Daniel L. Bonnett (AZ#014127)
Susan Martin (AZ#014226)
Jennifer Kroll (AZ#019859)
Michael M. Licata (AZ#033941)
Martin & Bonnett, P.L.L.C.
4647 N. 32nd Street, Suite 185
Phoenix, Arizona 85018
Telephone: (602) 240-6900
Facsimile: (602) 240-2345
dbonnett@martinbonnett.com
smartin@martinbonnett.com
jkroll@martinbonnett.com
mlicata@martinbonnett.com

Attorneys for Plaintiffs

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; Driver Provider Management 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' REDACTED MOTION FOR PARTIAL SUMMARY JUDGMENT

(Oral Argument Requested)

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Plaintiffs hereby move for partial summary judgment holding: (1) Drivers are not exempt from overtime under the Fair Labor Standards Act ("FLSA"); (2) Defendants (collectively, "DP") violated the FLSA by failing to pay required minimum wages and overtime; (3) DP's FLSA violations were willful within the meaning of 29 U.S.C. § 255(a) and a three-year statute of limitations applies; (4) DP is liable for liquidated damages pursuant to 29 U.S.C. § 260; (5) DP violated the Arizona Minimum Wage Act ("AMWA") by failing to pay required minimum wages and failing to maintain required records of hours worked; (6) DP's AMWA violations were willful and a three-year statute of limitations applies pursuant to A.R.S. § 23-364(H), and each Rule 23 Class Member is entitled to a penalties of at least $1,000 dollars pursuant to A.R.S. § 23-364(F); (7) DP violated the Arizona Wage Act ("AWA") by failing to pay Drivers for their pre- and post-shift work; (8) Drivers' time between trips was compensable work time under the FLSA and AMWA; and (9) Defendants Jason and Kendra Kaplan are employers and liable for DP's violations of the FLSA, AMWA, and AWA and Barry Gross is an employer and liable for DP's violations of the FLSA and AMWA; with damages and other relief under each of the forgoing claims to be determined pursuant to further proceedings. This motion is supported by Plaintiffs' Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment ("SF"), the Declaration of Michael Licata in Support of Plaintiffs' Motion for Partial Summary Judgment ("MSJ Decl.") and exhibits thereto and the record before this Court.

ARGUMENT

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[I]f the nonmoving party bears the burden of proof at trial, the moving party's summary judgment motion need only highlight the absence of evidence supporting the non-moving party's claims." *E.E.O.C. v. Love's Travel*, 677 F. Supp. 2d 1176, 1178 (D. Ariz. 2009).

I. DP Cannot Meet its Burden to Show Drivers are Exempt Employees.

Defendants have the burden to prove applicability of claimed exemptions. *Peterson v. Navajo Cnty.*, No. 20-08055, 2022 WL 992664, at *3 (D. Ariz. Mar. 31, 2022). "The FLSA

exemptions 'are to be withheld except as to persons plainly and unmistakably within their terms and spirit.'" *Id.* (quoting *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). While exemptions are to be afforded a "fair reading," *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), employers have the burden of proving they "plainly and unmistakably" apply. *Ader v. SimonMed Imaging*, 465 F. Supp. 3d 953, 960 (D. Ariz. 2020).

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

The 7(i) exemption applies only to "traditional local retail or service establishment[s]." 29 C.F.R. § 779.315.[1] "[A] retail or service establishment is one which sells goods or services to the general public" and "serves the everyday needs of the community in which it is located." § 779.318. These include, e.g., grocery, hardware, clothing, and furniture stores, restaurants, watch repair shops, barber shops, "and other such local establishments." *Id. See Brennan v. Keyser*, 507 F.2d 472, 476 (9th Cir. 1974) ("Adoption of the retail exemption was an effort to balance the needs of the small town or neighborhood merchant against the welfare of employees."). *See* § 779.414. To benefit from the exemption, DP must prove three elements: (1) that each of its business locations is a retail or service establishment; (2) that each Driver's regular rate of pay was more than 1.5 times the applicable minimum wage; and (3) that more than half of each Driver's compensation represented commissions on the sale of goods or services. *Gieg*, 407 F.3d at 1046; 29 U.S.C. § 207(i)). DP cannot prove these elements.

Before addressing each element, two points should be mentioned. First, contrary to what DP has argued, an employer does not qualify for the exemption merely because it provides a service. (Doc. 451 at 9). If an employer provides a service, it must be a "retail service." This has long been settled and is not open to challenge. *See Coast Van Lines v. Armstrong*, 167 F.2d 705, 706 (9th Cir. 1948) ("The reasonable conclusion to be drawn from the history is that Congress did not intend to exempt employees of all sellers of services, but only of those establishments whose business was analogous to the local retailer[]" and referencing "local

[1] Unless stated otherwise, citations to federal regulations are to Title 29, C.F.R. The Ninth Circuit defers to DOL regulations when applying 7(i). *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1046 (9th Cir. 2005); *Martin v. Refrigeration Sch., Inc.*, 968 F.2d 3, 6 (9th Cir. 1992).

purveyors of services," whose business was conducted directly with the consuming public, like the "barber shop, beauty parlor and tailor shop"); *Aetna Fin. Co. v. Mitchell*, 247 F.2d 190, 192 (1st Cir. 1957) ("In a broad sense, every business might be said to perform a 'service', yet that no one would seriously urge that all types of businesses were eligible to be exempt as 'service establishments' under § 13(a)(2)."); *Kelly v. A1 Tech.*, No. 09-962, 2010 WL 1541585, at *11 (S.D.N.Y. Apr. 12, 2010) (citing *Van Coast Lines* & *Lesser v. Sertner's Inc.*, 166 F.2d 471, 473 (2d Cir. 1948)); § 779.314 ("[I]t is clear from the context and the legislative history that all business establishments are not making sales of 'services' of the type contemplated in the Act;"); § 779.315 ("retail" to be read in context of Congress's objectives).

Second, "establishment" "means a distinct physical place of business." § 779.303. "Each such physically separate place of business is a separate establishment." *Id.* "Establishment" is not synonymous with a "business" or "enterprise," *id.*, as DP has argued. (Doc. 451 at 9). *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945) ("Congress used the word 'establishment' as it is normally used in business and in government—as meaning a distinct physical place of business[.]").

1. DP Cannot Prove Each Location is a Retail Establishment.

A retail or service establishment is "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." 29 C.F.R. § 779.411 (emphasis added).[2] Thus, DP must make a two-part showing for *each establishment* and *each year* (2016 to present): that 75% of the services sold are "recognized as retail sales" in the industry and not "sales for resale." As DP cannot prove either requirement for *any* establishment or *any* year, summary judgment on this exemption should be granted.

[2] *Gieg*, 407 F.3d at 1047 ("When Congress enacted section 207(i) in 1966, it intended the term 'retail or service establishment' to have the same meaning [as 29 U.S.C. § 213(a)(2)].") (citing 29 C.F.R. § 779.411); *Reich v. Delcorp, Inc.*, 3 F.3d 1181, 1183 (8th Cir. 1993) (same); 29 C.F.R. 779.312 (citing legislative history) & § 779.411.

a. Defendants Cannot Show 75% of Sales Are Recognized as Retail.

