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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Kelli Salazar, Wayne Carpenter, Rodney Lopez, and Gregory Hanna, individually and on behalf of other similarly situated individuals, Plaintiffs, v. Driver Provider Phoenix, LLC; Driver Provider Leasing, LLC; Innovative Transportation of Sedona, LLC; Innovative Transportation Solutions of Tucson, LLC; Innovative Transportation Solutions, Inc. (Arizona); Innovative Transportation Solutions, Inc. (Utah); Innovative Transportation Solutions, LLC; 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' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

A. Defendants' Controverting Statement of Facts Violates LRCiv 56.1.

The Court instructed the parties to review *Hunton v. Am. Zurich Ins. Co.*, No. 16-00539, 2018 WL 1182552 (D. Ariz. Mar. 7, 2018) before briefing summary judgment. (Doc. 92 at 4, ¶ 6(c)). *Hunton* addresses LRCiv 56.1, which "imposes specific requirements on the form and content of summary judgment with the goal of simplifying the process." 2018 WL 1182552, at *2. LRCiv 56.1(b) "requires the controverting party to provide a specific record reference supporting the party's position if a fact is disputed; **it does not permit explanation and argument supporting the party's position to be included in the response to the moving party's statement of facts**." *Id.* (quoting *Pruett v. Arizona*, 606 F. Supp. 2d 1065, 1075 (D. Ariz. 2009)) (emphasis added). The rule also requires additional facts to "be set forth in a separately numbered paragraph and must refer to a specific admissible portion of the record where the fact finds support." LRCiv 56.1(b). "If a fact is admitted, there should be no follow up. If a fact is disputed, the only follow up should be a citation to the admissible portion of the record where controverting evidence may be found. If the fact is admitted, but [a party] believe[s] additional information is needed for context, that additional evidence should be provided in a separately numbered statement of additional fact precluding summary judgment." *Gillard v. Good Earth Power*, No. 17-01368, 2019 WL 1280946, at *3 (D. Ariz. Mar. 19, 2019). In addition, an objection "in the party's response to the separate statement of material facts must be stated summarily without argument." LRCiv 7.2(m)(2). Where a party fails to heed these requirements, courts deem the moving party's statement admitted or will not consider the offending portions of the controverting statement. *See Hunton*, 2018 WL 1182552, at *3 ("Everything after the word 'admits' is improper."); *Kester v. CitiMortgage Inc.*, No. 15-00365, 2019 WL 4643779, at *1 n. 1 (D. Ariz. Sept. 24, 2019), *aff'd,* 837 F. App'x 577 (9th Cir. 2021) (court will not consider "non-responsive paragraphs and legal arguments…").

DP's controverting facts ("DCSF") (Doc. 530) are **replete** with violations. At least 112/179 of DP's statements (62.5%) are facially improper—many egregiously so.[1] DP

[1] Including ¶¶ 7, 12, 14, 15, 17, 20, 23-26, 29, 30, 32, 33, 35, 38-49, 52-54, 56, 58, 61, 66, 68,

persistently fails to respond to Plaintiffs' statement as written and instead materially rephrases them before responding. This prejudices Plaintiffs and burdens the Court from conducting the otherwise straightforward task of determining that Plaintiffs' statement, as written, is *not* in dispute. DP also frequently interjects its own factual assertions in the response to the paragraph and fails to set those facts out separately in additional paragraphs as required.[2] Plaintiffs' corresponding statement of fact should be deemed admitted. *See Shipp v. Arnold*, No. 18-4017, 2020 WL 4006334, at *3 (W.D. Ark. July 15, 2020), *aff'd*, 9 F.4th 694 (8th Cir. 2021) ("Plaintiff 'admits' Arnold's asserted facts while rephrasing the assertions in ways that are ostensibly more advantageous to Plaintiff… Arnold's assertions of fact are deemed admitted..."); *Uhl v. Home Depot U.S.A.*, No. 08-3064, 2010 WL 3282611, at *1 n.1 (E.D.N.Y. Aug. 13, 2010) (same); *Zaniewska v. City of New York*, No. 11-2446, 2013 WL 3990751, at *1 n. 3 (E.D.N.Y. Aug. 5, 2013), *aff'd*, 569 F. App'x 39 (2d Cir. 2014) (same); *Safeco Ins. Co. v. Renn*, No. 07-3024, 2011 WL 13258220, at *4 (N.D. Ill. Aug. 17, 2011) (citing cases).[3]

Numerous responses include DP's own statement of alleged fact and/or argument (¶¶ 7, 12, 14, 17, 20, 24, 30, 39, 44, 48, 49, 52-54, 58, 61, 66, 68, 71, 77, 78, 83, 92, 96, 97, 109, 113, 124, 134, 139, 142, 143, 152, 155-159, 163, 164, 167, 173, and 179).[4] The Court should only consider the non-offending portions of these statements, i.e., whether the statement is admitted, disputed, and if disputed, the record citation (if any). *See Lowe v. Maxwell & Morgan PC*, No. No. 15-02481, 2018 WL 4693532, at *1 n. 1 (D. Ariz. Sept. 27, 2018). Other responses fail to dispute, admit, or object to Plaintiffs' statement at all (¶¶ 25-26, 66, 101, 103-105, 153, 168, 172). Others dispute Plaintiffs' statement but fail to include any record cite in support (¶¶ 93, 107, 108). In other cases, DP merely asserts a legal position and references its brief (e.g, ¶ 68). These should all be deemed admitted.

71, 73, 75-78, 81-85, 90, 92-97, 99-110, 113, 115, 120, 124, 125, 127, 128-148, 150, 152, 153, 155-161, 163, 164, 167-170, 172, 174, 177, & 179.

[2] The offending paragraphs include: ¶¶ 12, 14, 15, 17, 20, 23, 29, 32, 33, 35, 38, 40-43, 45, 46, 48, 49, 56, 66, 73, 75, 76, 81-83, 85, 92-95, 99-106, 110, 113, 115, 120, 125, 127, 128-132, 135-138, 140, 141, 147, 150, 153, 160, 161, 168-170, 172, 174, and 177

[3] The local rules in these cases mirror LRCiv 56.1.

