THE HONORABLE JULIA GARRATT
Noted for Hearing: December 14, 2018
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

KRIS HARDIE AND TY BUFANDA, individually and on behalf of all others similarly situated, Plaintiffs, v. BEST PARKING LOT CLEANING INC., a Washington Corporation, Defendant.	No. 17-2-27730-4 KNT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Defendant Best Parking Lot Cleaning Inc. ("Defendant") has systematically violated Washington's wage and hour laws, unlawfully depriving Plaintiffs[1] and the proposed Class of their wages and statutorily mandated breaks. Defendant provides maintenance and services like construction site support, stormwater management, and street cleaning for general contractors, municipalities, and other customers. Defendant employs drivers who operate street cleaner trucks. Defendant sometimes provides services upon public works projects and contracts. The work performed by its employees on these public works projects is covered by Washington's prevailing wage laws.

Defendant employs more than 120 drivers during the proposed Class period. These driver employees compose the proposed Class. Defendant's policies and practices apply uniformly to the proposed Class of drivers and violate Washington State wage and hour laws in the following ways:

- Defendant has failed to pay drivers for all their hours worked, including at the prevailing wage rate as required;
- Defendant has failed to pay drivers the overtime compensation for their hours worked in excess of eight hours per day or forty hours per week;
- Defendant has failed to provide drivers with proper rest breaks;
- Defendant has failed to provide drivers with proper meal breaks;
- Defendant has failed to pay drivers all their earned wages upon termination; and

[1] Mr. Bufanda intends to remove himself as a named Plaintiff in this matter, although he remains a member of the proposed Class. Plaintiffs will move to amend the complaint accordingly. For this reason, Plaintiffs below seek that Mr. Hardie be appointed as the sole Class Representative.

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- Defendant has willfully committed the above violations.

Because these violations arise from Defendant's common practices and policies that affect all proposed Class members, Defendant is subject to class action liability under CR 23. As set forth below, Plaintiffs can show that the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements for class certification have been met.

II. RELIEF REQUESTED

Plaintiffs respectfully request certification of the following class (the "Class"):

> All employees who have worked as non-exempt drivers for Defendant in Washington during the statutory time period.

While Plaintiffs' complaint sought to represent all non-exempt employees, Plaintiffs are limiting the class to only those employees who were drivers. In addition, Plaintiffs respectfully ask the Court: to designate Plaintiff Kris Hardie as Class Representative; designate Rekhi & Wolk, P.S. as Class Counsel; and order that notice of the action be provided to the Class.

III. FACTUAL AND LEGAL BACKGROUND

Defendant is a for-profit corporation that provides services to construction projects. It also provides services to public entities for cleaning and maintenance. For example, Defendant's trucks clean roads and parking lots. Defendant has two owners, Mr. Rich Hamilton and Ms. Rebecca Craig. *See* Declaration of Hardeep S. Rekhi in Support of Plaintiffs' Motion for Class Certification ("Rekhi Decl."), Ex. 1 (Transcript of CR 30(b)(6) Deposition) at 7:23-8:5.

Defendant has identified 127 drivers who it employed during the proposed class period. *Id.*, Ex. 1 at 22:14-17. At any given time, it employs approximately 60 drivers. *Id*. at 22:11-13. Defendant owns, and its driver employees operate, a variety of street cleaning trucks and

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equipment. *Id.* at 41:11-42:21. Defendant's trucks are highly specialized. Many of these trucks are loaded with water at the beginning of a job. Rekhi Decl., Ex. 1 at 68:25-69:7; 79:5-13; Ex. 2 at 20:15-24. Dirt and debris are stored in the tank on the trucks, referred to as the hopper. *Id.*, Ex. 2 (Deposition of Kris Hardie) at 20:20-24; Ex. 3 (Vactor Services). Defendant estimates owning 47 trucks, in about 6 different models. *Id.*, Ex. 1 at 41:11-43:7. Trucks are kept at Defendant's shop in Puyallup. *Id.* at 69:2-7; 81:12-20.