As mentioned, 7(i) "is available only to a 'traditional local retail or service establishment.'" *Delara v. Diamond Resorts Int'l Mktg., Inc.*, No. 19-00022, 2021 WL 6123563, at *4 (D. Nev. Dec. 27, 2021) (quoting § 779.315). "Consequently, '[n]ot only must the particular sales or services in question be recognized as retail in the industry, but the industry itself must be one which Congress contemplated as falling within the 'retail concept.'" *Id.* (quoting *Brennan*, 507 F.2d at 475). Accordingly, to determine whether an employer meets the retail sales requirements, courts apply another two-prong test: (1) the establishment must be part of an industry in which there is a "retail concept"; and (2) the establishment's services must be recognized as retail in the industry. *Id. See Johnson v. Wave Comm GR LLC*, 4 F. Supp. 3d 423, 436 (N.D.N.Y. 2014); 29 C.F.R. § 779.316; *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202-03 (1996). ("[I]t is generally helpful to ask first whether the sale of a particular type of goods or services can ever qualify as retail whatever the terms of sale; if and only if the answer is affirmative is it then necessary to determine the terms or circumstances that make a sale of those goods or services a retail sale."); 29 C.F.R. § 779.329 ("If the subject of the sale does not come within the concept of retailable items contemplated by the statute, there can be no recognition in any industry of the sale of the goods or services as retail, for purposes of the Act, even though the nomenclature used by the industry members may put a retail label on the transaction.").

(1) Defendants' Business Lacks a Retail Concept.

"The question whether the industry itself falls within the retail concept of the Act is one of law—of statutory interpretation." *Brennan*, 507 F.2d at 475. This is a "threshold requirement" that DP cannot prove. *Partida v. Am. Student Loan Corp.*, No. 07-0674, 2008 WL 190440, at *2 (D. Ariz. Jan. 18, 2008). Until May 2020, *after* this lawsuit was filed, the DOL maintained a "list of establishments" that had "no retail concept" that were categorically unable to qualify as exempt under 7(i). § 779.317 (2019). The *per se* exclusion list included "Transportation companies." *Id.* While the DOL withdrew the list to address "modernization" of some industries and to promote "consistent treatment" by applying the

same analysis to all establishments," 85 FR 29867-01, DP cannot show it "serves the everyday needs of the community, how it is a traditional local retail establishment, or that Congress contemplated it as falling within the retail concept." *Fischer v. Full Spectrum Laser LLC*, No. 22-00339, 2022 WL 16857387, at *2 (D. Nev. Sept. 16, 2022). *See Umbrino v. L.A.R.E Partners*, 585 F. Supp. 3d 335, 352 (W.D.N.Y. 2022) ("lack of a *per se* exclusion [under § 779.317] does not relieve an employer…of its threshold burden of demonstrating that [its] industry has a retail concept").

Far from the local retailers contemplated under the Act, most of DP's revenue is derived from business-to-business arrangements, including multi-million-dollar contracts, that do not serve the everyday needs of the local community. SF ¶ 2, 4, 17-20, 24, 25, 26, 27, 30, 31, 32. By way of example, DP was awarded an $Redacted contract, through a bid process, whereby it operates 35 transit buses at a construction site. SF ¶ 26(a). Pursuant to another contract, DP transports employees at Intel's Chandler campus, including on buses and "tow tugs" (think Disneyland tram). SF ¶ 26(b). From 4/28/19 to 12/19/22, DP's revenue from these two fixed routes was $Redacted representing over 34% of its revenue for the period. SF ¶ 25. Even in the relatively few instances where DP's services are local and sold directly to a consumer, its services do not meet the everyday needs of the community. For example, in *Contreras v. Aventura Limousine & Transportation Serv., Inc.*, No. 13-22425, 2014 WL 11880993, at *6 (S.D. Fla. June 30, 2014), the court found the 7(i) exemption could not apply to a business that, like DP, provided chauffeured transportation services because such services do not serve the everyday needs of the community and are instead infrequently used by most people. *See Id.* at *6 ("[W]eddings, proms, birthday parties, graduations, anniversaries, private parties, nights out or events, trips to the airport, meetings, or corporate commitments—are not daily events with daily needs for the general public. Moreover, chauffeured transportation to those events does not serve the everyday needs of the community; rather, it is an infrequent occurrence for most people."). DP provides nearly identical services in addition to, *inter alia*, corporate campus shuttles, National Park tours, interstate bus service, and booking trips for customers in other locations *outside* the local community. SF ¶ 14, 15, 17, 18, 19, 20, 25.

Plaintiffs have not located a single instance where a court found 7(i) applied in DP's industry and Defendants are unable to identify a single other business in its industry that relies on this exemption. SF ¶ 45. DP has not and cannot show its business is "plainly and unmistakably within [the exemption's] terms and spirit." *Buber v. GrowersHouse LLC*, No. 20-00219, 2023 WL 2214333, at *6 (D. Ariz. Feb. 24, 2023).

(2) Defendants Cannot Establish Recognition Within the Industry.

Even if DP could establish its business is the type covered by the 7(i) exemption, it cannot prove 75% of each establishment's sales, for each of the relevant years, are recognized as retail within their industry. DP has not produced any evidence sufficient to establish the requisite revenue requirements for each establishment and year or any evidence sufficient to establish recognition within the industry. SF ¶ 24, 25, 46, 47, 166, 170.

The only data DP produced fails to distinguish between years or establishments despite DP confirming it has the data. SF ¶ 47, 170. This is fatal to DP's defense. *See* § 779.342 ("The 'annual dollar volume of sales' of an establishment consists of the gross receipts from all sales of the establishment during a 12–month period."). *See Alston v. DIRECTV, Inc.*, 254 F. Supp. 3d 765, 783 (D.S.C. 2017) ("[T]he only evidence to which DirecTV points to prove that it employs Plaintiffs in a retail or service establishment…refers to the volume of goods and services sold by DirecTV as a whole and makes no mention of the volume of goods and services sold by any subpart thereof."); *Dahdouh v. Rd. Runner Moving*, No. 20-61936, 2021 WL 3682293, at *5 (S.D. Fla. Aug. 3, 2021), *report and rec. adopted*, No. 20-61936, 2021 WL 3674692 (S.D. Fla. Aug. 19, 2021) ("Defendants failed to provide evidence of retail/resale percentages in the first instance notwithstanding their burden to do so."); *Lopez v. Triangle Fire, Inc.*, No. 15-22209, 2017 WL 2272057, at *4 (S.D. Fla. May 23, 2017) ("Defendants have failed to meet their burden of proving the applicability of the exemption because the record does not establish precise percentages of dollar volume attributable to sales which could properly be designated as retail sales."); *Acme Tire & Battery Co. v. Wirtz*, 330 F.2d 116, 119 (5th Cir. 1964) ("[T]he only evidence as to the dollar volume of sales from Acme's main place of business covers a 19-month period, rather than an 'annual' period, as required by the Act. There is no

evidence from which Acme's annual dollar volume of sales can be determined."). *See also Encinas v. Tucson Elec. Power*, 76 F. App'x 762, 765 (9th Cir. 2003) ("An adverse inference is appropriate when a party…fails to produce relevant evidence within its control."); *State Tax Comm'n v. Graybar Elec.*, 86 Ariz. 253, 257 (1959) (where "information is readily available to a party, it can only be presumed from the failure to produce it that the inference is adverse").

Defendants' failure to produce any records showing their annual sales revenues for each establishment for each year precludes their defense based on the 7(i) exemption. Defendants admit they have never analyzed the retail sales requirements for any establishment. SF ¶ 46. Their transparent attempt to circumvent the requirements of the defense by claiming they consider 100% of their sales to be retail is frivolous. *Id.* The relevant inquiry is whether the sales are recognized as retail *within the industry*, which is not determined by the employer. *Idaho Sheet Metal*, 383 U.S. at 204-05; § 779.324 ("[T]he basis for the determination as to what is recognized as retail 'in the particular industry' is wider and greater than the views of an employer in a trade or business, or an association of such employers. It is clear from the legislative history and judicial pronouncements that it was not the intent of this provision to delegate to employers in any particular industry the power to exempt themselves from the requirements of the Act."). Here, DP has not put forth a shred of evidence to establish recognition of their sales as retail within their industry. This is also fatal to DP's defense. *Umbrino*, 585 F. Supp. 3d at 353 ("Defendants have not come forward with any information regarding how the relevant players within its industry would view its services."); *Dahdouh*, 2021 WL 3682293, at *5 (same); *Owopetu v. Nationwide CATV Auditing Servs., Inc.*, No. 10-18, 2011 WL 883703, at *9 (D. Vt. Mar. 11, 2011) (no evidence "as to how persons in the industry and with knowledge of the industry view" its business.); *Andersen v. DirecTV Inc.*, No. 14-02307, 2017 WL 3382158, at *9 (D. Ariz. July 26, 2017) ("Defendant has offered no evidence that it is a retail establishment, failing to present facts that meet the requirements the Ninth Circuit has set forth.") (citing *Gieg*, 407 F.3d at 1047). In fact, the only evidence on the issue shows most of DP's revenues are *not* considered retail within the industry. SF ¶ 45; *see* MSJ Decl. Ex. V-1 (O'Neal Report at ONE000028-29).