[4] Particularly egregious examples are found at ¶¶ 24, 48-49, 78, & 97.

In addition, DP includes numerous objections that fail to adhere to the rules. (¶¶ 62, 87, 102, 107) or objections that are not summarily stated. (¶¶ 144-147). These objections should not be considered or should be overruled, and the facts deemed admitted. *See Am. Express Co. v. Ponnambalam*, No. 18-03237, 2020 WL 13442489, at *4 (D. Ariz. Apr. 7, 2020) (striking objections that were not made "summarily without argument"). DP also disputes certain facts based on what it calls Plaintiffs' "characterization" of a fact. *See* ¶¶ 32, 81, 93, 136. Such denials are improper, a fact is either admitted or denied. If DP disputes a fact, it was required to deny it. If it believes additional material facts are necessary for context, it was required to set those out separately. *See Hunton*, 2018 WL 1182552, at *3 (improperly disputing facts as incomplete or misleading, "is just another way of saying that he agrees with the factual statement made by Zurich but believes additional information is material…"). DP's violation of the rules deprives Plaintiffs of an even playing field, hinders the efficient resolution of Plaintiffs' motion and are a means for DP to exceed the page limit on argument. Plaintiffs complied with the Local Rules and heeded the Court's admonition to follow *Hunton*. DP should be held to the same standard.

B. Plaintiffs Object to the Kaplan and Lynn Declarations.

Plaintiffs object to K. Kaplan's June 30, 2023 Decl. (Doc. 530-2 at Ex. 4). ¶¶ 3, 7, 9-11, 14-16, and 19 are unsupported by admissible evidence and contradicted by the record. *See* PSOF ¶¶ 49-50, 140, 171;[5] 32; Doc. 332-3, Ex. II at ¶ 7 (Intel driver required to start day at DP yard); PSOF ¶¶ 92, 160, (Doc. 38-4 at 66/69) (Plaintiff Hanna's paystub showing 0.00 hours worked despite being paid $854); PSF ¶ 37(p) (required to track flights between trips); Exs. A & B to 7/17/23 Licata Decl. (filed herewith) (refuting claims Kaplans were not involved in DP operations during periods). The statements lack foundation and evidentiary support (¶ 16, 19) or are entirely immaterial (¶ 8). *Norman v. Rancho Del Lago*, No. 22-15111, 2023 WL 21461, at *1 (9th Cir. Jan. 3, 2023) ("[C]onclusory statements that are unsupported by the record are not sufficient to defeat a motion for summary judgment."); *Salas Avocado*

[5] DP engages in semantics. What Ms. Kaplan refers to as a "service charge" in ¶ 3 was a discretionary gratuity. *See* PSOF ¶¶ 49, 50, 140, 171.

SPR de RL v. SA&E Enterprises LLC, No. 20-00046, 2022 WL 60623, at *4 (D. Ariz. Jan. 6, 2022) (statement contradicted by documentary evidence does not create genuine dispute).

Plaintiffs object to the Lynn Decl. (Doc. 540, Ex. 5). Mr. Lynn lacks personal knowledge for ¶¶ 18 and 20 that amounts paid to Drivers were "intended to compensate them for all hours worked" or whether Mr. Carpenter was "compensated for all hours worked," which are also argumentative. He does not have personal knowledge to testify in ¶¶ 23 and 26 that the files (altered trip records) were "kept in the usual course of business" and the assertions are argumentative and contrary to the record. The files were *created* in response to this case (not in the usual course of business) and produced as purported time records when in fact they were retroactive *estimates* based "macros" written by someone DP hired from "Up Work" in 2020. Doc. 546, PSOF ¶ 81; Doc. 444 at ¶ 11; Doc. 469 at Ex. 11.

C. DP Has Failed to Prove Application of the 7(i) Exemption.

DP's attempt to rewrite the 7(i) exemption is meritless. The law defining "retail or service establishment" was developed in tandem with the identical terms used in FLSA § 213(a)(2). Despite repeal of § 213(a)(2), the body of law defining "retail or service establishment" continues to apply, as was held in *Gieg v. DDR, Inc*, 407 F.3d 1038, 1047 (9th Cir. 2005). DP's arguments to the contrary (at 3-9) conflict with a wealth of authority.[6]

DP failed to show that for any establishment for any year that at least 75% of revenue from sales is (a) recognized *as retail in the industry*; (b) that DP's sales have the requisite "retail concept"; or (c) that not more than 25% of its sales were for resale. *Gieg,* 407 F.3d at 1047; § 779.411. DP offered no "recognition in the industry" evidence.[7] Its records show that only 11.1% of revenue is derived from the sales that DP itself classifies as retail and 1% is from

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[6] *See* (Doc. 542 at 20; Doc. 545 at 2-9; Doc. 443 at 10-14); *Gonzalez v. Diamond Resorts Int'l Mktg.*, No. 18-00979, 2021 WL 6123631, at *2 (D. Nev. Dec. 27, 2021); *Casanova v. Gold's Texas Holdings Grp., Inc.*, No. 13-1161, 2016 WL 1241548, at *4 (W.D. Tex. Mar. 23, 2016). *See also Merritt v. Texas Farm Bureau*, No. 19-00679, 2023 WL 3520322, at *3 (W.D. Tex. May 16, 2023) (lack of retail concept).

[7] DP's suggestion (at 7) that the 2012 investigation could satisfy the requirement to show that from 2016 to the present at least 75% of its sales on an annual basis by establishment are recognized as retail in the industry because such a finding was "inherently required" is frivolous. Even so, DP still failed to provide any *evidence* of industry recognition.

individuals.[8] (PASF ¶ 25 (Doc. 538-2)). DP's arguments regarding "retail concept" and sales not for resale directly conflict with controlling authority. Given DP's failure to meet the threshold requirements, summary judgment is appropriate. *Partida v. Am. Student Loan Corp.*, No. 07-0674, 2008 WL 190440, at *2 (D. Ariz. Jan. 18, 2008) (employer failed threshold requirement, so court "need not decide whether [it] could satisfy the two other prongs of [7(i)]"); *Reese v. Fla. BC Holdings*, No. 17-1574, 2020 WL 10486252, at *13 (M.D. Fla. Jan. 16, 2020) (same); *Jackson v. R&A Towing*, No. 21-0618, 2023 WL 2433977, at *5 (S.D. Tex. Mar. 9, 2023) (failure to show "sales fit the definition of 'retail sales[]'").