Defendant's policies and procedures at issue here uniformly apply to the proposed Class members. *Id.* at 18:1-9. Mr. Hamilton has a supervisory role over all drivers. *Id*., Ex. 4 at 20. He sets all drivers' wages. *Id.* at 87:1-2. All drivers have the same general job duties. *Id.* at 68: 12-14. They have one central payroll department and compensation policies common to the Class. *Id.* at 47:22-25; 48:3-19; Ex. 4 (Defendant's Answers to Plaintiffs' First Set of Discovery Requests) at 18-19. One common handbook applies to them. *Id.*, Ex. 1 at 17:14-15; Ex. 5 (Employee Handbook) at D-000316. Defendant's 30(b)(6) designee testified that all drivers are paid every Friday, with the workweek beginning on a Saturday. *Id.*, Ex. 1 at 50:9-21; *but see* Ex. 5 at D-000318 ("the workweek is Sunday through Saturday").

Plaintiff Kris Hardie was a driver from approximately 2009 to 2011. *Id.*, Ex. 2 at 18:11-18; Ex. 8 (Personnel File) at D-000021, D-000039. He returned to work for Defendant from July 15, 2013 to August 5, 2015. *Id*. During his employment with Defendant, Mr. Hardie drove multiple trucks for multiple jobs (both prevailing and non-prevailing wages jobs). *Id.*, Ex. 2 at 19:25-20:14. In this way, he was typical of the Class as a whole. *See* Rekhi Decl., Ex. 1 at 43:23-44:12. He was subjected to the same policies and procedures as all other drivers during

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the Class period. *Id.* at 17:14-15; 18:1-9. He was, like all other drivers, subjected to the same handbook. *Id*. at 17:14-15; Ex. 5 at D-000316 ("To All Employees").

A. A Driver's Typical Day Working for Defendant.

The proposed Class of drivers have the same job title and essentially the same responsibilities. Rekhi Decl., Ex. 1 at 67:5-11, 68:12-14, 84:21-85:3. Typically, the night before a driver is required to work, Defendant sends a work assignment to the driver. *Id.*, Ex. 1 at 72:18-19l; Hardie Decl. ¶ 8. The job assignment informs the driver of the location and time of the next assignment. Rekhi Decl., Ex. 1 at 72:22-73:3; Hardie Decl. ¶ 8. Accordingly, drivers need to arrive at Defendant's facility with sufficient time to allow them to access the appropriate equipment, inspect it, travel to the job site, and start on time. Rekhi Decl., Ex. 1 at 72:22-73:16; Hardie Decl. ¶ 8.

On a typical work day during the Class period, drivers are required to arrive at Defendant's Puyallup facility and clock in. Rekhi Decl., Ex. 1 at 54:1-20; 54:21-55:3; Hardie Decl. ¶ 8. After clocking in, they get their paperwork, which includes a driver sheet and a job ticket, and keys. Rekhi Decl., Ex. 1 at 68:25-69:14. Drivers start their trucks and perform pre-trip inspections. *Id.*; Hardie Decl. ¶ 9. If driving a street sweeper, they either fill it up with water at Defendant's facility or wait to get the water at the job-site, or enroute to the job site. Rekhi Decl., Ex. 1 at 68:25-69:14. If drivers are required to fill up their truck with water, they will bring a water sheet with them and track the amount of water taken from off-site. *Id.*, Ex. 5 at D-000325. Drivers then drive their truck to the job site and begin cleaning. *Id*., Ex. 1 at 68:25-69:14. This beginning of the work-day routine is common to the proposed Class of

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drivers during the Class period. Rekhi Decl., Ex. 12; Rekhi Decl., Ex. 1 at 54:18-20; 146:12-147:10.

Throughout the day, drivers are required to fill out their driver sheet. Rekhi Decl., Ex. 12; Rekhi Decl., Ex. 1 at 146:12-147:10. The driver sheet reflects the tasks performed by the driver on that day. *Id*., Ex. 6 at D-000044. It includes information such as: truck number, start and end time, pre-op and post-op work[2], arrival and departure times, the job sites visited, "actual time on job site," travel time, meal breaks (if any were taken), and total hours paid to driver. *Id.* The driver sheet does not indicate whether rest breaks were taken or missed. *Id*. Defendant maintains a GPS system for tracking drivers during the workday. Rekhi Decl., Ex. 1 at 66:25-67:4.

