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9 *Attorneys for Plaintiffs*

10
 11 IN THE UNITED STATES DISTRICT COURT
 12 DISTRICT OF ARIZONA

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

15 Plaintiffs,)

16 v.)

17 Driver Provider Phoenix, LLC; Driver Provider)
 18 Leasing, LLC; Innovative Transportation of)
 19 Sedona, LLC; Innovative Transportation)
 Solutions of Tucson, LLC; Innovative)
 20 Transportation Solutions, Inc. (Arizona);)
 Innovative Transportation Solutions, Inc.)
 21 (Utah); Innovative Transportation Solutions,)
 LLC; Driver Provider Management LLC; Jason)
 22 Kaplan; Kendra Kaplan; Stephen Kaplan and)
 23 Barbara Kaplan, husband and wife; Barry Gross)
 and Jane Doe Gross, husband and wife; and)
 24 Does 1-10.)

25 Defendants.)

Case No.: CV19-05760-SMB

**PLAINTIFFS' REDACTED
 STATEMENT OF FACTS IN
 SUPPORT OF MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT**

I. The Driver Provider Business

1
2 **1.** Defendants are privately owned companies operating in AZ, UT, and WY as “The Driver
3 Provider” and its owners and/or officers, Jason Kaplan, Kendra Kaplan, Stephen Kaplan,
4 and Barry Gross (collectively referred to herein as “The Driver Provider,” “Defendants,” or
5 “DP”). Declaration of Michael Licata (“MSJ Decl.” or “*Id.*”) (filed herewith) at ¶ 1.

6 **2.** The Defendant entities operate for a common business purpose: providing chauffeured
7 transportation services to Defendants’ customers. *Id.* ¶ 2.

8 **3.** The Defendant entities are consolidated for business and tax purposes. *Id.* ¶ 3.

9 **4.** DP is a member of the “chauffeured transportation” industry. *Id.* ¶ 4.

10 **5.** During the relevant time DP employed at least 475 Drivers in Arizona. *Id.* ¶ 5.

11 **6.** Drivers were paid by Driver Provider Management, LLC from 2016-2019 and were
12 employed by Innovative Transportation Solutions, Inc. from 2020 to the present. *Id.* ¶ 6.

13 **7.** The relevant policies and procedures that applied to Drivers were set and governed by
14 central management that operated out of DP’s Phoenix office. *Id.* ¶ 7.

15 **8.** Phoenix dispatchers dispatch work in all of DP’s locations. *Id.* ¶ 8.

16 **9.** The DP entities all share equipment and have common management, including dispatch,
17 billing, human resources, and accounting. *Id.* ¶ 9.

18 **10.** DP’s revenue exceeds the threshold for FLSA coverage in 29 U.S.C. § 203(s)(1). *Id.* ¶ 10.

19 **11.** DP’s business is seasonally driven. *Id.* ¶ 11.

20 **12.** DP asserts that its “target consumers are corporate travel managers, event planners,
21 conference services professionals, and buyers of bulk or contract transportation services such
22 as schools or government institutions.” *Id.* ¶ 12.

23 **13.** DP asserts that it has “a worldwide fleet of over 1,200 vehicles through an extensive
24 affiliate network” and markets itself as providing “Worldwide Chauffeured Transportation.”
25 *Id.* ¶ 13.

26 **14.** The majority of DP’s current fleet (63%) are larger vehicles, including 73 buses (35 “city”
27 buses, 21 “mini” buses, 17 full coach buses, & 3 shuttle buses) and 3 “Textron Tugs” (think
28 Disneyland tram) with 10 tug trailers, and 16 sprinter vans. *Id.* ¶ 14.

1 15. DP’s competitors include limousine and charter bus companies and event logistics is “a
2 particular area of expertise” for DP. DP also provides wedding, prom, corporate event, and
3 other group transportation. *Id.* ¶ 15.

4 16. DP is a DOT registered motor carrier. *Id.* ¶ 16.

5 17. DP operates a variety of fixed routes including, but not limited to, employee shuttles at
6 corporate campuses and construction sites, school bus routes, interstate tours (for other
7 companies), and National Park tours, and receives public grants to operate the interstate
8 Mountain States Express route (between Salt Lake City, UT and Jackson, WY)). *Id.* ¶ 17.

9 18. DP offers National Park tours that provide food, commentary, and visual aids, and other
10 tours “anywhere our client would like to go” as well as transportation for other interstate tour
11 operators, including Top Deck. *Id.* ¶ 18.

12 19. DP provides transportation services for the Department of Defense and also derives
13 business through formal bid procedures employed by federal, state, and local governments.
14 *Id.* ¶ 19.

15 20. DP also provides fixed route shuttle transportation services including in vans and buses
16 pursuant to corporate contracts with companies such as Intel, Vanguard, and CAE. *Id.* ¶ 20.

17 21. Defendants do business with other transportation companies they refer to as “affiliates.”
18 *Id.* ¶ 21.

19 22. When a customer is referred to DP from an affiliate, DP performs the trip and invoices
20 the affiliate, who invoices the passenger. *Id.* ¶ 22.

21 23. When DP refers a customer to an affiliate, the affiliate performs the trip and invoices DP,
22 who invoices the customer and profits on the difference, usually 10%. *Id.* ¶ 23.

23 24. DP classifies only a small portion of their revenue as “retail” and most revenue they
24 classify as “wholesale,” “corporate,” or from “affiliates”, destination management companies
25 (“DMCs”), and hotels. Ex. 214. *Id.* ¶ 24.