DP attempts to squeeze its sales into the controlling definitions through misstating and omitting key portions of applicable regulations and authorities. DP baselessly suggests (at 8) that the term "resale" is "narrowly defined" and quotes one of ten sentences in the regulation entitled "Meaning of sales for resale," § 779.331. The quoted sentence states that a sale is a for resale if the seller "knows or has reasonable cause to believe that goods or services will be resold." While any claim DP didn't know its services are resold is contradicted by the record, (*see e.g.*, PSF ¶ 32), as a matter of law DP at all times had "reasonable cause to believe" that its services would be resold because the regulation expressly incorporates most of DP's sales in the definition of sales for resale. The regulation defining "resale" includes:

> sales by an establishment to a competitor are regarded as sales for resale even though made without profit. Similarly, 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.

Id. (citations omitted). Hence, all of DP's sales or exchanges with affiliates are resales as are DP's sales to businesses like Intel to transport their employees.[9] Contrary to DP's assertion (at 8) that Plaintiffs claim "without supporting evidence" that its sales to affiliates are resales,

[8] Revenue records consolidating years and locations were the only records produced before the SJ deadline (despite Plaintiffs' requests and DP's obligation to produce the records by location/year). The records produced on 6/29/23 also do not establish the 7(i) requirements.

[9] DP calls its competitors affiliates. (Doc. 530-2, 30(b)(6) Dep. Vol. 2 at 99-101; Doc, 502-2 at 255, 285/292).

§779.331 *expressly* provides that "supporting evidence."[10]

Regarding the "retail concept" test, DP misrepresents both facts and law by repeated references to "end users" (used nine times at 6-8). DP's assertion that "100% of the services are being provided directly to the end user" (at 7) is false: for instance, DP regularly "farms out" business and receives revenue from affiliates where the affiliate (not DP) provides the service. (PSF ¶ 21-23; PSAF ¶ 20). Nor is there merit to DP's "end user" arguments as a legal proposition. While a sale to a member of the public at a retail rate would constitute a retail sale, DP's sales to customers at retail rates represent a small percentage of its revenue. (PSAF ¶ 1). The only other relevance of "end user" is as one of multiple indicia analyzed to determine whether services have a *retail concept*. § 779.318(a). (at 8) The DOL letter that DP (at 8) urges the Court to embrace as "dispositive" (2020 WL 5367068), *forecloses* DP's 7(i) exemption defense. The letter makes clear service to an "end user" is just one of the retail concept factors and that the retail concept test is just one of two separate tests needed to determine whether at least 75% of the total sales of services are recognized as retail in the industry. *Id.* at *2, 4. Further, the letter explains the 75% of sales requirement is only *one* of *three* requirements necessary to meet the "retail or service establishment" test. [11] In short, DP's arguments about servicing an "end user" are insufficient to satisfy the "retail concept" test, much less prove that 75% of annual sales by establishment are recognized as retail in the industry—the other half of the test DP does not address.

Plaintiffs addressed DP's lack of "retail concept" on their MSJ. *See* Docs. 545 at 4-5; 542 at 18-21; 443 at 8-14. There is no merit to DP's argument that it meets the other principal indicia of possessing a retail concept, including serving the everyday needs of the community

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[10] While Plaintiffs have no burden to demonstrate the revenue percentages derived from these categories, the documents produced prior to close of fact discovery show DP's sales to affiliates amounted to 17.7% of its total sales, corporate sales amounted to 37.5%, DMC sales amounted to 8.1% and wholesale sales amounted to 12.1%. (Doc. 538 at 10).

[11] DP neglected to note the DOL letter emphasized the need for recognition in the industry. After explaining the requirement and noting the lack of information concerning industry recognition, the DOL conditioned application of 7(i) on satisfying that test stating, that the employer would be eligible to claim the 7(i) exemption "*provided*, …that its services are recognized as retail within the waste-removal industry." 2020 WL 5367068, at *4.

and disposing of its services "in small quantities" and at retail prices. *See Idaho Sheet Metal v. Wirtz*, 383 U.S. 190, 203, 208 (1996); 779.316, 779.318. DP's claim (at 6) that it disposes of its sales of services in small quantities disregards the law. Sales at discounts or in quantities greater than those typically purchased by members of the public are not retail sales. *Idaho Sheet Metal*, 383 U.S. at 208. § 779.328. Here most of DP's sales are not retail either because they are purchased in large quantities and "performed in smaller quantities" or because "instead of entering into a single contract," the purchaser "receives a series of regular deliveries of performances pursuant to a quotation, bid, estimate, or general business arrangement or understanding." § 779.328. *See e.g.*, PSF ¶ 24-31; PSAF ¶¶ 2, 4, 25, 26.

DP fails to comprehend the other basic element of a retail sale—the price. The price for a retail sale must represent the rate charged to a member of the public purchasing a quantity representing what a member of the public would purchase. DP makes a dispositive admission: in purporting to deny PSF ¶ 24 (asserting DP's own revenue records demonstrate that only a small percentage of its sales revenues are retail), DP states, *inter alia: "The 'retail' and 'wholesale' categories in The Driver Provider's revenue records merely denote the rates that are applied – not the nature of the services themselves."* DCSOF ¶24. It is precisely the rates charged and the quantity purchased that differentiate most of DP's sales from retail sales. § 779.328

Plaintiffs demonstrated (at Docs. 545 at 10-12; 542 at 21-23) that DP cannot show it paid *bona fide* commissions nor prove that more than half of Drivers' compensation represents commissions. Regardless of the Court's determination of what constitutes a *bona fide* commission, proof of 50% of pay by commission is not possible because DP unlawfully commingled revenue received from invoiced discretionary gratuities with its so-called commissions, and those payments were tips that may not be counted as commissions. (Doc. 501-7, Ex. 177, DOL Fact Sheet # 20) ("Tips paid to service employees by customers may never be considered commissions for the purposes of this exemption.")). *See* PSF ¶ 49, which DP failed to controvert. *See Jackson,* 2023 WL 2433977, at *7 (rejecting commission concept for tow truck drivers).