Defendants' testimony that all their revenue is "retail," is also directly contradicted by their *own* records which show they actually consider only a *small* portion of their revenue to be "retail" and classify most revenue as "wholesale," "corporate," or from "affiliates" (other transportation companies), destination management companies ("DMCs"), hotels, and schools. Those sales are in substantial quantities and at discount rates. SF ¶ 24, 25, 27, 29, 30. None of these sales are retail for purposes of 7(i). While sales of services to other businesses are not *per se* prohibited from being considered "retail," to qualify as retail, sales to commercial customers must be in quantities purchased and at prices paid by members of the public. *See* § 779.328; Oct. 12, 2022 Order (Doc. 353) at 4 (citing § 779.328). § 779.328 is consistent with Supreme Court precedent and Congressional intent. *See Idaho Sheet Metal*, 383 U.S. at 200-204 (discussing, *inter alia*, price discounts and large quantities as representative of sales that are not for retail). *See also* § 779.328(a) and § 779.328(b). Where a contract covers the purchase of large quantities of services that are performed in small quantities, or where there is no contract, but another business arrangement, "if the total quantity of goods or services which is sold is materially in excess of the total quantity of goods or services which might reasonably be purchased by a member of the general consuming public during the same period, it will be treated as a wholesale quantity for purposes of the statutory definition of the term 'retail or service establishment,' in the absence of clear evidence that under such circumstances such a quantity is recognized as a retail quantity in the particular industry." § 779.328(c). In addition, sales made pursuant to formal bid procedures, like those used by federal, state, and local governments, may not be recognized as retail sales. § 779.328(d).

Here, 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 the general public. SF ¶¶ 24-27, 29-31. These include sales to wholesalers, DMCs, hotels, and affiliates, that are at discounted prices, which DP confirmed were based on the "higher volume of bookings" by such customers. *Id.* Defendants also derive revenue through formal bid procedures employed by the federal, state, and local governments and even obtain revenue from federal grants. SF ¶¶ 12, 17, 19.

b. Defendants Cannot Show 75% of Sales Are Not for Resale.

DP cannot show that 75% of each establishment's annual dollar volume of sales are from sales which are not made for resale. § 779.330. The requirement that 75% of each establishment's dollar volume must be from sales of services "not for resale" is a separate test. *Id.* In other words, 75% must be from sales which are both not for resale *and* recognized as retail within the industry. *Id.* "The common meaning of 'resale' is the act of 'selling again.' A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold." § 779.331. "The same principles apply in the case of sales of services for resale." § 779.334. But "many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized as retail in a particular industry." § 779.322. *See also* 29 U.S.C. § 203(k) (defining sale).

Here, DP's revenues include those derived from discounted sales for transportation services that are packaged and resold, sometimes at substantial markups, including by resort hotels, DMCs, "wholesalers", and other transportation companies known as "affiliates." SF ¶ 26-33. These are all sales for resale. So are the employee shuttles. *See* § 779.331 ("sales for distribution by the purchaser for business purposes are sales for resale under the 'other disposition' language of the definition of 'sale' even though distributed at no cost to the ultimate recipient"). DP's revenue is also derived from selling transportation services that are carried out by other companies in other locations. SF ¶ 13, 21, 23, 28. *See* 29 U.S.C. § 203(k); *Dahdouh*, 2021 WL 3682293, at *5 ("Road Runner frequently acts as a middleman by selling services to customers that other companies carry out…these services are often not provided locally."); Opinion Letter Fair Labor Standards Act (FLSA), 2021 WL 240827, at *4 (Jan. 19, 2021) (staffing firm referral of candidates to other staffing firms is a resale). MSJ Decl. Ex. V-1, at ONE000021-26. *See also* § 779.331 ("sales by an establishment to a competitor are regarded as sales for resale"). The evidence also establishes that Defendants understood sales to each of these types of businesses would be resold. SF ¶ 30, 31, 32, 33. DP has not and cannot show that from 2016 to present more than 75% of each establishment's annual dollar volume of sales were not for resale.

c. DP Cannot Meet the *Bona Fide* Commission Requirement.

"Whether a given payment constitutes a 'commission' is a question of law. *Almanzar v. C & I Assocs.*, 175 F. Supp. 3d 270, 275 (S.D.N.Y. 2016) (citing *Klinedinst v. Swift Invs.*, 260 F.3d 1251, 1254 (11th Cir. 2001)). "It is a functional test and turns not on what the payment is called but rather on how that payment system works in practice." *Id.* "[C]ourts have described a commission as having distinct features…: (1) whether the commission is a 'percentage or proportion of the ultimate price passed on to the consumer;' (2) whether the commission is 'decoupled from actual time worked, so that there is an incentive for the employee to work more efficiently and effectively;' (3) the type of work is such that its 'peculiar nature' does not lend itself to a standard eight-hour work day; and (4) whether the commission system 'offend[s] the purposes of the FLSA.'" *Taylor v. HD & Assocs.*, 45 F.4th 833, 839 (5th Cir. 2022). Here, DP's compensation structure lacks every feature present in a *bona fide* commission. SF ¶¶ 51-57; *see* MSJ Decl. Ex. V-1 (O'Neal Report at ONE000032-35). Where a commission is *bona fide*, the employee's compensation will rise or fall based on the amounts paid by the customer, which usually provides incentive to employees to increase sales or sale prices. For example, in the context of commissioned employees selling "big ticket" items in a department store, a *bona fide* commission will result in higher pay to the employee if she sells a washing machine at a higher price or sells a service contract in addition to the appliance. Here, DP does not pay Drivers based on the ultimate amounts paid by customers. Rather, DP's compensation scheme "does not have anything to do with what the [customer] is paying." SF ¶ 52. Rather, it is nothing more than an arbitrary amount determined by DP paid on a per-trip basis. *Id.* DP's compensation scheme does not have the proportionality to price present that is present for bona fide commissions. *See Herman v. Suwannee Swifty Stores, Inc.*, 19 F. Supp. 2d 1365, 1371 (M.D. Ga. 1998) ("The whole premise behind earning a commission is that the amount of sales would increase the rate of pay."); Opinion Letter, 1996 WL 1031770 (contrasting a fee paid per installation with fee based on percent of actual sales price).

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); *see Jackson v. R&A Towing, LLC, No.* 4:21-CV-0618, 2023 WL 2433977, at *7 (S.D. Tex. Mar. 9, 2023) (discussing why tow truck drivers' rates were tied to time worked, not decoupled from the amount of time worked). Reference again to department store employees provides clarification and confirmation of this hallmark: one day a commissioned sales employee may work an 8-hour shift and sell one washing machine. The next day, the employee may work the same 8-hour shift but sell 10 washing machines. The employee's compensation is not tied to the amount of time worked (8 hours each day), but rather to the sales made. § 779.414. Here, the evidence shows that DP's so-called commission plan is not decoupled from work time. Rather, the only way Drivers can earn additional compensation is by being "available" more hours and being assigned more trips, which are entirely at DP's discretion. SF ¶¶ 54-57. DP also purports to pay commission to Drivers who work pursuant to shifts, i.e. the same schedule each day for the same amount of pay. SF ¶ 26(a),(b), 56, 99. *See* § 779.416(c) ("A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek."). DP also advertised and hired Drivers positions with hourly wage rates or equivalents. SF ¶¶ 39, 40, 100, 102, 103, 106.