26 25. The revenue report produced by DP for the period of 4/28/22 to 12/19/2022
27 [DriverProvider471156] shows the following revenue (for all entities) (*Id.* ¶ 25):
28

Summary of DriverProvider471156 Revenue from 4.28.22 to 12.19.2022		
Business Segment	Revenue	% of Total
Affiliates (e.g. Boston Coach & Carey Limo)	\$Redacted	11.15%
Corporate (e.g., Intel Corp. employee shuttle)	\$Redacted	56.50%
Destination Management Companies (e.g., Hello Arizona)	\$Redacted	9.33%
Hotels (e.g., Four Seasons Scottsdale)	\$Redacted	4.28%
Individuals	\$Redacted	
	Redacted	5.74%
Schools	\$Redacted	0.21%
Wedding	\$Redacted	0.66%
Wholesale	\$Redacted	9.50%
Broker (SATO) (Travel for Department of Defense)	\$4Redacted	0.25%
Credit Card (otherwise unidentified).	\$3Redacted	1.7%
Total:	\$Redacted	

26. Most of DP's revenues arise from sales of transportation services purchased in substantial quantities, often pursuant to contracts, that far exceed the quantity that would be purchased by members of the public. By way of example only:

a. DP was awarded an \$Redacted contract, through a bid process, with Hoffman Construction whereby DP (on scheduled shifts) operates 35 transit buses (i.e. city buses) at an Arizona construction site. *Id.* ¶ 26a.

b. Pursuant to a contract, DP transports employees at Intel's Chandler campus, including on buses and "tow tugs" (think Disneyland tram) on scheduled shifts. Pursuant to the contract for 6/17/19 through 6/16/22, Intel purchased \$Redacted worth of transportation services per month for the duration of the contract. *Id.* ¶ 26b.

c. DP's revenue from these two fixed routes was \$Redacted, representing over 34% of DP's entire revenue for the period. *Id.* ¶ 26c.

d. During the same period, DP's revenue from a single DMC, Hello Arizona, was

1 §Redacted Its revenue from a single wholesale customer, Studio F Designs, was
2 §Redacted Revenue from just two of its contracts with hotels was \$^{Redacted}. *Id.* ¶ 26d.

3 27. DP's sales, including to wholesalers, DMCs, hotels and affiliates are at discounted prices,
4 including use of "wholesale rate" sheets, which are generally less than DP's retail rates
5 purchased by members of the general public. The discounts apply based on the "higher
6 volume of bookings." *Id.* ¶ 27.

7 28. Some of the affiliates are also competitors that operate in some of the same markets,
8 including Carey Limousine. *Id.* ¶ 28.

9 29. DP's sales to affiliates are also generally at discounted rates, which is industry standard.
10 *Id.* ¶ 29.

11 30. DP's revenues include those derived from selling large quantities of discounted
12 transportation services that are packaged and resold, including by hotels, DMCs, wholesalers,
13 and "affiliates," including, for example, Hello Arizona!, which includes a substantial "markup
14 charged to customers of Hello Arizona! for transportation services performed by The Driver
15 Provider." *Id.* ¶ 30.

16 31. DP's contract with the Four Seasons provides that the hotel is to collect all revenues
17 derived from DP's services by adding charges to hotel room guest rooms, DP invoices the
18 hotel, and the hotel remits payment to DP, less a ^{Redact}% fee retention. The hotel is also
19 "responsible for booking all reservations made by Guests of the Hotel" and "All reservations
20 will be processed through Contractor's reservations and dispatch." *Id.* ¶ 31.

21 32. Defendants understood sales to DMCs, hotels, and affiliates would be resold. *Id.* ¶ 32.

22 33. Rather than DP, some of DP's customers, including the Four Seasons, charge sales tax to
23 the customer and DP completes a form confirming the sales to the Four Seasons are exempt
24 from sales tax because the hotel's purchase is a "purchase for resale." *Id.* ¶ 33.

25 **II. Drivers' Work Duties**

26 34. Drivers were and are governed by a uniform set of procedures and policies. Many of these
27 procedures are set forth in company-wide written documents and manuals distributed to
28 Drivers including written "Core Standards" setting forth "Minimum chauffeur standards for

1 ALL VEHICLE TYPES” and a written “Chauffeur Manual,” setting forth uniform policies
2 for Drivers’ job duties, pre- and post-trip inspections, vehicle damage, grooming and dress
3 requirements, and acceptable and unacceptable “chauffeur conduct.” *Id.* ¶ 34.

4 **35.** Drivers all performed the same main job duty: the transportation of passengers in vehicles
5 assigned by The Driver Provider. *Id.* ¶ 35.

6 **36.** Drivers are required to confirm their “in time” the day before and to also call dispatch to
7 confirm (for a second time) an hour before their “in time” to notify DP of their intent to
8 arrive by their scheduled “in time” before actually arriving at DP’s facilities. Defendants’
9 stated purpose for this requirement is to ensure that The Driver Provider is able to meet its
10 business obligations. *Id.* ¶ 36.

11 **37.** In addition to the transportation of passengers, Drivers have additional job duties and
12 responsibilities that were substantially the same across Drivers and locations. These duties
13 included, *inter alia*, the following (*Id.* ¶ 37a-z).