7(i) also requires accurate records of all hours worked. (Doc. 501-7 (Dep. Ex. 177). DOL

Fact Sheet # 20 ("Without hours worked and earnings records, the employer will be unable to substantiate that all conditions for the exemption have been met."). DP admitted that prior to this lawsuit if failed to implement any systems to determine 7(i) compensation requirements. PSF ¶ 160. More than two decades after having been found to have violated FLSA's overtime and recordkeeping requirements and after committing to DOL investigators in 2002 and again in 2012 that it would keep records of all time worked, DP *still* does not record all time worked. (PSF ¶ 78-82, 134, 144, 147, 149, 168, 169, 179). DP nonetheless asserts it should be permitted to treat the 7(i) compensation test as "factual disputes" to be determined down the road. However, none of DP's cited cases involved persistent disregard for recordkeeping requirements. DP violated FLSA and state law requirements for over two decades and deprived Drivers of wages due for years. DP's effort to treat its 7(i) noncompliance as a mere factual dispute to be resolved later makes a mockery of the law.

D. DP Has Failed to Prove Application of the Taxicab Exemption.

As set forth in Doc. 545 at 13-17 and Doc. 542 at 9-17, DP does not come close to meeting its burden to show this exemption applies.[12] Application of the exemption is not an individualized inquiry but turns on the *nature of DP's business*. *Id.* at 9-13. Contrary to DP's straw-man argument (at 11), Plaintiffs do not argue for a bright-line test or claim that an employer must "solely" operate taxicabs. Consistent with substantial caselaw and DOL guidance (subject to *Skidmore* deference),[13] there should be "evaluation of all relevant facts and circumstances" and that there is "no precise formula[.]" *Chao v. Am. Serv. Sys., Inc.*, No. 98-0174, 2001 WL 37131280, *4 (D. Ariz. Oct. 9, 2001). There is absolutely no authority for DP's contention the exemption requires an employee-by-employee inquiry or that the Court may disregard the panoply of facts that show DP is *not* engaged in the business of operating taxicabs, as explained in detail at Doc. 542 at 9-13. Even *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, 904 F.3d 208 (2d Cir. 2018) considered *the company's* fleet, whether *the company*

[12] DP fails to address the Opt-ins who are *party plaintiffs* and who moved for summary judgment. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018).

[13] *See Marsh v. J. Alexander's LLC*, 905 F.3d 610, 623 (9th Cir. 2018).

operated fixed routes, the extent and "magnitude" of *the company's* corporate contracts, and whether *the company* served the local needs of the community. *Id.* at 216-217. Like its arguments under 7(i), the Court should reject DP's effort to rewrite the law.

While DP relies on *Munoz,* it fails to address the facts that show its business is the direct *inverse* from the employer in *Munoz*, as outlined at Doc. 545 at 14-15 and Doc. 542 at 13-15. The majority of DP's fleet consists of larger vehicles that can never be considered a "taxicab" (Doc. 546, ¶ 14). Where the *Munoz* employer had a "negligible" amount of business from "recurrent contracts and corporate clients," here, only a negligible amount of business is from individual members of the public and the *vast majority* (96.3 to 98.9%) is from recurrent contracts or business from corporate clients (or their equivalents, like schools). (Docs. 546 ¶ 25). This includes at least 30% of revenue from written contracts, although the relevant inquiry does not consider only written contracts. (Doc. 534, PSAF ¶¶ 1-4). [14]

As set forth in Doc. 533 at 14, DP's reliance on *Munoz* for the argument (at 13) that the amount of its "business from recurrent contracts and corporate clients," 904 F.3d at 217, is irrelevant if DP can provide services to members of the public is misplaced as that was not the holding. *See Alabsi v. Savoya, LLC*, No. 18-06510, 2019 WL 1332191, at *11 (N.D. Cal. Mar. 25, 2019). Contrary to DP's unsupported assertion (at 13) that "there has not been a time when The Driver Provider has been unable to provide services to the general public due to contractual obligations," the facts show DP was often unable to provide services to members of the public because of its commitments to corporate clients, including clients with whom DP maintained contracts and recurrent business, and had to "farm out" those trips to other companies to complete. (Doc. 534 at PSAF ¶ 20).[15]

While DP argues the Court should disregard the DOL guidance and numerous cases and

[14] These facts resemble those in *Blan v. Classic Limousine Transp.*, No. 19-807, 2021 WL 1176063 (W.D. Pa. Mar. 29, 2021), which DP does not address.

[15] The lone support for DP's claim is the conclusory statement in the 3/27/23 Decl. of K. Kaplan (Doc. 451-1 ¶ 6), which is the subject of a motion to strike (Doc. 460) and cannot defeat summary judgment. She fails to identify what "business records" she reviewed or provide any detail and her statement is contrary to the record. (Doc. 534 at PSAF ¶ 20).

instead apply the statute's "plain language," it then argues (at 12) the plain language doesn't really matter either and asserts that "luxury vans" (that accommodate 15 passengers) are also "taxicabs." DP's argument shows that reliance on the overly broad definition *created* by the court in *Munoz*, which is divorced from the plain meaning of the statute (when it was adopted and now) and the exemption's purpose, results in an expansion that Congress never intended. *Munoz*, for example, left open the possibility that coach buses qualify as "taxicabs," stating only that such vehicles "might not qualify," which is absurd. 904 F.3d at 216 n. 8. If the Court declines to follow the DOL and the numerous courts to have decided the exemption, then its task is to apply the ordinary meaning *when the statute of was adopted. Williams v. King*, 875 F.3d 500, 503 (9th Cir. 2017) ("[W]e examine contemporaneous sources to determine the legal meaning of the term at the time Congress employed it in the statute.") (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979) (courts look for the meaning "at the time Congress enacted the statute")). "In these circumstances, consulting common dictionary definitions is the usual course." *California All. of Child & Fam. Servs. v. Allenby*, 589 F.3d 1017, 1021 (9th Cir. 2009). Even if the Court does not follow the OED which includes taximeters (Doc. 507-2, Ex. Y-2), "taxicab" is still not as broad as applied in *Munoz*. While the *Munoz* court cited *Webster's New International Dictionary: Unabridged* (2d ed. 1934), it ignored that definition includes only vehicles "designed to seat five or seven persons" that are available for hire "on public thoroughfares or at public stations or stands." 904 F.3d at 213.

Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975), addressing "technological changes," does not support departure from the plain meaning since there have been no advancements that render the plain meaning ambiguous or its application inconsistent with the statute's purpose. The assertion (at 14) that "gone are the days where states and localities heavily regulate the taxi industry" is not only completely unsupported, but also demonstrably false. The municipalities where DP operates regulate taxicabs and those regulations are 100% consistent with the historical and modern day meaning of the word "taxicab" and the purpose of the exemption, which was to avoid conflict with such local regulations, including, *inter alia*, the setting of taxi fares. *See* Pls. MSJ (Doc. 545 at 16-17); *Munoz*, 904 F.3d at 208, 215. *See* Ex.

A (hereto) (SLC) at 5.72.005 (vehicles seating up to 5 passengers); (5.72.305) (taximeters required); 5.72.405 (rates set by city council and must be on outside of vehicle); (5.72.505) (required to pick up passengers who hail them in public); (Ex. B) (hereto) (PHX) at § 36-202 (must post fares inside and outside); § 4-67 (must seat less than 7 passengers to operate at airport); (§§ 4-67, 4-82) (must have contract with city); § 4-83 (set fares to be charged from the airport); § 4-77(17) (at airport required to have taximeters rooftop sign); Ex. C (TUC) at (§ 20-303(1), § 20-304(2)) (rates posted on outside & inside); § 20-303(3) (dome lights "baring the word "TAXI or the company name"); taximeters (§ 20-305(1) (taximeters); Ex. D (Jackson) 5.50.20(J) (only up to 7 passengers); 5.50.085(A)(fares are set by the town council); 5.50.085(B) (fares displayed); 5.50.090 (vehicle markings and signage); (5.50.095) (roof light).

Lastly, although DP's sole focus on the Named Plaintiffs is incorrect (and based on substantial misstatements and/or unsupported assertions), all DP establishes is that they operated smaller vehicles in addition to larger ones (like 15-passenger vans) for part of their work, which does not, in any context, establish applicability of the exemption. [16] Even if the inquiry were employee-specific (and it isn't), DP concedes Named Plaintiffs operated some fixed routes, but fails to address trips performed for corporate clients or pursuant to contracts, including, *e.g.*, the Four Seasons, or the trips from a fixed termini, including trips from the Four Seasons "stand" (not open to the general public) and from other hotels, where Drivers are stationed at the hotel as required by DP's hotel contracts and work in shifts.[17]

E. Partial Summary Judgment on the FLSA and AMWA Claims is Appropriate.

In claiming that summary judgment is not appropriate, DP again attempts to relitigate conditional and class certification. However, Plaintiffs' claims are certified as collective and class actions and Plaintiffs have established all elements of their FLSA and AMWA claims.

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[16] DP's assertion (at 12) that Plaintiffs "admit" they "rarely operated on a fixed schedule, fixed route, or fixed termini," is false. Doc. 534, PSAF ¶¶ 34-35. The statement by the Court in its 12(b)(6) Order (Doc. 44) that DP relies on regarding fixed routes appears to have been based on DP's false assertion that Drivers "did not operate with fixed schedules, routes or termini" (Doc. 27 at 6). Discovery confirms that not only does DP operate fixed routes, but its most lucrative contracts are for fixed routes. (Doc. 534, PSAF ¶1-4).

[17] Drivers attended trainings by the Four Seasons. (Doc. 534, PSAF ¶ 37).

See Smith v. Nov. Bar N Grill LLC, 441 F. Supp. 3d 830, 834 (D. Ariz. 2020) ("To establish a minimum-wage or overtime violation of the FLSA, Plaintiff must establish three elements: (1) she was an employee of Defendants; (2) she was covered under the FLSA, and (3) Defendants failed to pay her minimum wage or overtime wages.") (citing 29 U.S.C. §§ 206(a), 207(a)); A.R.S. § 23-364(G). DP does not and cannot genuinely dispute any of these elements, including the failure to pay minimum wages and overtime in weeks where Drivers worked more than 40 hours. Doc. 530 at DCSF ¶ 89 (admitting DP never paid overtime). In other words, there is no dispute as to the *fact* of damages—only the *amount* remains in dispute. *See Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("Once the employee 'has proved that he has performed work and has not been paid in accordance with the [FLSA],' the *fact* of damage is certain…The only uncertainty is the amount of damage.") (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)). With respect to damages, DP's own expert, who substantially *undercounts* work time, provides that 70/78 collective members who worked for DP within three years of the filing of their consent forms have minimum wage damages and/or overtime damages, which is almost 90% of the collective members considered in DP's report, with 55 (70%) owed minimum wages and 59 (75%) owed overtime. Doc. 530-3 at Schedules Set 1 – 1a, 2a; 3a. DP's expert found nearly 300 Rule 23 Class Members have damages under the AMWA. *Id.* at Schedule Set 1 – 1a.

While the parties dispute the amount of damages, that does not prevent summary judgment. *See* 10B Fed. Prac. & Proc. Civ. § 2736 (4th ed.). Since there is no dispute DP is liable to Drivers who were not paid minimum wage and/or who worked more than 40 hours in a week, summary judgment on liability is appropriate with damages to be decided at trial. *See Finton v. Cleveland Indians Baseball Co. LLC*, No. 19-02319, 2021 WL 661975, at *8 (D. Ariz. Feb. 19, 2021), *order vacated in part on other grounds*, No. 19-02319, 2021 WL 1610199 (D. Ariz. Apr. 26, 2021) (liability with damages to be decided at trial); *Draskovic v. Oneota Assocs., LLC, No.* 117-5085, 2019 WL 783033, at *11 (E.D.N.Y. Feb. 21, 2019) (same); *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-00824, 2018 WL 1088811, at *22 (D. Ariz. Jan. 9, 2018) (personal

liability, willfulness, and liquidated damages).[18] *Cole v. CRST, Inc.,* 150 F. Supp. 3d 1163 (C.D. Cal. 2015) is inapposite. In *Cole* (meal break violations of CA law), there was a genuine dispute as to whether there was *any liability at all*, which prevented summary judgment. Here, there is no question as to liability, i.e. the *fact* of minimum wage and overtime violations --- the only dispute is the extent of damages. *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 479 (9th Cir. 2023) is also inapposite—Plaintiffs are not seeking judgment as to *all* FLSA and Rule 23 members; Plaintiffs seek *partial* summary judgment for those Opt-in and Rule 23 members who prove damages at trial. This is entirely appropriate under Rule 56(a) and (g). At the very least, Plaintiffs are entitled to judgment for the nearly 300 Drivers DP agrees have damages.