As to the other features of a bona fide commission, DP demands full-time Drivers to be "available" 60 hours per week (six days, 10 hours per day) (SF ¶ 128), but this is merely a requirement that benefits DP. There is nothing "peculiar" about the work that requires it. Drivers work pursuant to schedules determined weeks in advance and many Drivers are assigned shifts, i.e., the same hours every day for the same hourly pay. *E.g,* SF ¶ 26(b) 99. DP's compensation system is merely an unlawful scheme to avoid paying overtime to low wage employees who are required to work lengthy workweeks—often exceeding 40 hours—without any means to affect the amount of compensation they receive as so-called "commissions." This was not the intended purpose of 7(i) and offends the purpose of the FLSA and its overtime provisions. *See* § 779.414; *Gieg*, 407 F.3d at 1046 ("The regulation exempts employers who employ *well-compensated employees*…") (citing *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (clarifying why purposes of overtime

provisions are not offended where there is a bona fide commission).

2. DP Cannot Prove 7(i)'s Minimum Compensation Requirements.

Even if DP had not violated all the other threshold requirements for the 7(i) exemption, DP cannot prove Drivers were paid at least 1.5 times the applicable minimum wage for all workweeks during the relevant time period. *First*, Defendants failed (and continue to fail) to comply with all the numerous, detailed recordkeeping requirements needed to prove application of and compliance with the exemption. *See* §516.16.[3] SF ¶ 76-88, 93, 168, 169. As explained in the DOL Fact Sheet provided to DP by their counsel in 2015: "Regulations require that employers maintain accurate records of hours worked each workday, hours worked each workweek, and earnings and wages paid. *Without hours worked and earnings records, the employer will be unable to substantiate that all conditions for the exemption have been met.*" SF 166.[4] In addition to failing to record all hours worked (the principal means to establish 7(i)'s wage requirements), DP paid discretionary gratuities as commissions even though gratuities cannot be counted as commissions or wages. SF ¶ 49-51, 76-88, 171. *See Alban v. 2K Clevelander*, No. 17-23923, 2018 WL 4859068, at *6 (S.D. Fla. Aug. 28, 2018) ("The Court has serious doubts as to whether Defendant can maintain a 7(i) exemption upon a 'bona fide' commission rate where non-commissioned tips were commingled in with the rest of the pool."). SF ¶ 49-50, 140, 171; MSJ Decl. Ex. V-1 (O'Neal Report at ONE000036--41). In addition, the retroactive estimates produced by DP in discovery improperly exclude substantial worktime (SF ¶ 76-88, 135, 136), and do not account for deductions to Drivers' pay by DP (SF ¶ 92-93), but nonetheless show DP did not pay the requisite wages in all workweeks. SF ¶ 91. Defendants

[3] § 516.16 incorporates (with minor exceptions) all the payroll and other records required under the Act, including, *inter alia:* start time, hours worked each workday and week; total wages; and additions and deductions from wages. 7(i) also requires employers to notate records to identify employees paid pursuant to 7(i), to maintain a copy of the agreement under which 7(i) is utilized or a memo summarizing its terms, including the basis of compensation, the representative period, the date the agreement was entered into, and how long it remains in effect, and the total compensation paid to each employee each pay period (showing separately the amount of commissions and noncommission amounts).

[4] DP has been advised of these requirements repeatedly and promised to keep such records in response to multiple DOL investigations. SF ¶ 76-79, 87, 88, 93, 144-150, 168, 169, 179.

did not and cannot satisfy the compensation requirements for invoking the 7(i) exemption.

B. The Exemption for Taxicab Companies 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 have a separate definition of what it means to be "in the business of operating taxicabs," but the DOL has issued guidance in its Field Operations Handbook ("FOH"):

> The taxicab business consists normally of common carrier transportation in small motor vehicles of persons and such property as they may carry with them to any requested destination in the community. The business operates without fixed routes or contracts for recurrent transportation. It serves the miscellaneous and predominantly local transportation needs of the community. It may include such occasional and unscheduled trips to or from transportation terminals as the individual passengers may request, and may include stands at the transportation terminals as well as at other places where numerous demands for taxicab transportation may be expected.

FOH § 24h01. The DOL has also issued an opinion letter on the taxicab exemption in which it explains, *inter alia*, that "[t]he ordinary meaning of [taxicab] contemplates vehicles that are offered for hire to the general public on city streets. While it is not necessary that all the transportation be provided to persons who 'flag down' the vehicles, that is an important aspect of the common meaning of 'taxicab[.]'" Opinion Letter (FLSA), 1998 WL 852774.[5]

Numerous courts, including the District of Arizona, have relied on the FOH factors or similar factors when determining application of the exemption.[6] As recognized in the cited

[5] 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." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Helix Energy Sols. Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 678 (2023) (applying clear meaning of long-established regulations: "The Court's reading of the relevant regulations properly concludes this case"); *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 630 (9th Cir. 2018), *Clarke v. AMN Servs.*, 987 F.3d 848, 856 (9th Cir. 2021) (applying guidance in the FOH).

[6] *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); *Blan v. Classic Limousine Transp.*, No. 19-807, 2021 WL 1176063, at *5 (W.D. Pa. Mar. 29, 2021); *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

cases, whether an employer qualifies for the taxicab exemption requires "a fact-intensive evaluation of all relevant facts and circumstances," and there is "no precise formula[.]"*Chao*, 2001 WL 37131280, at *4. Here, Relevant facts include, *inter alia*: the vast majority of DP's business is derived from contracts and recurrent business with corporate clients, as opposed to the general public (SF ¶ 12, 17, 20, 21, 23, 24, 25, 26, 30); most of DP's fleet are large vehicles, including 73 buses (35 "city" buses, 21 "mini" buses, 17 full coach buses, & 3 shuttle buses), 3 "Textron Tugs" (think Disneyland tram) with 10 tug trailers, and 16 sprinter vans (SF ¶ 14); DP operates a variety of fixed routes, including (among others) employee shuttles, school bus routes, interstate tours (for other tour companies), National Park tours, and the interstate Mountain States Express (between Salt Lake City, UT and Jackson, WY) (SF ¶ 17, 20, 26(a-c)); all trips are prearranged and Drivers are not permitted to "cruise" for passengers or pick up passengers how "hail" them on the street (SF ¶ 63); none of DP's vehicles have taximeters, dome lights, or say "Taxi" on them (SF ¶ 60, 70); DP does not advertise as a "Taxi" company (*id.*); fares are not posted inside the vehicles (SF ¶ 65); DP is not licensed to operate taxicabs, although that is required in each of DP's operating locations (SF ¶66); fares are not determined by the distance, but instead are flat-rate or hourly (SF ¶ 59); DP's fares are significantly higher than those charged by recognized taxi companies in the local area (SF ¶ 68); DP does not operate taxi stands (SF ¶ 61); and DP's business does not serve the everyday needs of the community (SF ¶ 15-26).

It is also worth noting that DP only asserted the exemption *after* this lawsuit was filed as a *post-hoc* rationalization based on the decision in *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, 904 F.3d 208 (2d Cir. 2018), 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, is readily distinguishable and should not be followed here. In *Munoz*, the fleet primarily consisted of "small" vehicles. *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, No. 15-9368, 2017 WL

(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, Inc.*, 992 F. Supp. 1054, 1059–60 (E.D. Wis. 1998).