At the end of the work-day, drivers are required to dump all debris that is collected in the hopper and return to Defendant's facility. *Id*., Ex. 1 at 54:15-17. At the facility, drivers perform post-trip inspections, turn in all paperwork and keys, clock out, and go home. *Id.* at 54:12-20; 68:25-69:14; 70:13-15; Hardie Decl. ¶ 8-9. This routine is common to the proposed Class of drivers. Rekhi Decl., Ex. 12; Rekhi Decl., Ex. 1 at 146:12-147:10.

B. Defendant Violates Washington Wage Laws.

Defendant had a uniform employee handbook that applied to all drivers. *Id.* at 17:14-15. The handbook and Defendant required all drivers to keep the driver sheets, which identify their hours worked and the work they perform each day. *Id*., Ex. 5 at D-000359; D-000363; *Id.* Ex. 12 ("We pay you off of your Driver Sheets."). Defendant's pay practices differ from the policy,

[2] Defendant provides a "Pre-op Check List" to its employees. Rekhi Decl., Ex. 3 at D-000363 (Employee Handbook). Both pre-op and post-op work are daily equipment surveys. *See id*.

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however. Defendant not only uses driver sheets, but also GPS records (since 2014), time clocks, and job tickets to calculate driver pay. *Id.*, Ex. 1 at 20:1-12; 30:10-19; 51:22-25; 52:1-20. In some instances, it is unclear how Defendant calculated drivers' pay. Defendant has kept these payroll records for the Class period. *Id.* at 31:7-9.

1. Defendant Uniformly Failed to Pay Prevailing Wage to Drivers for "Mobilization" Time.

RCW 39.12.020 requires payment of the prevailing wage to all those who work "upon" a public works project. To determine whether work should qualify for prevailing wage payment, "Washington law looks to whether the work is 'upon' a public work." *Superior Asphalt & Concrete v. Dep't of Labor & Indus.*, 84 Wash. App. 401, 408, 929 P.2d 1120, 1123 (1996). This does not mean whether the labor was performed at a public work site. As the Office of the Attorney General opined in 1967, RCW 39.12 is broad enough to encompass work performed off-site, for example, while traveling to and from a public works project:

> There certainly is no requirement in this statute that the laborers, workmen or mechanics, in order to benefit from the "prevailing rate of wage" requirement, be actually physically employed on the project site itself. It is sufficient, for purposes of this statute, that they be "employed in the performance of the contract.[3]

[3] "LABOR - CONTRACTS - PUBLIC WORKS - APPLICATION OF PREVAILING WAGE LAW TO PREFABRICATION - STANDARDS FOR DETERMINING PREVAILING WAGE," AGO 1967 No. 15 - May 2 1967, https://www.atg.wa.gov/ago-opinions/labor-contracts-public-works-application-prevailing-wage-law-prefabrication-standards (accessed October 16, 2018) ("Giving effect to this provision, it follows that the word "upon" as used in RCW 39.12.020, should not be regarded as limiting the application of the "prevailing rate of wage" act to work at the site of the project. Instead, we would regard the word "upon" as being used to describe a function - a "connection or employment or activity with or in regard to something." See, Webster's New International Dictionary, 3rd ed., "upon" and "on." A person may, therefore, be employed "upon" a public works project without being employed at the site of the project itself.")

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This specific Attorney General Opinion was cited approvingly in *Everett Concrete Prod., Inc. v. Dep't of Labor & Indus.*, 109 Wash. 2d 819, 828, 748 P.2d 1112, 1116 (1988), where the Washington Supreme Court rejected an employer's attempt to limit RCW 39.12's application to on-site employees.