14 a. arriving at the Driver Provider locations prior to the first scheduled assignment of the
15 day (the Driver’s assigned “in time”) *Id.* ¶ 37a;

16 b. retrieving items used throughout the day, including an iPad, cooler, car keys; *Id.* ¶ 37b;

17 c. traveling to a separate Driver Provider storage lot if the assigned vehicle was not stored
18 at the main office *Id.* ¶ 37c;

19 d. completing pre-trip inspections of each assigned vehicle prior to the Driver’s first
20 pickup and during the workday when assigned a new vehicle *Id.* ¶ 37d;

21 e. These inspections are completed at the direction of DP, for DP’s benefit, and include,
22 *inter alia*, checking fluid levels (i.e. oil), belts, tires, air conditioning, heating, fuel level, lights,
23 and other items to ensure the safe operation of the vehicle *Id.* ¶ 37e;

24 f. completing pre-trip inspection reports (prior to the Driver’s first pickup and during
25 the workday when assigned a new vehicle) *Id.* ¶ 37f;

26 g. stocking vehicles with amenities or other items (like beverages) as necessary *Id.* ¶ 37g;

27 h. fueling the vehicle when picking the vehicle up (as necessary) *Id.* ¶ 37h;

28 i. updating the Driver’s trip status on an iPad software program (including when the

1 Driver was “on route” to a scheduled pickup location, when the Driver arrived “on location”
2 at the pickup address, and when the passenger departed) *Id.* ¶ 37i;

3 j. arriving at pickup locations at least 15 minutes ahead of each scheduled pickup time;

4 k. waiting for passengers *Id.* ¶ 37l;

5 l. cleaning the interior and exterior of vehicles as part of the Driver’s pre-trip duties and
6 in between trips (as necessary) *Id.* ¶ 37l;

7 m. traveling to pick-up locations throughout the day *Id.* ¶ 37m;

8 n. traveling back to the Driver Provider office from drop-off locations (at the end of the
9 workday or in between trips when swapping assigned vehicles) *Id.* ¶ 37n;

10 o. fueling the assigned vehicle prior to returning it to the Driver Provider location at the
11 end of the day and in between trips when assigned a new vehicle *Id.* ¶ 37o;

12 p. tracking flight arrival times, including prior to the Driver’s first scheduled pickup and
13 throughout the workday as necessary *Id.* ¶ 37p;

14 q. regularly communicating and staying in contact with dispatchers *Id.* ¶ 37q;

15 r. remaining available for additional trips throughout the workday *Id.* ¶ 37r;

16 s. remaining with or near the assigned vehicle in between trips *Id.* ¶ 37s;

17 t. being in uniform *Id.* ¶ 37t;

18 u. swapping vehicles as necessary in between trips or transporting between locations,
19 which included performing required post-trip duties of the first vehicle and required pre-trip
20 duties of the new vehicle *Id.* ¶ 37u;

21 v. traveling to a gas station to fuel the vehicle after the Driver’s last trip of the day or in
22 between trips when swapping vehicles during the workday *Id.* ¶ 37v;

23 w. cleaning the interior and exterior of the vehicle at the end of the workday *Id.* ¶ 37w;

24 x. performing a post-trip inspection of the vehicle at the end of the workday or in
25 between trips when swapping vehicles during the workday *Id.* ¶ 37x;

26 y. completing a post-trip inspection report at the end of the workday or in between trips
27 when swapping vehicles during the workday *Id.* ¶ 37y;

28 z. returning any required items to dispatch at the end of the workday or in between trips

1 when swapping vehicles during the workday; *Id.* ¶ 37z.

2 III. Drivers' Compensation

3 38. DP asserts all Drivers were subject to the same compensation structure, and the
4 compensation plans were substantially similar at each location except for the amounts paid
5 to Drivers. *Id.* ¶ 38.

6 39. Drivers were told they would be paid an hourly rate and/or were not provided with a
7 commission plan or told they would be paid on a commission basis when hired. *Id.* ¶ 39.

8 40. DP testified that use of the per hour "equivalent" in job ads was "what an employee could
9 anticipate receiving in commission for their time worked." *Id.* ¶ 40.

10 41. All Drivers were subject to the same policy by which their compensation could be
11 deducted or totally withheld for damage caused to Defendants' vehicles. *Id.* ¶ 41.

12 42. All Drivers were subject to the same policy by which DP would unilaterally reduce
13 Drivers' wages at DP's sole discretion if a Driver made a mistake. *Id.* ¶ 42.

14 IV. DP's Claimed Overtime Exemption

15 43. DP asserts all employees are exempt from overtime under the 7(i) exemption. *Id.* ¶ 43.

16 44. Jason Kaplan testified he did not know what Drivers are told with respect to their exempt
17 classification status. *Id.* ¶ 44.

18 45. Defendants are not aware of any other company in the industry that classified their
19 Drivers as exempt under the 7(i) exemption. *Id.* ¶ 45.

20 46. Defendants admit they have never analyzed the retail sales requirement for any DP
21 establishment, purportedly because they consider 100% of their sales to be retail. *Id.* ¶ 46.

22 47. Despite requests in discovery, DP did not produce revenue data identifying the sources
23 of its revenue for each establishment, for each year in the relevant time period (2016 to
24 present) and instead produced a single document, combining years and locations, despite
25 being capable of producing revenue data by location and year. *Id.* ¶ 47.

26 48. Prior to this lawsuit, DP had no procedure to determine whether Drivers' pay was more
27 than 50 percent of what DP calls "commission" or whether Drivers were earning at least 1.5
28 times the applicable minimum wage for 7(i) purposes *Id.* ¶ 48.