2973980, at *1 (S.D.N.Y. July 12, 2017). At the time, there were only 18 vehicles, all "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.").[7] The company also operated an airport "taxi stand" and did not operate fixed routes or schedules. 904 F.3d at 216.

In *Blan,* 2021 WL 1176063, at *1, the court found that even considering the factors in *Munoz,* the employer was not a taxicab company based on facts that are also present here. 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 8 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*.

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. *Munoz*, 904 F.3d at 214 and n.6 (despite noting that multiple dictionary definitions and the Motor Carrier Act (1935) reference taximeters and a small number of passengers). 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

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

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). When the FLSA was enacted, the term "Taxicab" was "short for *Taximeter* cab." Taxicab, The Oxford English Dictionary (1933) (emphasis added) (MSJ Decl. Ex. Y-2).[8] This Court should not disregard the meaning of "taxicab" in the 1930's.

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 Helena Glendale Ferry Co. v. Walling*, 132 F.2d 616, 619 (8th Cir. 1942) ("The section of the Act granting exemptions deals with employment of a character or with employees of a class to which application of the provisions of the Act for … maximum hours is either impracticable or impossible, or with employees in occupations in which the conditions of labor are regulated by other statutes..."). "To a large extent taxi drivers are free to organize their own time and to select their own routes, and they are required to exercise considerable initiative to secure the necessary patronage[.]." *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. As stated in *Munoz*, 904 F.3d at 208, "mandating overtime compensation for taxicabs could have forced municipalities to change their fare caps to keep cabbing profitable." *Id.* at 215 (noting other exemptions work to avoid regulatory clashes in the transportation industry).

Here, in stark contrast, DP's Drivers work pursuant set schedules or "shifts" and do not cruise for passengers. Rather, they 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

[8] Scalia & Garner, Reading Law: The Interpretation of Legal Texts 419-420 (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").

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."). Here, DP is *not* regulated as a taxicab, even though each location in which it operates regulates taxicabs including, *inter alia*, mandating taximeters, signage, posting of rates.[9] Here, like many other similar companies, including DP's partners like Carey International (n. 6, *supra*), the nature of the business, the working conditions of Drivers, and the purpose of the exemption all weigh against a finding DP to be a taxicab company under 29 U.S.C. § 213(b)(17).

II. DP Violated the FLSA's Minimum Wage and Overtime Requirements.

The FLSA requires employers to pay covered, non-exempt employees minimum wages and overtime pay. 29 U.S.C. §§ 206, 207. These FLSA violations require proof of three elements: (1) that Drivers were employees of Defendants; (2) they were covered under the FLSA; and (3) Defendants failed to pay them minimum wages or overtime wages. *Leyva v. Avila*, No. 21-00635, 2022 WL 5241894, at *2 (D. Ariz. Oct. 6, 2022). *Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 889 (9th Cir. 2017) (citations omitted).

It is undisputed that Drivers are employees, and the DP entities meet the requirements for FLSA enterprise coverage under 29 U.S.C. §§ 203(r), (s). (SF ¶ 2-10). Accordingly, Drivers are covered by the minimum wage provisions, and unless an exemption applies, the overtime provisions of the FLSA. As to the third element, it is undisputed that DP failed to pay some Drivers at least the minimum wage in some workweeks. (SF ¶ 91). It is also undisputed that Drivers regularly worked more than 40 hours per week but were never paid any overtime compensation. (SF ¶ 90-91). Because DP cannot meet their burden to prove their claimed

[9] Salt Lake Ord. Ch. 5.18, at § 5.18.080, 090; A.R.S. §§ 28-9505, 28-9506(B); (SF ¶¶ 66, 70).

overtime exemptions, Plaintiffs are entitled to summary judgment on both FLSA claims.

III. DP Violated the Arizona Wage Act, A.R.S. § 23-355.

To establish a violation of the AWA, a plaintiff "must prove that [d]efendants did not timely pay all wages due as required under the AWA." *Grabda v. IMS Acquisition LLC*, No. 20-00117, 2020 WL 5544366, at *2 (D. Ariz. Sept. 16, 2020). Summary judgment is appropriate because; (1) it is undisputed DP required Drivers to perform pre- and post-shift work (SF ¶ 34, 36-37 and subparts); (2) DP agrees Drivers should be paid for the work (SF ¶ 94); and (3) the evidence confirms DP failed to pay Drivers for their pre- and post-trip work. SF ¶ 95-109. While DP claims Drivers were already compensated for that work as part of the so-called "commission" plans, there is a no evidence sufficient to create a genuine factual dispute on this issue. The so-called commission plans say *nothing* about pre- and post-trip work and there is no other evidence showing the amounts paid to Drivers covered all hours worked. While DP attempted to make this showing through a self-serving assertion by K. Kaplan (Doc. 464-1), it is black-letter law that a *post-hoc* explanation of supposed "intent" is irrelevant and inadmissible. *See* Doc. 464 (citing *State v. Mecham*, 173 Ariz. 474, 483 (Ct. App. 1992); *Helena Chemical Co. v. Coury Bros. Ranches*, 126 Ariz. 448, 453 (Ct. App. 1980); *Stewart v. Sw. Cotton Co.*, 38 Ariz. 547, 550 (1931)). There is, however, substantial admissible evidence that shows Drivers were not paid at all for their pre- and post-trip work.[10] **(SF ¶ 95-109).** For example, Defendants' failure to pay anything for pre- and post-trip work is dramatically illustrated by some of the employees who were victimized by Defendants' schemes. Defendants have advertised and hired Drivers who respond to ads promising $18 per hour "equivalents." The record shows that after being promised the advertised hourly rate, once on the job Defendants implement what one Driver termed a "bait & switch" and fail to pay for all hours worked paying nothing for the required pre-and post-trip time. (SF ¶¶ 99-103).

[10] DP knew employees were protesting the failure to be paid for work hours (SF ¶ 140-43, 100-105) and their mere continued employment does not negate Drivers' reasonable expectation to be paid for all hours worked. There is no triable issue of fact nor any agreement by Drivers that they should not be paid for those hours. SF ¶¶ 110-111.

IV. DP Violated the Arizona Minimum Wage Act.

DP violated the AMWA in two ways: it failed to pay required minimum wages and failed to maintain required records. A.R.S. § 23-364(G) provides that employers who fail to pay required minimum wages must "pay the employee the balance of the wages owed, including interest thereon, and an additional amount equal to twice the underpaid wages or earned paid sick time." Here, it is undisputed that DP failed to pay Rule 23 Class Members, including Named Plaintiffs, at least the minimum wage in some workweeks. SF ¶ 91.

As to the recordkeeping claim, A.R.S. § 23-364(D) provides "[e]mployers shall maintain payroll records showing the hours worked for each day worked, and the wages…paid to all employees for a period of four years. Failure to do so shall raise a rebuttable presumption that the employer did not pay the required minimum wage rate[.]" A.R.S. § 23-364(F) provides that "[a]ny employer who violates recordkeeping, posting, or other requirements that the commission may establish under this article shall be subject to a civil penalty of at least $250 dollars for a first violation, and at least $1,000 dollars for each subsequent or willful violation."[11] Here, DP failed to maintain the records required under the AMWA and did so willfully. SF ¶¶ 76-88, 144-179. Accordingly, Plaintiffs are entitled to summary judgment and statutory penalties of $1,000 for every Rule 23 Class Member. *See* Doc. 416, at 12 ("The Court also finds the claim cognizable, as other courts have awarded damages under the statute.") (citing *Senne v. Kansas City Royals Baseball Corp.*, No. 14-00608, 2022 WL 783941, at *89 (N.D. Cal. Mar. 15, 2022) (finding damages under A.R.S. § 23-364(F) "for every Arizona class member whose payroll records were not maintained by Defendants").