Under RCW 39.12.015, the Department of Labor and Industries' industrial statistician shall make all determinations of the prevailing rate of pay. LNI's industrial statistician has determined that travel time – often referred to as "mobilization" time – is prevailing wage work when it is "time spent performing work that is contemplated by or necessary to complete the public work." David J. Soma, "Request for Determination – Overtime with mixed public and private work, ten hour days, and roundtrips for deliveries to public works," 2 (August 12, 2008).[4]

Here, the trade or occupation is covered by WAC 296-127-01354, which addresses: "all types of self-propelled mechanically, electrically, electronically, hydraulic, automatic or remote controlled equipment on construction projects." Defendant required the Class to transport specialized trucks to the job site to perform the required cleaning work. Hardie Decl ¶¶ 9-10 ; Chadderton Decl. ¶ 13, Brown Decl. ¶ 10, Markus Decl. ¶ 10, Wilson Decl. ¶ 11. They are also required to fill up the trucks with water prior to reaching to the job site. Rekhi Decl., Ex. 1 at 69:2-14. As such, this is "mobilization time" which must be compensated at the prevailing wage rate. However, Defendant does not pay for this travel time or "mobilization time" work at the prevailing wage rate. *Compare* Rekhi Decl., Ex. 11 *with* Ex. 12; Declaration of Gabriel

[4] https://www.lni.wa.gov/TradesLicensing/PrevWage/files/Policies/OvertimePublicandPrivateWorkAllocationMcPheeWorkland&Witherspoon.pdf.

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Chadderton ("Chadderton Decl.") ¶ 13; Declaration of Paul Brown ("Brown Decl.") ¶ 10; Declaration of Charles Markus ("Markus Decl.") ¶ 10; Declaration of Jedidiah Wilson ("Wilson Decl.") ¶ 11.

This is a common issue for the proposed Class: whether Defendant is required to pay drivers the prevailing wage for any of the travel time or mobilization time.

2. Defendant Violates Prevailing Wage Laws Related to Overtime

In Washington the general rule for prevailing wage projects is that employers must pay employees overtime for all hours worked in excess of eight on any day. RCW 49.28.010. An exception to this rule is provided in RCW 49.28.065:

> [A] contractor or subcontractor in any public works contract subject to those provisions may enter into an agreement with his or her employees in which the employees work up to ten hours in a calendar day. No such agreement may provide that the employees work ten-hour days for more than four calendar days a week. Any such agreement is subject to approval by the employees.

The agreements are generally referred to as 4/10 agreements.

WAC 296-127-022(3) provides further guidance as to the validity of 4/10 agreements:

> (3) For the purpose of this section an agreement must:
> (a) Have been authorized by employees who bargained collectively with their employers through representatives of their own choosing; or
> (b) Be obtained in writing, signed, and dated by both parties; and
> (c) Be entered into individually with each employee; and
> (d) Be entered into separately for each public works project, except that an employer, at its option, may obtain an annual authorization; and
> (e) State the name of the public works project with specificity; and
> (f) Be entered into voluntarily by the employer and employee.

The "[a]bsence of an authorization record for an employee shall be deemed per se evidence of lack of that employee's authorization." WAC 296-127-022(4).

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Defendant states it obtained 4/10 agreements from all its drivers. Rekhi Decl., Ex. 1 at 127:4-23. Defendant confirms that the 4/10 agreements are uniform for all drivers. *Id*. at 127:4-23; *see also* 122:14-23. Defendant states that all employees were required to sign 4/10 agreements. *Id.*, Ex. 1 at 127:24 – 128:12. Defendant asserts it had two different forms of the 4/10 agreement. *Id.*, Ex. 1 at 127:4 – 131:8. The first form is part of the handbook and states:

> According to the RCW 49.28.065, employers may enter into an agreement with their employees to work up to ten hours per day, four days per week, before overtime is paid. Recognizing that there may be days when a full ten hours of work is not available, the remainder of the forty hours may be made up on another work day or days within the same work week. All hours over forty hours will be paid at time and one-half.
>
> In signing the Employee Handbook you will agree that you have read and understand that it is the policy of Best Parking Lot Cleaning, Inc. to work up to ten hours per day, four days per week, before overtime is paid.

Rekhi Decl., Ex. 5 at D-000319.

