27). To the contrary, Arizona courts have held that negligent conduct on the employer's part can suffice to negate any finding of a reasonable good faith dispute. *See Apache E., Inc. v. Wiegand*, 119 Ariz. 308, 313 (App. 1978) (affirming treble damage award where "[t]he dispute was, in part, created by the negligent manner in which the appellants handled the bookkeeping and wage record."); *Patton v. Mohave Cnty.*, 154 Ariz. 168, 172 (App. 1987) ("Since the error was in large part caused by the county's erroneous bookkeeping and its failure to undertake a reasonable investigation upon request, its refusal to pay Patton the wages owed him cannot be said to have been based upon a good-faith dispute."); *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 428 (App. 1994) ("the statute was intended to provide employers with a shield from treble damage liability when they retain wages based on a good faith belief that they owe nothing more.").

Here, the record amply demonstrates the absence of a good faith dispute in DP's failure to pay the pre- and post-trip wages due including, *inter alia*, the fact that DP knew employees were performing pre-trip and post-trip work that was uncompensated and never

bothered, even to this day, to accurately track their time. PSF ¶ 87; PSAF 7. Drivers were entitled to payment for that work and DP didn't pay them. DP did not exercise good faith in failing to pay Drivers for work performed for DP's benefit that Drivers had reasonable expectations they would receive. *See* discussion above and cases at Doc. 456, at pp. 13-14; Doc. 476, at 6. *See Sanborn*, 178 Ariz. at 428 (App. 1994) (cited at Doc. 506 at 27) (upholding treble damages, holding that where an employer had conceded that some wages were owed, those amounts couldn't be withheld on grounds that the employee had sought other amounts that the employer contended were "excessive" and "constituted overreaching."); *Abrams v. Horizon Corp.*, 137 Ariz. 73, 78 (Ariz. 1983) (upholding treble damages, finding there was no good faith dispute based, *inter alia*, on representations by the defendant's comptroller that wages were owed and defendants' acknowledgement that employee would continue the same work as to which wages were owed).

DP's arguments that Drivers were purportedly paid for their pre- and post-trip work under the commission plans is meritless as demonstrated herein. PSF ¶ 97, PSAF ¶ 7. DP was aware that their commission plans did not pay for this work. As discussed above, there was also no basis to bind Drivers to any agreement that the commission plans, which said absolutely nothing about payment for pre and post-trip work, would constitute the sole source of wages owed to Drivers. Unlike the contract in *Olson v. McKesson Corp.*, No. CV-04-2428-PHXFJM, 2006 WL 2355393, at *3 (D. Ariz. Aug. 14, 2006) (cited by DP at Doc. 506 at 28), the court found "some support in the contract and extra-jurisdictional caselaw" for the proposition that the contract covered the dispute and that "nothing causes us to conclude that it interpreted the contract in bad faith." *Id.* As explained, those considerations are absent here. In *Dalos v. Novaheadinc*, No. 1 CA-CV 07-0459, 2008 WL 4182996, at *7 (Ariz. App. Mar. 18, 2008), (cited at Doc. 506 at 27), the court ***affirmed*** an award of treble damages, rejecting the employer's defenses that it had acted in good faith where the company claimed it lacked the revenue to pay and that there were no ambiguities in the contractual obligation to pay, holding that "an employer violates the wage statutes at its peril."

As set forth above, DP's repeated "bait and switch" with regard to advertised

employee hourly rates of pay or equivalent is further evidence of bad faith. There is no evidence that Defendants ever advised Drivers when they were hired that the trip payments constituted payment for all hours worked, that Drivers were actually provided with the commission plans at time of hire, or that Defendants advised them at hiring that they would not receive payments for required pre- and post-trip worktime. Furthermore, DP cannot claim good faith that its commission plans were the sole basis for Driver compensation when DP itself has conceded minimum wage violations contrary to state and federal law. It is axiomatic that one cannot knowingly violate Arizona's wage statutes then claim they did so in good faith. On this record, finding that DP exercised good faith would sanction unlawful conduct and invite employers to knowingly devise pay schemes that deprive employees of statutorily protected wages in the hope that some employees will not challenge them and, that if they do, the employer will just simply pay the wages that were due anyway with no disincentive to refrain from future statutory violations. The obvious intent of the treble damages provisions of A.R.S. § 23-355 was intended to discourage such unlawful conduct. .

Here, DP concedes that Drivers have a right to expect payment for their pre- post- and work and yet has not paid it. PSF ¶ 107. There is no good faith dispute that Defendants have failed to timely pay Drivers all wages due.

CONCLUSION

For the foregoing reasons, DP's Motion for Summary Judgment should be denied.

Respectfully submitted this 30th day of June, 2023.

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