V. The Individual Defendants are Liable Under the FLSA, AMWA, and AWA.

The FLSA, AMWA, and AWA provide that employers are liable for violations of the statute. 29 U.S.C. § 216(b); A.R.S. § 23-364(F) & (G); A.R.S. § 23-355.

The FLSA and the AMWA define "employer" to include "any person acting directly or

[11] The Industrial Commission has established detailed and extensive recordkeeping requirements. *See* Ariz. Admin. Code R20-5-1210. The failure to maintain payroll records showing the hours worked "shall raise a rebuttable presumption that the employer did not pay the required minimum wage rate." A.R.S. § 23-364(D).

indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d); A.R.S. § 23-362(B). The AMWA "looks to the standards of the FLSA to determine whether an individual is an employee[.]" *Martinez v. Ehrenberg Fire Dist.*, No. 14-00299, 2015 WL 3604191, at *2 (D. Ariz. June 8, 2015). Courts therefore apply FLSA caselaw when determining employer status under the AMWA. *Loserth v. Accelerated Retention Inst. LLC*, No. 18-03587, 2020 WL 13268122, at *4 (D. Ariz. Feb. 7, 2020); *Cramton v. Grabbagreen Franchising*, No. CV-17-04663, 2019 WL 7048773, at *24 (D. Ariz. Dec. 23, 2019). The Ninth Circuit gives this definition an "expansive interpretation." *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc) (quoting *Bonnette v. Cal. Health & Welfare*, 704 F.2d 1465, 1469 (9th Cir. 1983)). *See Bryant v. Tristate Logistics of Arizona*, No. 19-01552-PHX-SMB, 2020 WL 1285907, at *2 (D. Ariz. Mar. 18, 2020). Those who have "economic control" or who exercise "control over the nature and structure of the employment relationship" are considered employers for FLSA purposes. *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (quoting *Lambert*, 180 F.3d at 1012). "Notably, 'an employer-employee relationship…does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'" *Bryant*, 2020 WL 1285907, at *2 (quoting *Bonnette*, 704 F.2d at 1469). "As a guide in making this determination, the Ninth Circuit looks to four factors: 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.' *Id.* (quoting *Bonnette* at 1470). Managers and officers, not just owners, may be independently liable under the FLSA. *Loserth*, 2020 WL 13268122, at *5. "The determination of employer status presents a mixed question of fact and law where the ultimate question whether an individual is an employer for FLSA purposes is a question of law to be determined by the court." *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-00824, 2018 WL 1088811, at *11 (D. Ariz. Jan. 9, 2018). *See also Delgado v. Dempsey's Adult Care Homes*, No. 22-15176, 2023 WL 3034263, at *2 (9th Cir. Apr. 21, 2023) (individual liability under AMWA).

Individual owners of businesses may also be held liable under the AWA. In *Schade v. Diethrich*, 158 Ariz. 1 (1988), the Arizona Supreme Court expressly referenced the relationship

between the individual defendant and entity which he wholly owned and affirmed judgment against both under A.R.S. § 23-355. *Id.* at 15 and n.1. *Accord Singleton v. Adick*, No. 09-0486, 2011 WL 1103001, at *6 (D. Ariz. Mar. 25, 2011) (individual who was the president, CEO, and sole shareholder of corporation was jointly liable for treble damages under § 23-355).[12]

Here, the evidence shows summary judgment is appropriate finding Jason Kaplan, Kendra Kaplan, and Barry Gross liable as employers under the FLSA and AMWA, and Jason Kaplan and Kendra Kaplan liable as employers under the AWA. SF ¶¶ 112-126.

VI. Time Between Trips Was Compensable Work Time.

""The Supreme Court long ago established that 'no principle of law…precludes waiting time from also being working time,' and that an employee who is 'engaged to wait' must be compensated, even though an employee 'wait[ing] to be engaged' need not." *Lassen v. Hoyt Livery, Inc.*, 120 F. Supp. 3d 165, 175 (D. Conn. 2015) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944)). S*ee Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1944) ("an employer, if he chooses, may hire a man ... to do nothing but wait for something to happen" and "[r]eadiness to serve may be hired, quite as much as service itself"). Time spent waiting for work is compensable if it is spent "primarily for the benefit of the employer and [its] business." *Armour,* 323 U.S. at 132–34. For example, "[a] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, [a] fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity." 29 C.F.R. § 785.15. In contrast "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. § 785.16. However, an employee "is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the

[12] While some cases in this district have found otherwise, those cases appear to have overlooked that the Arizona Supreme Court has expressly found individual liability against the owner of the Defendant corporations liable in *Schade*.

job and that he will not have to commence work until a definitely specified hour has arrived." 29 C.F.R. § 785.16 (emphasis supplied). *See Donovan v. 75 Truck Stop, Inc.*, No. 80–9, 1981 WL 2333, at *12, (M.D. Fla. July 20, 1981) (holding that even if truck washers had been permitted "to go across the street to go swimming at the Days Inn, this would not have been sufficient to relieve the employer from his responsibility to compensate them during such periods ... because the employees were expected to be available to commence work immediately upon arrival of a truck"). *See also Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 941 (9th Cir. 2019) ("an employee performs compensable work throughout the [] day until the employee completes their last principal activity (or the last activity which is 'integral and indispensable' to the employee's principal activities)—whether or not the employee actually engages in work throughout that entire period.").

Arizona law likewise counts as hours worked "all hours for which an employee covered under the Act is employed and required to give the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work." Ariz. Admin. Code R.20-5-1202(9). "On duty," under Arizona law means "time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee's own purpose." Ariz. Admin. Code R20-5-1202(12). This more expansive than the FLSA. *In re: Amazon.Com, Inc. Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.*., 905 F.3d 387, 404–05 (6th Cir. 2018).

The evidence here demonstrates that between trips, Drivers are actively engaged in productive work or are "engaged to wait" such that all time in between trips is compensable. SF ¶ 127-133, 37 (subparts d to z). The duties of the Drivers here closely parallel the facts in *Hoyt*, in which the court held the time in between drivers' scheduled trips was compensable. Here, as in *Hoyt*, the time between scheduled trips is compensable because Drivers cannot effectively use the time for their own purposes; they must "stay in proximity to the vehicle," "stay dressed" in uniform," and must "be ready to take on an unexpected new assignment in the interim or otherwise risk losing the assignment they were already waiting for[.]" *Id.* at *176. SF ¶ 127-133, 37. In addition, as in *Hoyt*, Drivers are not typically allowed to use the

vehicle for personal use. SF ¶ 131. Even where Drivers are not engaged otherwise productive work in between trips (i.e., swapping vehicles, cleaning, or fueling vehicles, etc.), they are not completely relieved of duty and cannot use the time between trips effectively for their own purposes. To the contrary, Drivers are expected to always be available and prepared to perform unexpected trips. They are not permitted to turn down trips and are not completely relieved of duty with no obligation "to commence work until a definitely specified hour has arrived." *Hoyt*, 120 F. Supp. 3d at 176 n. 4 (quoting § 785.16). SF ¶ 127-133.

VII. Defendants' Violations Were Willful Under the FLSA and AMWA

DP acted willfully and a three-year statute of limitations under 29 U.S.C. § 255(a) and A.R.S. § 23-364(H) applies. Under the FLSA, conduct is 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*, 486 U.S. 128, 133 (1988). *See also Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) (willfulness includes reckless disregard of the "possibility" that employer was violating the FLSA). "[T]he standard for willfulness under Arizona's minimum wage law is the same as the standard under the FLSA." *Senne.*, 591 F. Supp. 3d at 567.