The second form is separate document, signed by both the driver and a representative of BLPC. These two types of 4/10 agreements were uniform for the entire Class. *Id*. at 129:13-14.

Both of Defendant's purported 4/10 agreements fail to comply with WAC 296-127-022(3), which requires that 4/10 agreements be dated, state the name of the public works project with specificity and be voluntary. First, the agreements, at the time of signing, do not "state the name of the public works project with specificity" and are not "entered into separately for each public works project nor annually." Rather, Defendant simply makes copies of the document for different projects. Rekhi Decl., Ex. 1 at 140:11-12, 21-24. This is inconsistent with WAC 296-127-022(3)(d)-(e). Second, they are not dated as required by WAC 296-127-022(3)(b). *Id*., Ex. 5 at D-000372; Ex. 7. Third, Defendant testified that all employees were required to sign the agreement, i.e. they did not have choice-which means their purported

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assent was not voluntary. *Id*., Ex. 1 at 127:24 – 128:12. Further, because the 4/10 agreements lacked a project identifier at the time of signing, the drivers cannot know what they are "voluntarily" agreeing to. Rather, they signed 4/10 agreements without a particular public work project listed. See, e.g. Hardie Decl., Ex. B.

Given the facial invalidity of Defendant's purported 4/10 agreements and the WAC's presumption that it is the employer's burden to show valid authorizations, the Class was not subject to an effective 4/10 waiver of their overtime rights. A copy of Defendant's purported "Annual Overtime 4/10 Agreement" can be found at Rekhi Decl., Ex. 5 at D-000372; Ex. 7. The validity of Defendant's uniform 4/10 agreements can be resolved on class-wide basis. Plaintiff Hardie signed one these purported, but invalid, 4/10 Agreements. Defendant failed to pay Plaintiff Hardie the required overtime on prevailing wage work. For example, on March 18, 2015, Plaintiff Hardie worked a prevailing wage job for 9.5 hours, but he was not paid at the overtime rate for the 1.5 hours over 8. Rekhi Decl., Ex. 10 at D-000173; D-000167-8; D-003668. Hardie Decl., Ex. C.

3. Defendant Uniformly Fails to Provide or Pay Drivers for Their Required Rest Breaks.

Under Washington law, employees are entitled to a paid ten-minute rest period for each four hours of work on the employer's time. WAC 296-126-092(4). Washington's rest period regulation is "unequivocal." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 913 (9th Cir. 2003); *see also Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002).

"[T]he mandatory language of Wash. Admin. Code § 296-126-092" operates "to create a duty" on employers to provide the minimum breaks allowed, and "[n]o intrusions" on those breaks "are condoned or even acknowledged." *Id*. at 913 (quoting *Wash. State Liquor Control*

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Bd. v. Wash. State Pers. Bd., 88 Wn.2d 368, 377, 561 P.2d 195 (1977)). Indeed, Washington courts have consistently interpreted the plain language of WAC 296-196-092 to impose a mandatory obligation on the employer.

It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. A workplace culture that encourages employees to skip breaks violates WAC 296–126–092 because it deprives employees of the benefit of a rest break on the employer's time. *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 658, 355 P.3d 258 (2015) (citations omitted); *see also Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002) ("Washington's manifest policy of protecting the health and welfare of its employees by requiring periodic rest periods may not be abrogated"). Moreover, Defendant is required to "schedule breaks at regular intervals unless the 'nature of the work' allows employees to take intermittent rest periods." *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 512, 415 P.3d 224 (2018).

In *Chavez*, the Court noted that the employer had no system in place to ensure rest breaks were taken. *Id.* at 518. Further, the employees provided testimony that there was no method to report missed rest breaks. The Court certified the Class stating "…the dominant and overriding issue common to all putative class members is whether [Defendant] failed to ensure [class members] could take breaks and record missed breaks." *Id*.