1 49. Beginning in 2015, DP revised its customer invoices to state that the amount charged
2 included a “recommended gratuity” and that “Whether a tip is to be given and its amount are
3 determined solely by the customer” and thereafter continued to include invoiced
4 discretionary gratuities as commission payments. *Id.* ¶ 49.

5 50. Some of the affiliates who DP performed work for would include discretionary gratuities
6 that were required to be paid to DP’s Drivers. *Id.* ¶ 50.

7 51. DP treats all amounts paid to Drivers, including for instance, the hourly wages paid to
8 Drivers assigned to the Four Seasons, to be “commission” and does not treat such payments
9 differently for 7(i) purposes. *Id.* ¶ 51.

10 52. The “base rate” on which DP bills its customers has nothing to do with what DP’s
11 customer actually pays to its Drivers. [MSJ Decl. Ex. 199, at DriverProvider319883 (“The
12 Commission Base does not have anything to do with what the client is paying. It is an average
13 that is input so that the chauffeur is not penalized or rewarded in pay based on what the client
14 is paying. Otherwise, how would we ever get a VIP chauffeur to agree to a site visit because
15 the rate is so significantly reduced?”)]; MSJ Decl. ¶ 52.

16 53. When Drivers are paid, they are not provided with the ultimate price paid by the
17 customer, the amount of time spent on a given trip, or the purported amount of “gratuity”
18 included for a given trip. *Id.* ¶ 53.

19 54. For hourly trips, DP paid Drivers by multiplying their assigned hourly rate by the number
20 of hours billed to the customer. *Id.* ¶ 54.

21 55. The only way Drivers can earn additional compensation is by being “available” more
22 hours and taking more trips, which are assigned entirely at DP’s discretion. *Id.* ¶ 55.

23 56. Some Drivers worked scheduled shifts, working the same scheduled hours each day for
24 the same amount of pay. *Id.* ¶ 56.

25 57. The only way Drivers can earn additional compensation is by being “available” more
26 hours and taking more trips, which are assigned entirely at DP’s discretion. *Id.* ¶ 57.

27 58. DP considers all Drivers to be exempt pursuant to the taxicab exemption. *Id.* ¶ 58.

28 59. DP’s fares are either a flat or hourly rate. *Id.* ¶ 59.

1 60. None of DP’s vehicles say “Taxi” on the outside nor do they have taximeters, or vacancy
2 lights and DP does not advertise as a taxi company. *Id.* ¶ 60.

3 61. DP did not operate a “taxi stand.” *Id.* ¶ 61.

4 62. Defendant Gross testified that he didn’t think the term “taxi” was “applicable” or the
5 right “parlance,” in reference to DP’s Four Seasons work. *Id.* ¶ 62.

6 63. Drivers are not permitted to cruise for passengers or pick up passengers who hail them
7 on the street. *Id.* ¶ 63.

8 64. DP often transports more than one passenger at a time. *Id.* ¶ 64.

9 65. Rates or “fares” are not posted on the inside of the vehicles. *Id.* ¶ 65.

10 66. DP does not operate pursuant to a taxi permit in any of its locations. *Id.* ¶66.

11 67. The only taxi permit possessed, “was related to Ecotrans, which is a division that we no
12 longer operate.” *Id.* ¶ 67.

13 68. Fares charged by DP are not equivalent to those charged by recognized taxi companies.
14 *Id.* ¶ 68.

15 69. Defendants previously operated Eco Trans, which was set up in Wyoming in 2013 and
16 operated for a period of time in Arizona. *Id.* ¶ 69.

17 70. Eco Trans, which no longer operates, had drivers who were permitted to operate taxis in
18 Jackson, WY and any vehicles that said “taxi” or had dome lights were in relation to Eco
19 Trans, and the last time J. Kaplan recalled any advertising for “taxi” services was in relation
20 to Eco Trans. *Id.* ¶ 70.

21 71. Eco Trans was operated as separate company. *Id.* ¶ 71.

22 72. In relation to setting up Eco Trans, DP’ attorney defined a taxicab company as “operating
23 without fixed routes or contracts for recurrent transportation” and expressly stated “as
24 distinguished from limousine business.” *Id.* ¶ 72.

25 73. The business filings for Eco Trans show it ceased making tax payments in 2015 (before
26 the class period) and was eventually administratively dissolved. *Id.* ¶ 73.

27 74. DP does not belong to any trade associations for taxicab companies. Jason Kaplan has
28 been a board member of the National Limousine Association and DP is a member. *Id.* ¶ 74.

1 75. DP includes in its contracts with some third parties exclusivity provisions to ensure
2 competitor companies are not being used; however, those provisions specifically allow the
3 use of “taxis.” *Id.* ¶ 75.

4 **V. Recordkeeping Violations**

5 76. DP agrees that anything Drivers are instructed to do, either in written policies or verbally,
6 by DP constitutes work and is required to be tracked. *Id.* ¶ 76.

7 77. DP did not maintain payroll records showing all hours worked for each day worked by
8 Drivers or the actual daily starting and stopping time for Drivers. *Id.* ¶ 77.

9 78. DP failed and continues to fail to maintain accurate or complete records of actual time
10 worked by Drivers and following commencement of this lawsuit, Defendants attempted to
11 retroactively estimate and continue to estimate work time for Drivers using Santa Cruz trip
12 records and assigned “in times” that do not reflect actual hours worked. *Id.* ¶ 78.