Lastly, as set forth in Doc. 484, Plaintiffs have cognizable claims for civil penalties under the law of the case and the plain language of the statute. DP does not even attempt to show it maintained the records required. A.R.S § 23-364(D); Ariz. Admin. Code R20-5-1210.

F. There Is No Genuine Dispute DP Violated the AWA, A.R.S. § 23-355.

Plaintiffs showed that: 1) DP required Drivers to perform pre- and post-trip work; 2) DP agrees Drivers should be paid for the work; and 3) DP failed to pay Drivers for that work. (Doc. 545 at 18; Doc. 542 at 1-9). The law is clear that when DP directed and the Drivers performed that work, an employment contract was formed, creating a reasonable expectation of and right to payment. (Doc. 542 at 5-8). *See also* A.A.C. § R20-5-1202 (hours worked includes "all time the employee is suffered or permitted to work"). DP's defense that its commission plan formed the sole basis for compensation to which Drivers allegedly agreed, fails to create a triable issue of fact, *inter alia* because: 1) there was never such an agreement; 2) the plan does not provide that it is the sole source of payment, nor disclose that payments will be less than the promised hourly rate or equivalents; 3) there is no admissible evidence that it was ever intended to compensate Drivers for all hours worked; and 4) DP failed to produce any evidence of any procedure for disclosing that its commission plan was the sole source of payment, that it would not pay in accordance with the hourly rates advertised and

[18] The MCA exemption was not properly asserted by DP and cannot be a basis to avoid summary judgment. *See* Doc. 432. DP also fails to establish its applicability.

promised at hire nor obtain acknowledgements and consent from Drivers that the commissions would be the sole basis for payment.[19] (*See* Doc. 542 at 1-9).

Each of the four reasons asserted for denial of Plaintiffs' MSJ (at 17) is meritless. DP's argument that the contracts and policies "viewed as a whole" evidence an agreement that DP's commission plan compensated for all hours worked is not supported by any admissible evidence and is pure fiction. There is no proof that the commission plan was ever disclosed or agreed to by Drivers as the sole source of payment as a condition of employment, nor that Drivers were told they would receive less under the plan than the hourly rates they were promised. DP's argument that Drivers had to establish a promise for "additional pay" stands the inquiry on its head. (Doc. 542 at 5-8).[20]

Plaintiffs showed that Drivers uniformly had a reasonable expectation to be paid for their pre- and post-trip time, *inter alia*, through PSF ¶ 39 which asserts in relevant part that Drivers were told upon hire they would be paid an hourly rate, and that Drivers were not given commission plans. (*See also* PSAF ¶ 5, 8-13). Nothing in DP's denial of ¶ 39 (citing DSF ¶ 37-51) or in DP's additional facts in any way contradicts DP's consistent practice of soliciting and advising Drivers at time of hire that they were to receive either hourly pay or hourly pay equivalents at specified dollar amounts. Plaintiffs included job postings showing hourly or hourly "equivalent" offers including for the shuttle Drivers at Intel. (Ex. 19 to PSAF; PSCF ¶ 94). Ms. Howard left her job as a school bus driver paying $15.30 per hour "on the express promise of an increased hourly wage" of $18 an hour. (Doc. 332-3, Ex. II, ¶¶ 5-6). Neither Mr. Williams nor anyone else submitted a declaration challenging what Ms. Howard was told

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[19] Plaintiffs addressed in Doc. 542 at 8-9 the cases DP cites again (at 17-18, 20). In *Anderson v. S. Home Care Servs., Inc.*, No. 13-0840, 2016 WL 11521626, at *5 (N.D. Ga. Sept. 21, 2016), commissions were not at issue.

[20] Citing to a single identical paragraph in *July 2020* declarations in support of Pltfs' Mot. for Conditional Cert. (Doc. 38), DP grossly misrepresents the facts by asserting that Plaintiffs "declared under oath that their agreement with the Driver Provider provided that the commission plan compensated them for all hours worked." (at 18, 22). There is no reasonable basis to assert that the Plaintiffs who are suing DP over its illegal pay structure somehow agreed to that structure merely by describing it. Nor is there any reference to it covering "all hours worked" in the declarations.

when she was hired. The absence of any controverting evidence is dispositive.

DP's 30(b)(6) witness understood that promising an employee an hourly rate equivalent means that the Driver will earn an amount that is equivalent to that hourly rate. Citing DP's 30(b)(6) witness, PSF ¶ 40 states: "DP testified that use of the per hour 'equivalent' in job ads was 'what an employee could anticipate receiving in commission for their time worked.'" (Doc. 499-1 at 125-126/650 (30(b)(6) Dep. Vol. 2, at 140-41)). DP admitted PSF ¶ 40 (albeit in improper reformulation). Similarly, citing, *inter alia,* Doc. 477-6 at 5-7 (K. Kaplan Dep. at 109:8-18), Plaintiffs established in PSF ¶ 106-107 that based on an advertisement specifying an hourly rate, it was reasonable for Drivers to understand that the position would pay that rate and that the rate would be paid *for all hours worked.* DP does not dispute ¶ 107; instead, it claims it is somehow "misleading" without any explanation nor additional facts—clearly insufficient to create a triable issue of fact. Fed. R. Civ. P. 56(e). Plaintiffs set forth in detail why there is no basis to dispel Drivers' reasonable expectations that they would be paid for their work. (PSF ¶ 99; PSAF ¶ 5-13, 36, 37*;* Doc. 542 at 1-9).