Like in *Chavez*, Defendant has no policy or procedures relating to missed rest breaks. Rekhi Decl., Ex. 1 at 56:22-58:4, 94:24-96:13. D-000319 (Employee Handbook Section on Rest and Meal Periods). Defendant has failed to enact any proactive method to ensure that Class

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members have taken their required rest breaks. Rekhi Decl., Ex. 1 at 56:22-58:4, 94:24-96:13. Defendant does not record rest breaks. *Id.* at 57:2-10. There is no evidence that Defendant regularly schedules breaks. Defendant does not monitor rest breaks. Rekhi Decl., Ex. 1 at 56:22-58:4.

Until January of 2018, Defendant did not provide training on taking rest breaks. Rekhi Decl., Ex. 1 at 60:6-9. Defendant claims rest-breaks are self-regulated by the drivers. Rekhi Decl., Ex. 1 at 57:11-16, 94:24-96:13. Sworn declarations of drivers claim that they routinely missed rest-breaks. Chadderton Decl. ¶ 8, Brown Decl. ¶ 7, Markus Decl. ¶ 7, Wilson Decl. ¶ 6, Declaration of Joshua Taylor ("Taylor Decl.") ¶ 6, Declaration of Peter Calkins ("Calkins Decl.") ¶ 6, Declaration of Gary Wieberg (Wieberg Decl.") ¶ 6, Declaration of Jacob McCarter ("McCarter Decl.") ¶ 5. And when drivers missed rest breaks, Defendant failed to compensate them for the missed rest breaks. Chadderton Decl. ¶ 8, Brown Decl. ¶ 7, Markus Decl. ¶ 7, Wilson Decl. ¶ 6, Taylor Decl. ¶ 6, Calkins Decl. ¶ 6, Wieberg ¶ 6, McCarter Decl. ¶ 5; *see* Rekhi Decl., Ex. 6 (D-000035 Driver Sheet for 4/15/2014, showing no rest breaks or meal breaks).

Here, like in *Chavez*, a dominant and overriding issue common to all drivers is whether Defendant's policies and practices uniformly failed to ensure the Class took and recorded their rest breaks.

4. Defendant's Policies and Practices Uniformly Failed to Provide Meal Breaks to the Propose Class and Failed to Pay for Missed Meal Breaks.

Under Washington law, meal breaks, like rest breaks, are "conditions of labor" governed by RCW 49.12 *et seq*. Pursuant to that statute, WAC 296-126-092 provides that employees shall be allowed certain meal periods during their shifts. Defendant takes no proactive measure to assure drivers receive meal breaks. Rekhi Decl., Ex. 1 at 54:5-11, 55:19-

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56:21, 58:16-59:4, 96:1-9; Rekhi Decl., Ex. 5 at D-000319 (Employee Handbook). Like rest breaks, meal breaks were not scheduled. Rekhi Decl., Ex. 1 at 96:1-9. Defendant, however, did include a place to list meal breaks on its driver sheets. *See* Hardie Decl Ex. A. Defendant has an obligation to provide employees with thirty minutes of additional pay for each missed meal break. *Hill v. Garda CL Nw., Inc.*, 424 P.3d 207, 216 (Wash. 2018).

Here, Defendant's employees missed meal breaks. Hardie Decl. ¶ 13; Chadderton Decl. ¶ 11; Brown Decl. ¶ 8; Markus Decl. ¶¶ 8-9, 11; Wilson Decl. ¶ 9; Taylor Decl. ¶ 8; Calkins Decl. ¶¶ 8-9; Collins Decl. ¶ 7; Wieberg Decl. ¶ 7; McCarter Decl. ¶ 6. Defendant failed to compensate employees for missed meal breaks. Hardie Decl. ¶ 14; Chadderton Decl. ¶ 12; Wilson Decl. ¶ 10; Taylor Decl. ¶¶ 8-9; Calkins Decl. ¶ 10; Collins Decl. ¶ 8; Wieburg Decl. ¶ 8; McCarter Decl. ¶ 7.