13 79. The records DP is relying on in this litigation as records of hours worked are retroactive
14 estimates created after this litigation started from Defendants’ “Santa Cruz” records through
15 the use of a consultant Defendant Kendra Kaplan hired. *Id.* ¶ 79.

16 80. Santa Cruz is a dispatching and accounting software platform used by DP to schedule
17 reservations, dispatch Drivers, and provide accounting processes. *Id.* ¶ 80.

18 81. Without disclosure to Plaintiffs’ counsel, Defendants produced records to Plaintiffs,
19 listing “shift start” and “shift end” times, that were retroactively added by Defendants, and
20 which are not actual hours worked. Defendants only admitted the records had been amended
21 after discrepancies in otherwise duplicate records were identified. Defendants’ Response to
22 Plaintiffs’ Third Set of Interrogatories Interrogatory No. 21. *Id.* ¶ 81.

23 82. DP is still estimating post-trip work time by simply adding 30 minutes after the Driver
24 drops off her last passenger if the trip ends at the Phoenix airport and one hour for every
25 other trip, regardless of how much time it takes to complete work duties. *Id.* ¶ 82.

26 83. Drivers are paid by the trip and not provided with any additional compensation where a
27 flight is delayed (a common occurrence) regardless of how long they are required to wait at
28 the airport for passenger arrival, pickup and departing to their destination. *Id.* ¶ 83.

1 84. Drivers are not told what the time estimates are that DP is now using to estimate the
2 Driver’s hours worked for payroll purposes nor are they provided their workweek hours when
3 they are paid. *Id.* ¶ 84.

4 85. After this lawsuit, DP attempted to institute timekeeping procedures using a platform
5 called “Driver Schedule” but is using that system only “at times” “subjectively” and does not
6 review those records for all Drivers. *Id.* ¶85.

7 86. For a period, dispatchers were instructed to clock Drivers in when they showed up in the
8 morning and to clock them out when they returned their keys at the end of the day in a
9 platform called “Time Data Systems,” a policy that ended in 2017. This practice was
10 ineffective at tracking work time and was never used for payroll purposes. *Id.* ¶86.

11 87. DP understands the FLSA and Arizona law makes it the employer’s obligation to
12 accurately track and maintain records of employees’ hours worked. *Id.* ¶ 87.

13 88. DP agrees that “whatever tasks [Drivers] complete from when they check in with dispatch
14 until they go on a break and then again until they leave” constitute working hours and is
15 required to be tracked. *Id.* ¶ 88.

16 **VI. Overtime and Min Minimum Wage Violations**

17 89. DP has never paid overtime to any Drivers. *Id.* ¶ 89.

18 90. Named Plaintiffs and members of the Rule 23 Class worked more than 40 hours per week
19 in some workweeks during the relevant time. *Id.* ¶ 90.

20 91. Defendants’ retroactive estimates of working time show that Drivers worked more than
21 40 hours per week and were paid less than required minimum wages in some workweeks. *Id.*
22 ¶ 91.

23 92. All Drivers are subject to having their wages docked, including up to their entire paycheck,
24 for damaging a vehicle and there was no procedures ensure such deductions did not reduce
25 Drivers’ pay below minimum wage. *Id.* ¶ 92.

26 93. The trip records DP uses to estimate Driver compensation do not account for any
27 deductions that were made to Drivers’ pay. *Id.* ¶ 93.

28

VII. Arizona Wage Act Violations

1
2 **94.** DP does not dispute that Drivers' pre- and post-trip duties constitute work for which
3 Drivers should be compensated if performed. *Id.* ¶ 94.

4 **95.** The so-called commission plans and "additional items" document (not created until 2019)
5 prepared by DP say absolutely nothing about pre- and post-trip work duties or work
6 completed between trips, and absolutely nothing about compensation for that work. *Id.* ¶ 95.

7 **96.** DP's "commission plans" only compensated Drivers for their trip time, "not from when
8 somebody got to the office." *Id.* ¶ 96.

9 **97.** DP's Billing Manager Mr. Abbasy testified Drivers assigned to the Four Seasons "stand"
10 "were compensated for the length of time that they were at the stand on minimum –
11 minimum hourly wages" and were not paid for their pre-and post-shift work. *Id.* ¶ 97.

12 **98.** Drivers whose pay was to be reduced to "minimum wage" for a given trip for making a
13 mistake were paid based on the trip pickup and drop-off time. *Id.* ¶ 98.

14 **99.** While DP does not provide Drivers their work hours, some Drivers who worked
15 scheduled shifts were able to determine their hourly wage and complained that they were not
16 being paid for all hours worked *Id.* ¶ 99.

17 **100.** One Intel Shuttle Driver, Rory Simmons, heard a rumor that Drivers were only
18 earning \$14 per hour. When he raised this with his manager Tyson Williams in a March 4,
19 2020 email, he was told he was making \$18 per hour. But Mr. Simmons' March 18, 2020
20 Driver statement showed a seven hour shift at the Intel campus and he was paid \$126, or \$18
21 per hour [$\$126/7 = \18], which does not account for the pre- and post-trip work time.
22 Adding approximately one hour of both pre- and post-shift work, for a total of 9 hours of
23 work that day, Mr. Simmons' wage *was* approximately \$14 per hour [$\$126 / 9$ hours of work
24 = \$14 per hour]. *Id.* ¶ 100.