DP's argument (at 17) that Drivers forfeited their rights to payment based on the parties' course of dealing is also meritless. Defendants' deceptive course of dealing is well documented. (Doc. 542 at 1-9).[21] Plaintiffs demonstrated DP did not compensate Drivers for their pre- and post-trip work. (Doc. 533 at 29-30). DP also admits at DCSF ¶ 99, 140 that Drivers did not understand how they were paid and complained they were not being paid what they were promised for all hours worked. DP's own expert (who Plaintiffs assert vastly understated actual hours worked) determined many Drivers were earning well below the promised rates. (E.g., PSF ¶¶ 102-103; PSAF ¶ 36) (DCSF Ex. 11 (HaugenSuppRpt000079 (Doc. 530-3 at 58/222)). DP also admits Drivers who were receiving minimum wage for working at the Stand (i.e., the Four Seasons) were not paid for pre- and post-trip work and were only compensated for the length of time that they were at the Stand. (DCSF ¶ 97).

[21] DP's citation (at 19) of an incorrect section of the UCC (A.R.S. § 47-1205) grasps at straws. Employment contracts and employee rights are accorded special treatment under Arizona law. Employees are not widgets, and their rights are not governed by the UCC.

Likewise, DP admits that when it unilaterally reduced Drivers' pay to "minimum wage" for making a mistake, the reduced pay was based only on the trip pickup and drop off time and did not include pre- and post-trip time including travel. (DCSF ¶ 98). DP offered no evidence that these failures, which clearly violate the law, were some sort of anomaly; they are consistent with DP's longstanding practice of not paying for pre- and post-trip work.

DP's assertion (at 17) that the Court is prohibited from granting summary judgment because Plaintiffs' AWA claims are not yet certified under Rule 23 is incorrect. The Rule 23 motion is *sub judice* (Doc. 456). It is well-established that "[a] Court may rule on a motion for summary judgment before a motion for class certification." *Arrison v. Walmart Inc.*, No. 21-00481, 2023 WL 4421425, at *2 (D. Ariz. July 10, 2023) (citing *Wright v. Schock*, 742 F.2d 541, 543–44 (9th Cir. 1984)). DP does not claim it lacks information necessary to respond under Rule 56(d) (nor could it) and DP waived its argument by seeking summary judgment on the AWA claims against all Drivers (Doc. 490 at 22), *see Estakhrian v. Obenstine*, 859 F. App'x 121, 122 (9th Cir. 2021), and by failing to seek amendment of the case schedule. *See Wright*, 742 F.2d at 544 (defendant consented to the chosen procedure).

Finally, Plaintiffs also do not rely solely on testimony of two Drivers as DP contends (at 17, 21). Drivers' reasonable expectations is an objective test and Drivers here were all required to perform the same work under the identical pay structure. Further, aside from DP *agreeing* Drivers should be paid for their pre- and post-trip time (belying any assertion Drivers could not reasonably expect payment), Plaintiffs submitted substantial evidence from DP itself, Plaintiffs and opt-ins supporting reasonable expectations. (PSF ¶ 94-111). DP cites no cases to show why Plaintiffs are not permitted to rely on this evidence. It is well recognized that representative evidence can be sufficient. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454–55 (2016). Plaintiffs submitted admissible evidence of a right to payment under the AWA. It was DP's burden to submit controverting admissible evidence. They failed to do so.

G. The Kaplans and Barry Gross are Personally Liable.

DP does not address the Kaplan's liability for the AWA claims so summary judgment on this issue must be granted. *E.E.O.C. v. Walgreen Co.*, No. 05-1400, 2007 WL 926914, at *1 n.

2 (D. Ariz. Mar. 26, 2007). Regarding FLSA and AMWA liability, the assertion (at 25-26) first made in DP's opposition, that the Kaplans were "completely dissociated with the Driver Provider" for any part of the relevant time (and that this is "undisputed") should be excluded for DP's failure to disclose. DP failed to timely disclose any facts or legal theories supporting the assertion that the Kaplans were not personally liable for any periods of time. *See* Licata Decl. Ex. C (Defs.' 37th MIDP responses). Because the failure to disclose relevant facts and theories is neither harmless (now that fact discovery has closed) nor justified, this argument should be disregarded. Doc. 4 at 4-6/12 ¶¶ 3-4, 8; *Udd v. City of Phoenix*, No. 18-01616, 2021 WL 535526, at *9 (D. Ariz. Feb. 12, 2021) (excluding theory that was not timely disclosed).

DP's new assertion is pure fiction and another example of its willingness to misstate the facts. The undisputed evidence shows the Kaplans not only maintained operational control but exercised that control *throughout* the relevant period, including when they claim they "were not regularly involved in [DP]'s day to day operations." (Doc. 530 ¶ 113). *See* Exs. A & B to Licata Decl. *See also* (Doc. 546) PSOF ¶¶ 112-122, 155 (2013 WHD report: "Jason Kaplan was actively involved in the day-to-day operations of the company"). There is no dispute the Kaplans maintained "control over the nature and structure of the employment relationship" regardless of any claimed periods of lesser involvement. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). They were the only ones with ownership interests and authority to determine the compensation structure and rates and authority to pay or not pay for all hours worked. (Doc. 546, PSOF ¶¶ 112-122); (Doc. 530, DCSOF ¶¶ 112-122, ¶ 105). They also had the power to hire and fire Drivers, repeatedly disciplined Drivers (docked their pay), were responsible for the policies and procedures under which the Drivers were required to work, and negotiated and executed the contracts under which Drivers worked, among other things. *Id.* While they concede they were responsible for recordkeeping, they were also responsible for failing to institute timekeeping procedures and for continuing to *estimate* Drivers' work time after this lawsuit was filed. PSF ¶¶ 78-79, 81, 84-85, 119-120, 135, 148. But such micromanagement in nearly every aspect of DP's business is not necessary to establish liability. *See, e.g., Collinge v. IntelliQuick Delivery*, No. 2:12-00824, 2018 WL 1088811, at

*16 (D. Ariz. Jan. 9, 2018) ("even if Spizzirri only occasionally controlled the drivers, that fact would not allow him to evade FLSA liability. Control may be 'exercised only occasionally...without removing the employment relationship from the protections of the FLSA") (quoting *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999)).