As with the rest breaks violations discussed *supra*, Defendant's meal break violations are an issue common to the class.[5]

5. Defendant's Prior Violations.

Prior to this lawsuit, the Department of Labor and Industries had investigated certain wage and hour policies related to Defendant's drivers. However, the investigation only addressed an issue not raised in this litigation. Defendant was accused of paying the wrong prevailing wage rate to its drivers. Specifically, LNI investigated whether Defendant routinely

[5] In addition to all of the above-mentioned wage violations, Plaintiffs also alleged Defendant violated RCW 49.48.010 by failing to pay all such owed wages upon drivers' termination of employment, and RCW 49.52.050 by willfully failing to pay the owed wages according to their policies and practices. To this extent this Court agrees that Plaintiffs have met the requirements under CR 23 for the above mentioned wage violations, certification would also be proper for the resulting violations under RCW 49.48.010 and RCW 49.52.050.

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and improperly split the difference on the prevailing wage rates when an employee worked in two counties in a given day – even when the employee's time spent in the second county was minimal. For example, on October 23, 2014, Plaintiff Hardie was paid for four hours of King County prevailing wage, four hours of Snohomish County prevailing wage, and two hours of non-prevailing wage "Travel / Brokedown / Etc. Hours" when he logged in 10.75 hours of work. See Rekhi Decl., Ex. 6 at (D-000042). Defendant split hours perfectly down the middle, even when billing tickets show that the work was predominantly performed in King County.

Upon the conclusion of the investigation, Defendant chose to pay its drivers for the alleged specific prevailing wage rate violations. However, the investigation did not cover issues related to overtime, mobilization time, or meal and rest breaks.

IV. AUTHORITY AND ARGUMENT

A. Washington Liberally Interprets Class Certification Requirements.

When deciding whether to certify a class action, courts generally assume that the allegations in the pleadings are true and will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49, 53 (2003). Courts may, however, go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23 have been met. *Id.*

Civil Rule 23, governing class actions, provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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CR 23(a). In addition, Plaintiffs seek certification under CR 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Washington courts interpret CR 23 "liberally" and will "err in favor of certifying a class." *Hill v. Garda CL Nw., Inc.,* 198 Wn. App. 326, 340, 394 P.3d 390, 398 (2017), *review granted in part, denied in part*, 189 Wn.2d 1016, 403 P.3d 839 (2017). The purposes of class actions include saving class members the cost and trouble of filing individual suits and freeing the defendant from identical future litigation. *Brown v. Brown*, 6 Wn. App. 249, 256–57, 492 P.2d 581 (1971).

CR 23 authorizes class actions and demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000, 1005 (2007). Trial courts "should err in favor of certifying the class" because "[a] class is always subject to later modification or decertification by the trial court." *Id.* Thus, "[a]n appellate court resolves close cases in favor of allowing or maintaining the class." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007).

As set forth above, Plaintiffs have presented evidence that Defendant's uniform policies and practices violate Washington wage laws as to the entire Class. The policies and practices include:

- Defendant has failed to pay drivers for all their hours worked, including at the prevailing wage rate as required;

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- Defendant has failed to pay drivers the overtime compensation for their hours worked in excess of eight hours per day or forty hours per week;
- Defendant has failed to provide drivers with proper rest breaks;
- Defendant has failed to provide drivers with proper meal breaks;
- Defendant has failed to pay drivers all their earned wages upon termination; and
- Defendant has willfully committed the above violations.

As demonstrated below, Plaintiffs satisfy all the requirements of CR 23(a) and (b)(3), and certification of the proposed Class is appropriate. Washington courts have a long history of favoring class actions for wage and hour claims, including the claims alleged here. *See e.g.*, *Chavez*, *190 Wash. 2d 507, 511* (reversing trial court's failure to certify a class of nurses for unpaid rest breaks); *Pellino v. Brink's Inc.*, 164 Wash. App. 668, 699 (2011) (affirming class certification as to employer's common policy related driver employees' mandatory breaks); *Mendis v. Schneider Nat'l Carriers, Inc.*, C15-0144-JCC, 2017 WL 497600, at *2-*7 (W.D. Wash. Feb. 7, 2017) (certifying a class of drivers as to employer's common policies related to rest breaks, unlawful wage deductions, and overtime violations under Washington wage laws); *Miller*, 136 Wn.App. at 657-665 (affirming class certification as to employer's common policy related to overtime).