Here, the evidence not only establishes DP's reckless disregard for the possibility it would violate the FLSA and AMWA by not paying Drivers based on the hours they worked, not maintaining records of hours worked, and not taking the basic steps necessary to benefit from their claimed 7(i) exemption, it shows DP committed violations with full knowledge, including repeated admonishment from the DOL and DP's counsel, and despite express and repeated promises. SF ¶ 144-179. More than *three years* after this case was filed, DP *still* does not track Drivers' actual work time (SF ¶ 78-82, 134, 144, 147, 149, 179) (which they promised they would do *20 years ago* (SF ¶ 168, 169) and *still* does not undertake the necessary steps to comply with their claimed 7(i) exemption.[13] DP offers no defense to their minimum wage violations, which could have been prevented by reasonable recordkeeping and pay practices that were in place at multiple companies DP took over which it simply discarded. (SF ¶ 178).

[13] Plaintiffs moved to strike DP's unpled § 259 defense. (Doc. 432 at 4-5). If the motion is denied, Plaintiffs request leave to submit a supplemental motion on this defense.

Even after this lawsuit was filed, DP failed to take steps necessary to ensure proper recordkeeping and pay practices and instead hired a consultant to build DP a means to *estimate* Drivers' worktime that systematically undercounts actual worktime. SF ¶ 77-82, 85, 180.

As explained below, DP's attempts to defend against willfulness based on reliance on counsel or reliance on the 2012 DOL investigation are meritless and foreclosed by DP's history of FLSA violations and broken commitments to the DOL to keep accurate records of all hours worked, their failure to pay Drivers for all hours worked, failure to follow the advice of counsel, and their knowing disregard of the most basic requirements of their claimed exemption. When the DOL found DP violated the FLSA's overtime requirements in 2003, it gave DP explicit instructions in "great detail" "that all hours worked, which the employee is required to give to his employer must be compensated accordingly." SF ¶ 145. The DOL Investigator explained "what constitutes 'waiting time,' 'on-duty,' 'off-duty,' and 'on-call time" and what it means to be "engaged to wait," overtime requirements, and recordkeeping requirements and mailed DP ten explanatory publications. *Id.* (*see* MSJ Decl. Ex. U-169). DP, through Mr. Kaplan, expressly agreed to keep an actual record of hours worked for Drivers. SF ¶ 146. Not only did DP fail to comply in and after 2002, they again failed to comply as promised in 2012 when, lacking any records showing Drivers' "beginning and end of each day" as requested by the DOL Investigator, they represented actual work time records would be maintained and that they had "addressed any record keeping deficiencies."[14] SF ¶¶ 168-169. Here again Defendants violated their commitments. SF ¶ 179. Also dispositive of willfulness is DP's failure to follow the advice of counsel regarding the requirements for the 7(i) exemption and their knowing and willful disregard of the specific conditions for the exemption as set forth above. SF ¶¶ 45-52, 54-57, 147-149, 160, 163, 171, 173, 179 *See Herman v. Palo Group Foster Home,* 183 F.3d 468, 474 (6th Cir. 1999) (willfulness proven where defendant "had been investigated for violations twice in the past, paid unpaid

[14] Defendants have at various times suggested that their failure to record actual work time was somehow the Drivers' fault, as if that were an excuse. The law is clear that it is the employers' obligation to record such time and that an employee's failure to do so is no defense. *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011).

overtime wages, received explanations of what was required to comply with the Act, and assured the DOL that he would comply in the future"); *Bull v. United States*, 68 Fed. Cl. 212, 272–73, *decision clarified*, 68 Fed. Cl. 276 (2005), *aff'd*, 479 F.3d 1365 (Fed. Cir. 2007) ("Courts have found willful violations of the FLSA where an employer disregards the DOL's Wage and Hour Division warnings,… ignores the advice of its own legal department,…or has been penalized previously for violating the FLSA.") (citations omitted); *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 918-19 (9th Cir. 2003) ("prior FLSA violations, especially when combined with the undisputed testimony of the former employees, prove, at the very least, reckless disregard"); *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973) (willfulness where "two previous investigations of [the defendant's] labor practices had resulted in warnings against further violations of the FLSA"); *Gillard v. Good Earth Power AZ*, No. 17-01368, 2019 WL 1280946, at *10 (D. Ariz. Mar. 19, 2019) ("Even if the investigation did not raise issues about Plaintiffs,…it still is relevant to the willfulness inquiry."); *Baker v. D.A.R.A. II, Inc.*, No. 06-2887, 2008 WL 191995, at *5, 7 (D. Ariz. Jan. 22, 2008) (prior DOL violations, "*even for a different type of violation*," support a finding of willfulness); *Maravilla v. Rosas Bros. Constr.*., 401 F. Supp. 3d 886, 897 (N.D. Cal. 2019) ("To state the obvious, Rosas Brothers's conduct in continuing to flout federal wage laws after a [DOL] investigation was not in subjective good faith."). Against this background, DP's purported "reliance on counsel" and/or "reliance on the 2012 investigation" supports, rather than defeats, a finding of willfulness. They demonstrate DP knew and/or recklessly disregarded their obligations and consistently endeavored to evade rather than comply with the law.

A. The 2012 Investigation Does Not Absolve Defendants' Willfulness.

As an initial matter, DP's reliance on the 2012 investigation regarding an overtime exemption cannot in any way absolve DP's minimum wage violations, which result from DP's failure to maintain accurate records and failure to pay Drivers for all worked time. But DP's purported reliance on the 2012 Jackson Hole DOL investigation is also meritless with respect to the willfulness of its overtime violations. First, and most obviously, the 7(i) exemption is an *establishment*-specific exemption based on meeting *annual* revenue and compensation

requirements, and DP concedes it never undertook any such analysis at any of its locations for any of the hundreds of employees it claimed were exempt, in any of the 10+ years since the 2012 investigation. (SF ¶ 46-48, 78-82, 85-86, 134-136, 170, 173, 179). The 2012 investigation found that from August 2010 to August 2012 the Jackson Hole location was exempt from overtime under 7(i). By all appearances, until this lawsuit was commenced, Defendants had no report of that investigation and nothing other than a phone call from the DOL investigator stating there were no violations. SF ¶ 161. Purporting to rely on the Jackson Hole investigation involving 19 Drivers (SF ¶ 157) as a defense to the willful failure to comply with the annual review by establishment and other requirements of 7(i) and in the face of Defendants' prior overtime and recordkeeping violations is the height of recklessness.

Aside from DP's complete disregard of 7(i) requirements, the conclusions of the 2012 investigation are not reliable due, in part, to DP's substantial effort to limit the scope of the investigation to its Jackson Hole entity and DP's intentional failure to disclose all relevant facts, including the earlier overtime and recordkeeping violations J. Kaplan's ownership interests in the other locations. (SF ¶ 156-158, 168). In this regard, the record reveals a concerted effort to limit the focus of the investigation solely to Jackson Hole, including several misstatements made in DP's response to the DOL's requests for information. *Id.* In the face of a prior finding of overtime and recordkeeping violations and Defendants' continued failure to track all working hours, it is likely that the investigation would have been more extensive and that, the investigator would have again found DP in violation of their recordkeeping and overtime obligations considering their failure to satisfy 7(i) requirements, including the failure to maintain a "representative period." Given the prior violations, retroactive creation of a "representative period" is not permitted. FOH 21h05 (discussion of 29 C.F.R. § 516.16, 29 C.F.R. § 779.415, and 29 C.F.R. § 779.417). Defendants also (1) provided the DOL with a commission plan they had just revised for the investigator (SF ¶

163-164);[15] (2) never established and could not establish that all their revenue was retail as they claimed (SF ¶ 24, 146, 59); and (3) offered no evidence of a recognized retail concept in the industry. After going to great lengths to limit the 2012 investigation to Jackson Hole, it is ironic at best to attempt to defeat willfulness by asserting the investigation somehow blessed application of 7(i) after 2012 for all their locations, for every Driver, for over a decade.