Plaintiffs agree that Mr. Gross is not liable for periods where he was not at DP, but a trial is unnecessary to determine those dates. Mr. Gross hired and fired Drivers, docked their pay, was responsible for ensuring Drivers followed directions and had authority to control schedules and did so. (Doc. 546, PSOF ¶¶ 123-126); (Doc. 504 at Dep. Ex. 129). He also had authority regarding compensation. For example, managers took complaints from Drivers regarding their pay to him and he was also involved in determining Drivers' compensation. (Doc. 504 at Exs. 7, 8, 11, 13-15, 17, 111-112, 114-116, 127).

H. There Are No Genuine Disputes That Time Between Trips Was Compensable.

In opposition to DP's decertification motion (Doc. 512 at 10-19), Plaintiffs explained in detail the overwhelming evidence that shows time between trips is compensable. Regardless of DP's *post hoc* efforts to claim Drivers are "free" in between trips, the *facts* prove otherwise. For the same reasons, DP's arguments do not support denying summary judgment. It is undisputed Drivers perform active work between trips (Doc. 546, ¶37d-f, i, l-q, u, v, x-z) for which DP agrees Drivers are entitled to be paid. (*Id.* at ¶ 130). In addition, Drivers are subject to substantial restrictions that prevent them from being relieved of duty in between trips. (*Id.* at ¶ 37p-t). Drivers are also *required* to take trips during their scheduled "availability" and are subject to reprimand if they decline a new trip assigned in between scheduled ones, such that Drivers are "engaged to wait" and are not completely relieved of duty with no obligation "to commence work until a definitely specified hour has arrived." *Lassen v. Hoyt Livery, Inc.*, 120 F. Supp. 3d 165, 176 n. 4 (D. Conn. 2015) (quoting 29 C.F.R. § 785.16). That Drivers are not free to turn down assignments in between scheduled ones is supported by *overwhelming* evidence. *See* Doc. 512 at 10-12. In December 2022, J. Kaplan also confirmed this is DP's *current* policy. (Doc. 499-1 at Ex. C, 214:9-216:18). The testimony is unequivocal: Drivers are obliged to take assignments throughout their workday, including in between trips, and face

reprimand if they refuse. Conclusory, unsupported statements by K. Kaplan are not sufficient to deny SJ. The 2021 document created by DP *five years into the relevant time period* also does not provide that Drivers are free to turn down trips assigned in between scheduled ones. (Doc. 495-1 at 82/85). DP's Opposition merely provides that Drivers might be able to eat or read a book between trips does not create a genuine dispute as to the compensability of the time. 29 C.F.R. § 785.15 (a stenographer who reads a book while waiting for dictation is working).

I. Summary Judgment on Liquidated Damages and Willfulness is Warranted.

DP's attempt to rely on its advice of counsel fails. DP offers no excuse for failing to follow the DOL Fact Sheet its counsel provided setting forth the explicit operational and threshold requirements of the 7(i) exemption and defining retail or service establishment. (PSF ¶ 166). DP admitted that prior to this lawsuit, it never implemented any system to determine even threshold, much less operational, compliance in any respect. The fact that a decade after the 2012 investigation DP could not produce a scintilla of evidence of compliance with these requirements is more than sufficient to establish a lack of good faith and willfulness. DP has violated the rights of its employees for decades, has lured them to believe they are being paid more than they are actually receiving, has withheld information regarding how Driver pay is calculated, and has taken no steps to meet the requirements of the 7(i) exemption, including, failing to track hours worked or in this lawsuit, timely producing any records of its revenues by establishment in this case until summary judgment oppositions were due. None of these errors are mitigated by purported good faith reliance on counsel as Plaintiffs demonstrated in their MSJ. Counsel examined no documents regarding the nature of DP's business. (PSF ¶ 173).

DP's conduct precludes any claim it was merely negligent. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) and its progeny make clear that "willfulness includes reckless disregard of 'the very possibility' that employer was violating the FLSA." DP was on notice that it was required to track working hours, that 7(i) is establishment and year specific and that 7(i) mandates annual revenue analysis and that both minimum wage and 7(i) obligations necessitate weekly contemporaneous compensation review. DP was also on notice that

transportation companies were expressly excluded from 7(i) until 2020 because they lack a retail concept. DP has exhibited no good faith effort to comply with the law and consciously assumed the risk that its pay practices would be declared unlawful and that its 7(i) defense would fail. Even after this lawsuit was filed, DP continued its reckless disregard for the exemption's requirements. Surely, counsel never advised DP that it was ok not to pay Drivers minimum wage, yet that is the uncontroverted result of DP's callous disregard for the law.[22]

There is no evidence DP ever had a copy of the 2012 Action Compliance Report and cannot claim it relied on any "guidance" from that report even if it did. (PSF ¶ 161). The only copy of the report produced by DP was a copy produced under a FOIA request after this lawsuit was filed. (*Id.*) Although DCSF ¶ 161 stated the results of the DOL investigation were "confirmed in an email," that assertion is completely unsupported by the cited statements DP relies on (DSF ¶ 66, 74). In fact, Mr. Kaplan's declaration makes clear that the only post-investigation communication that he received was a call from the investigator. (Doc. 491-5 Ex. 8, at ¶ 23 and 4/80). *See Koellhoffer v. Plotke-Giordani*, 858 F. Supp. 2d 1181, 1191 (D. Colo. 2012) (rejecting reliance on conclusions of single DOL investigator).

With respect to DP's assertion that the amount of wages due is in dispute, given DP's lack of any colorable claim of good faith in failing to pay for Drivers' pre-and post-trip time, the absence of any good faith dispute precluding an award of treble damages is manifest. DP undeniably knew or should have known that they owe some wages under Arizona law because they failed to pay anything at all for pre- and post-trip work. *See, e.g., Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 428 (App. 1994) ("the statute was intended to provide employers with a shield from treble damage liability when they retain wages based on a good faith belief that they owe nothing more.").

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' MSJ, Plaintiffs respectfully request that the Court grant Plaintiffs' MSJ.

Respectfully submitted this 17th day of July, 2023.

[22] Plaintiffs addressed DP's cases (at p. 28) in response to DP's MSJ, (Doc. 542 at 26-27).

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