25 **101.** In seeking advice on whether DP had to schedule breaks for Intel shift Drivers, B.
26 Gross relayed the shift time as only including the actual work time at the Intel campus, not
27 the pre- or post-trip time that would include travel time, inspections, etc.). *Id.* ¶ 101.

28 **102.** Another Driver made a formal complaint to the Industrial commission of Arizona

1 that he was hired based on a job ad for \$18 per hour, but “once hired, a bait-and-switch action
2 occurred where pay was not \$18” but instead based on “per-job” amounts “labelled by the
3 company as a ‘commission’” and, in addition, that his entire paycheck was withheld for
4 damage that was not his fault. *Id.* ¶ 102.

5 **103.** Driver Annette Howard who left her prior job based on a DP ad for \$18 per hour
6 complained that she was not receiving any compensation for two hours of work each day and
7 in response was told the time was “not directly” paid, but it was not paid all. *Id.* ¶103.

8 **104.** Internal communications among high-level managers expressly state DP does not
9 compensate Drivers for their pre- and post-trip work and time in between trips and that DP
10 was aware of Driver complaints. *Id.* ¶ 104.

11 **105.** Defendant Gross, the Executive Director, agreed to compensate a Driver for his “in
12 time” after the Driver complained about not being paid for it, notwithstanding DP’s
13 contention that Drivers were already being compensated for that work time. *Id.* ¶ 105.

14 **106.** DP advertised and hired Drivers based on hourly rates that did not account for any
15 of the pre- and post-trip work. *Id.* ¶ 106.

16 **107.** DP agrees that it was reasonable for Drivers to expect to be paid at least those
17 amounts for each hour worked. *See, e.g., Id.* ¶ 107.

18 **108.** Even after this lawsuit was filed, DP still had not determined whether and how to pay
19 all Drivers for all hours actually worked. *Id.* ¶ 108.

20 **109.** Drivers at Intel were only paid for the actual time they were providing passenger
21 transportation services at Intel. *Id.* ¶ 109.

22 **110.** Some Drivers did not raise issues about their compensation, even after realizing they
23 were not being paid for all hours worked for fear of retaliation by DP. *Id.* ¶ 110.

24 **111.** Drivers testified they feared they would be fired and continued working because some
25 income, albeit less than they were entitled to receive, was better than none. *Id.* ¶ 111.

26 **VIII. Individual Liability**

27 **112.** Jason Kaplan has 100% ownership of all the businesses that operate as The Driver
28 Provider and testified that he “has authority to do anything I choose to do in my business”

1 including the authority to hire and fire employees, supervise and control employee work
2 schedules and conditions of employment. *Id.* ¶ 112.

3 **113.** Both Jason and Kendra Kaplan testified that everyone reported to them. *Id.* ¶ 113.

4 **114.** Only Jason Kaplan and Kendra Kaplan had authority to determine and institute the
5 compensation structure and compensation rates paid to Drivers. *Id.* ¶ 114.

6 **115.** Jason Kaplan was involved in maintaining employment records.’ *Id.* ¶ 115.

7 **116.** J. Kaplan employed the Core Standards every Driver is required to follow. *Id.* ¶ 116.

8 **117.** Both Jason and Kendra Kaplan have instructed that Drivers’ wages be reduced
9 including where the Driver has a “service failure.” *Id.* ¶ 117.

10 **118.** Kendra Kaplan had power to hire and fire the employees and negotiate the contracts
11 under which Drivers work. *Id.* ¶ 118.

12 **119.** Kendra Kaplan was involved in setting up the DP’s current timekeeping and
13 recordkeeping procedures. *Id.* ¶ 119.

14 **120.** Jason and Kendra Kaplan were the only individuals identified as being involved in
15 creating the estimates DP produced as Drivers’ work hours, which was spearheaded by
16 Kendra. *Id.* ¶ 120.

17 **121.** When she was DP’s General Manager, Kendra Kaplan was responsible for “all of the
18 sales and operation of the business.” *Id.* ¶ 121.

19 **122.** Kendra Kaplan benefits financially from the profits that are made by the Driver
20 Provider business. *Id.* ¶ 122.

21 **123.** As the Executive Director of DP, Barry Gross’s responsibilities were to oversee and
22 ensure the general operations of DP, ensure Drivers were following DP procedures, and meet
23 with Drivers to address complaints and resolve disputes among Drivers. *Id.* ¶ 123.

24 **124.** Barry Gross had power to hire and fire and discipline employees and he determined
25 the rate and method of payment. *Id.* ¶ 124.

26 **125.** Barry Gross supervised and controlled employee work schedules and conditions of
27 employment and was involved in maintaining employment records. *Id.* ¶ 125.

28 **126.** On multiple occasions, B. Gross directed that Drivers be paid “minimum wage” for

1 certain trips if a mistake was made. *Id.* ¶ 126.

2 **IX. Time Between Trips Was Compensable Work Time**

3 **127.** All Drivers are required to designate the hours they were available, are expected to
4 accept assignments during those designated timeframes and are not permitted to decline work
5 assigned during the period they have been scheduled as “available” and according to DP
6 policy, can face reprimands for doing so and other adverse action, including not being given
7 additional work later in the day. *Id.* ¶ 127.

8 **128.** Full-time Drivers were required to be “available” to work a minimum of six days per
9 week, 10 hours per day. *Id.* ¶ 128.

10 **129.** Drivers face reprimand for declining trips, even after the end of their scheduled
11 workday. *Id.* ¶ 129.