In addition, DP significantly changed their business, including their purported "commission" plan (SF ¶ 53), and changed their billing practices in 2015 by adding language to their invoices which made clear that the customer had the discretion to disregard or pay more or less than the suggested gratuity. SF ¶ 49-50. Only mandatory service charges, but not discretionary gratuities are permitted to be counted towards wages under the FLSA. After 2015 none of the invoiced gratuities could properly be combined with wages to satisfy the 7(i) compensation requirements. SF ¶ 49-50. Because the 2012 investigation found all of DP's "gratuities" were "service fees" (MSJ Decl. Ex. U-221, at DriverProvider000012), and therefore able to satisfy the compensation requirements of 7(i), once this practice changed to discretionary gratuities they could no longer be counted to satisfy 7(i) requirements. DP could not reasonably rely on a prior 7(i) finding and in fact, its commingling of gratuities with commissions precludes an attempt by DP to rely on the payroll records produced as support for meeting the compensation requirements of 7(i).

B. Advice of Counsel Provides No Defense to Willfulness.

Multiple reasons foreclose DP's advice of counsel defense to willfulness. "[M]ere reliance on the advice of counsel is insufficient to satisfy the defendants' burden in proving their good faith in failing to pay overtime." *Carr v. AutoZoner, LLC*, 501 F. Supp. 3d 1237, 1244-45 (N.D. Ala. 2020) (*citing Fuentes v. CAI Int'l, Inc.*, 728 F. Supp. 2d 1347, 1358-59 (S.D. Fla. 2010)) (further citing *Townley v. Floyd & Beasley Transfer Co.*, 1989 WL 205342, at *4 (N.D. Ala. 1989)). First any reliance defense fails because Defendants failed to follow their attorney's advice. *See*

[15] The DOL investigator also failed to comment on the fact that rather than guarantee payment of more than 1.5 times minimum wage, the plan merely provided that if commissions fell short the Driver would receive minimum wage. SF ¶ 164.

SF ¶ 147-149, 162, 165, 166, 170, 171. *Mumby v. Pure Energy Servs. (USA), Inc.*, 636 F.3d 1266, 1270 (10th Cir. 2011) ("[C]onsultation is, by itself, insufficient…The 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."); *Bull*, 68 Fed. Cl. at 272–73; *Randolph v. PowerComm Const., Inc.*, 309 F.R.D. 349, 364 (D. Md. 2015) ("It is the actual knowledge of the requirements under the law combined with the ongoing nature of Defendants' violations of the very same requirements that makes such violations knowing and willful.").

Second, Defendants are charged with knowingly undertaking the risk that their 7(i) exemption defense was invalid, a factor alone sufficient to establish willfulness. The risks Defendants assume included, *inter alia:* the absence of any legal authority or knowledge by Defendants of a single company in its industry purporting to utilize the 7(i) exemption (SF ¶ 45), the complete absence of any evidence that DP's business was recognized as retail in the industry, and the existence (until 2020) of the DOL's regulation excluding transportation companies from 7(i) coverage. SF ¶ 167. *See* 85 FR 29867-01; 29 C.F.R. § 779.317 (2019) and *Alvarez*, 339 F.3d at 909 (willfulness includes reckless disregard of "the very possibility" that employer was violating the FLSA).[16]

Third, Defendants failed to make complete disclosure of all relevant facts to their counsel. SF ¶ 152-154, 173. Counsel was not furnished with, nor did she review, any DP records necessary for a reasonable determination of the applicability of the 7(i) exemption. SF ¶ 173. DP's counsel was unaware nor could she recall if Defendants had ever disclosed the numerous complaints from employees that they were not being paid for all hours of work. She produced no records of any such communications. SF ¶ 99-103, 105, 140-143, 177. There is also no evidence that DP disclosed to their attorney the 2002 DOL investigation and FLSA violations until after this lawsuit was filed. SF ¶ 154. Nor was there any written opinion on which DP purported to apply. SF ¶ 172. *Mumby*, 636 F.3d at 1270 (to rely on advice of counsel

[16] DP's claim that it is a "taxicab" company is a *post-hoc* rationalization that provides absolutely no defense to DP's willful failure to pay overtime. *See* SF ¶ 74 (no mention of taxicab exemption when attorney asked to state the opinions on which DP is relying).

in FLSA action, employer must show "full disclosure of the relevant facts to counsel...."); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1168 (11th Cir. 2008) (affirming willfulness because defendants "failed to supply Kalish and the payroll company with all of the information needed to arrive at an informed opinion on the subject."); *Carr* , 501 F. Supp. 3d at 1244–45 (no defense to willfulness where defendant does not provide evidence regarding information supplied to attorneys or what attorneys considered); *Koellhoffer v. Plotke-Giordani*, 858 F.Supp.2d 1181, 1193 (D. Colo. 2012) (good faith defense not applicable "If Defendants did not honestly and completely disclose all relevant information..."). In sum, Defendants' claimed reliance on the advice of counsel defense is defeated by the doctrine of "garbage in garbage out."[17]

Fourth, aside from rendering advice without knowledge and consideration of all relevant facts, it appears legal advice was based on ignoring governing regulations and controlling precedent regarding the operative definitions of retail establishments and the conditions required for application of the 7(i) exemption. Defendants were on notice of the law and had an independent duty to inquire to ensure its compliance if they were in doubt. SF ¶¶ 145-151, 166, 168, 169, 171, 179. Reliance on erroneous or incompetent advice is no defense to willfulness. *See Glenn v. General Motors Corp.*, 658 F.Supp. 918, 927 n.3 (D. Ala. 1987), *affirmed in relevant part, reversed in part*, 841 F.2d 1567 (11th Cir. 1988) ("If an employer could escape the 'reckless disregard' standard solely by obtaining a green light from its lawyers, it would be far too easy for a defendant to circumvent the requirements of the Act. . . It seems that the better law would require, at a minimum, good faith reliance on a colorable legal position."); *Scalia v. Employer Solutions Staffing Group IV, LLC* (951 F.3d 1097 (9th Cir. 2020) (finding that an agent's reckless disregard must be imputed to an employer because to do otherwise "would create a loophole in the FLSA.").

[17] *See, e.g.*, *In re Yellowstone Mountain Club*, 436 B.R. 598, 647 (Bankr. D. Mont. 2010), *aff'd in part,* 656 F. App'x 307 (9th Cir. 2016) ("the Court finds that the information relied upon is not reliable and in fact that the garbage in/garbage out maxim is applicable").

VIII. Good Faith Under FLSA § 260 or AMWA, A.R.S. § 23-365, Does Not Apply.

Under the FLSA, liquidated damages are the "norm" absent an employer's showing that "it acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that its conduct did not violate the FLSA." *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003) (citing 29 U.S.C. § 260). It is the employer's burden to establish "subjective and objective good faith in its violation of the FLSA. If the employer fails to carry that burden, liquidated damages are mandatory." *Loc. 246 Util. Workers Union of Am. v. S. California Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996).

For the same reasons DP's violations are willful, summary judgment should be granted finding no good faith defense to liquidated damages. Courts cannot find good faith where there is a finding of willfulness. *See, e.g., Chao*, 346 F.3d at 920 ("a finding of good faith is plainly inconsistent with a finding of willfulness").

Likewise, DP has not asserted nor could they establish a "good faith" exception under the AMWA. Given the foregoing facts, including the minimum wage violations throughout the class period, there is no basis for a good faith defense. *Martinez v. PM&M Elec. Inc.*, No. 18-01181, 2019 WL 450870, at *4 (D. Ariz. Feb. 5, 2019). SF ¶ 144-170.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and enter partial judgment against Defendants.

Respectfully submitted this 31st day of May 2023.

MARTIN & BONNETT, P.L.L.C.
By: /s/ Michael Licata
Daniel L. Bonnett
Susan Martin
Jennifer Kroll
Michael M. Licata
4647 N. 32nd Street, Suite 185
Phoenix, AZ 85018

Attorneys for Plaintiffs