12 **130.** DP agrees Drivers may have to perform work in between trips and should be
13 compensated for that work. *Id.* ¶ 130.

14 **131.** Drivers were not permitted to take vehicles home in between trips and could be
15 terminated for doing so *Id.* ¶ 131.

16 **132.** Drivers were required to be available and respond to dispatch and take additional
17 assignments in between trips *Id.* ¶ 132.

18 **133.** Drivers were required to respond immediately to dispatch. *Id.* ¶ 133.

19 **134.** Before this suit, DP was not tracking any time it considered to be a “break.” *Id.* ¶ 133

20 **135.** DP’s current estimates do not account for all work time as the estimates automatically
21 consider Drivers not to be working after 90 minutes if there is a “gap” between trips and then
22 automatically consider Drivers to be working only 30 minutes ahead of their next trip,
23 regardless of what Drivers were doing in between trips, and regardless of the differences in
24 travel time to a Driver’s second pickup. *Id.* ¶ 134.

25 **136.** Because Drivers are required to be at their pickup location 15 minutes ahead of the
26 scheduled pickup time, the estimate of 30 minutes of work time only allows for 15 minutes
27 of actual travel time regardless of the distance to be traveled, which DP concedes is not
28 enough time, on average, for Drivers to make it to any given pickup location and can result

1 in estimates that fail to account for all time worked *Id.* ¶ 136.

2 **137.** Drivers are not told DP is automatically and retroactively clocking them in and out.
3 *Id.* ¶ 137.

4 **138.** Prior to the lawsuit, there was no written policy regarding compensability of time
5 between trips and “chauffeurs had been instructed to clock in at the beginning and out at the
6 end.” *Id.* ¶ 138.

7 **139.** DP was instructed by their third-party Human Resources company that employees
8 must be completely relieved from time to be considered a break. *Id.* ¶ 139.

9 **X. Drivers’ Repeated Complaints**

10 **140.** Many Drivers complained about their compensation, including, *inter alia*, for not being
11 paid for all work time, for deductions from pay for “service failures,” not getting a full
12 schedule for a particular day, and that customers were being advised that gratuities were
13 discretionary. *Id.* ¶ 140.

14 **141.** Often, there was no response from DP regarding such complaints. *Id.* ¶ 141.

15 **142.** One Driver complained about having to call in an hour ahead of showing up at the
16 DP yard (after confirming the in-time the day before) and that it was actually work time. DP’s
17 third-party Human Resources company confirmed the Driver was correct, and that DP “can’t
18 require employees to call in prior to their shift. This time should be paid.” *Id.* ¶ 142.

19 **143.** DP has continued this practice, claiming their counsel has approved it. *Id.* ¶ 143.

20 **XI. Willfulness**

21 **144.** In 2002 and 2003, the U.S. Department of Labor, Wage & Hour Division (“WHD”)
22 investigated a complaint made against DP and found that DP had failed to keep track of all
23 hours worked, failed to pay overtime as required by the FLSA and that the Motor Carrier Act
24 exemption did not apply to DP. *Id.* ¶ 144.

25 **145.** Jason Kaplan represented DP during the 2002/2003 investigation and the WHD
26 discussed “in great detail,” with Mr. Kaplan *inter alia*, FLSA exemptions, hours worked, and
27 DP’s recordkeeping obligations under the FLSA. *Id.* ¶ 145.

28 **146.** Jason Kaplan represented to the investigator that DP would: review all FLSA

1 exemptions and assure compliance; pay nonexempt employees the applicable overtime pay,
2 and keep actual records of actual hours worked for its non-exempt employees including
3 Drivers. *Id.* ¶ 146.

4 **147.** As early as 2005, DP’s attorney, told DP **Redacted**

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6
7 *Id.* ¶ 147.

8 **148.** DP was advised on multiple occasions prior to this lawsuit that DP needed to maintain
9 accurate records of hours worked each workday and hours worked each workweek by Drivers
10 in order to meet the requirements of the 7(i) exemption. *Id.* ¶ 148.

11 **149.** Defendants also acknowledged the need for but failed to “develop clear policy
12 regarding when chauffeurs should clock out/in for gaps in the day” which resulted in failure
13 to track all hours worked. *Id.* ¶ 149.

14 **150.** WHD conducted a second investigation of DP in 2012-2013 during which general
15 aspects of the FLSA including its coverage, recordkeeping, travel time, hours worked and
16 exemptions were again explained to Jason Kaplan. *Id.* ¶ 150.

17 **151.** During the 2012 WHD investigation, Jason Kaplan met with the WHD investigator
18 and received advice during the investigation from DP’s attorney, Stacey Gabriel. *Id.* ¶ 151.

19 **152.** Jason Kaplan testified that he did not know whether Attorney Gabriel ever knew
20 about the 2002/2003 WHD investigation and testified that if he had sent her the 2003 WHD
21 Compliance Report, “she would have definitely had it[.]” *Id.* ¶ 152.

22 **153.** Documents related to the 2002/2003 DOL investigation were not produced by
23 Defendants or their counsel despite discovery requests. *Id.* ¶ 153.

24 **154.** Gabriel testified that she had no recollection **Redacted**

25 *Id.* ¶ 154.

26 **155.** The 2013 WHD Compliance Action Report states that “Jason Kaplan was actively
27 involved in the day-to-day operations of the company.” *Id.* ¶ 155.

28 **156.** The 2013 WHD Compliance Action Report erroneously states “[t]he firm has no prior

1 history with [WHD]” when it clearly did. *Id.* ¶ 156.

2 **157.** DP failed to disclose all locations to the WHD in 2012 when specifically requested to
3 identify and provide information for “ALL branches owned or controlled by the ownership
4 of this firm” and instead, only provided information regarding 21 individuals including the
5 19 Drivers and responded to WHD that “Innovative Transportation does not own any other
6 entities in the U.S.” *Id.* ¶ 157.

7 **158.** DP failed to provide WHD with any tax returns despite the WHD request for three
8 years of tax returns for all DP entities requested; *Id.* ¶ 158.

9 **159.** DP represented that all of its Jackson Hole sales were retail when they were not. *Id.* ¶
10 159.

11 **160.** Prior to the lawsuit, DP failed to implement any systems to determine whether they
12 were complying with minimum wage requirements or the compensation requirements for 7(i)
13 purposes. Rather, they “relied on the DOL findings in 2012[.]” [*Id.* ¶ 160.

14 **161.** Until this lawsuit commenced, DP had no copy of the Compliance Action Report
15 from the 2012 investigation. Rather, the only copy produced was stamped and redacted as
16 having been provided through their counsel’s FOIA request. *Id.* ¶161.

17 **162.** DP’s attorney acknowledged that with respect to any given pay period, if any Drivers
18 were paid less than the minimum wage, there is no 7(i) defense to overtime and that the
19 Driver “would have to be paid overtime if it was worked.” *Id.* ¶ 162.

20 **163.** Not only did DP fail to have an established “representative period” during the 2012-
21 2013 investigation, DP failed to provide WHD with an established commission plan operative
22 during the two year period under review (2010-2012). Instead, DP edited a document entitled
23 “Commission Plan” from 2005 and submitted it to WHD without disclosing that it had just
24 been revised for submission and, which among other changes, eliminated the signature line
25 for employees. *Id.* ¶ 163.

26 **164.** The Commission Plan submitted to WHD for the 2012 investigation did not
27 guarantee payment of not less than 1.5 times the applicable minimum wage and only provides
28 that if commissions fall short of the minimum wage, that is what the Driver would receive,

1 not 1.5 times minimum wage. *Id.* ¶ 164.

2 **165.** DP’s Rule 30(b)(6) representative testified that DP understood the requirements for
3 the 7(i) exemption. *Id.* ¶ 165.

4 **166.** On two separate occasions, Attorney Gabriel provided DP with copies of
5 DOL/WHM Fact Sheets about the 7(i) exemption explaining, *inter alia*, an explanation that a
6 retail or service establishment for purposes of 7(i) is an establishment “75% of whose annual
7 dollar volume of sales of goods or services (or of both) is not for resale and is recognized as
8 retail sales or services in the particular industry.” *Id.* ¶ 166.

9 **167.** Ms. Gabriel testified that she knew that “Transportation companies” were on a list
10 the DOL/WHM maintained of “establishments” it determined had “no retail concept” and
11 which were categorically unable to qualify for the 7(i) exemption. *See* 85 FR 29867-01; 29
12 C.F.R. § 779.317 (2019). *Id.* ¶ 167.

13 **168.** DP was advised by both the WHM about DP’s legal obligations and committed to
14 WHM investigators in both the 2002/2003 and 2012/2013 WHM investigations that they
15 would keep accurate records of all hours actually worked by DP’s Drivers, stating, *inter alia* in
16 Exhibit 172 that by maintaining logs of hours worked in the future DP is “confident we have
17 addressed any recordkeeping deficiencies”). *Id.* ¶ 168.

18 **169.** Kaplan committed to the DOL in 2012 that Driver time would be tracked using
19 Department of Transportation (DOT) logs [Ex. 172], but DP was not using DOT records
20 for payroll purposes and never has. *Id.* ¶ 169.

21 **170.** Defendants never conducted the analysis required under 7(i) to show that each
22 establishment, each year, met the 7(i) revenue and compensation requirements. *Id.* ¶ 170.

23 **171.** DP obtained legal advice on **Redacted** ,
24 which it failed to comply with. *Id.* ¶ 171.

25 **172.** Neither Defendants nor their counsel produced a written legal opinion regarding the
26 7(i) exemption; other than the commission plan there were only emails and oral
27 conversations. *Id.* ¶ 172.

28 **173. Redacted**

1 Redacted

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. *Id.*

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¶ 173.

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174. Counsel for Defendants testified Redacted

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. *Id.* ¶ 174.

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175. Defendants could not identify any written legal opinion from DP’s counsel regarding whether DP met the 7(i) exemption was produced in this case. *Id.* ¶ 175.

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176. In January 2020, Jason Kaplan sent an email with the subject of “potential huge loophole for us regarding Overtime” attaching a case on the taxicab exemption from overtime *Id.* ¶ 176.

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177. Attorney Gabriel does not recall Redacted

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. *Id.* ¶ 177.

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178. DP has purchased other transportation companies that employed timekeeping systems that were available to DP, but then discarded. For instance, Kendra Kaplan instructed Drivers who previously worked for Alltrans, which DP purchased, that “You no longer need to clock in and out for your shifts.” *Id.* ¶ 178.

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179. After this lawsuit was filed, DP’s counsel repeatedly advised DP Redacted

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. *Id.* ¶ 179.

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Respectfully submitted this 31st day of May 2023.

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MARTIN & BONNETT, P.L.L.C.

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By: /s/ Michael Licata
Daniel L. Bonnett

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