B. Plaintiffs Satisfy the Four Certification Prerequisites under CR 23(a).

The four prerequisites to class certification are numerosity, commonality, typicality, and adequacy of representation. CR 23(a); *see also*, *Moeller v. Farmer's Ins. Co., Inc.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Pellino*, 164 Wn.App. at 682. Plaintiffs satisfy all the requirements of CR 23(a).

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1. Plaintiffs Satisfy the Numerosity Requirement.

The first prerequisite for certification is that the class is "so numerous that joinder of all members is impracticable." CR 23(a)(1). While there is no fixed rule, more than forty members generally suffice. *Miller v. Farmer Bros*., 115 Wn.App. at 821−22, 64 P.3d 49 (2003). Here, the proposed Class consists of more than 120 current and former drivers. *See* Rekhi Decl., ¶ 3. Numerosity is satisfied.

2. There Are Common Questions of Law and Fact.

The second prerequisite for class certification is the existence of "a single issue common to all members of the class." *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 320, 54 P.3d 665 (2002); *see also* CR 23(a)(2). As Washington courts have noted, "there is a low threshold to satisfy this test." *Behr Process*, 113 Wn.App. at 320. If a defendant has "engaged in a 'common course of conduct' in relation to all potential class members," class certification is appropriate regardless of whether "different facts and perhaps different questions of law exist within the potential class." *Brown v. Brown*, 6 Wn.App. 249, 255, 492 P.2d 581 (1971); accord *Miller*, 115 Wn.App. at 825. Furthermore, a common course of conduct need not affect all potential class members uniformly. Instead, a "common" question is one that is "characteristic of a *usual* type or standard: *representative* of a type." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 875, 281 P.3d 289 (2012).

"[C]laims by workers that their employers have unlawfully denied them wages to which they were legally entitled have repeatedly been held to meet the prerequisites for class certification . . . ," including commonality. *Mendis v. Schneider Nat'l Carriers, Inc.*, C15-0144-JCC, 2017 WL 497600, at *2 (W.D. Wash. Feb. 7, 2017) (Order Granting Class Certification)

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(*citing Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 355 (E.D.N.Y. 2011). This is because the "glue" holding together such claims is the "common question" of "whether an unlawful [wage] policy prevented employees from collecting lawfully earned [wage] compensation." *Id*.

Defendant's systematic practice of wage and hour abuse constitutes a common course of conduct that has adversely affected the proposed Class. Common questions of law and fact arise from Defendant's conduct, including whether:

- Defendant has failed to pay drivers for all their hours worked, including at the prevailing wage rate as required;
- Defendant has failed to pay drivers the overtime compensation for their hours worked in excess of eight hours per day or forty hours per week;
- Defendant has failed to provide drivers with proper rest breaks;
- Defendant has failed to provide drivers with proper meal breaks;
- Defendant has failed to pay drivers all their earned wages upon termination; and
- Defendant has willfully committed the above violations.

Due to these common questions among the proposed Class, the commonality requirement is satisfied.

3. Plaintiffs' Claims Are Typical of the Class Claims.

The third prerequisite is that Plaintiffs' claims are typical of the Class. CR 23(a)(3). "Typicality is satisfied if the claim 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Pellino*,164 Wn.App. at 684 (quoting *Behr Process*, 113 Wn.App. at 320). "Where the same unlawful conduct is alleged to have affected both named Plaintiff and the class members, varying fact patterns in the individual claims will not defeat the typicality

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requirement." *Id*. Typicality tends to merge with commonality. *Gen. Tel. Co. of the Southwest. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Plaintiffs' claims are typical of the claims of other proposed Class members because they arise from the same conduct of the Defendant—systematic violations of Washington wage and hour laws—and are based on the same legal theories, namely systematic violations of Washington's wage and hours laws and breaks laws. *See supra* § III. As set forth above, Defendant's CR 30(b)(6) designee has already admitted that the policies and practices which put these questions of law and fact at issue were common to the entire Class. Rekhi Decl., Ex. A at 47:22-25; 48:3-19; Ex. 4 (Defendant's Answers to Plaintiffs' First Set of Discovery Requests) at 18-19. Accordingly, it is undisputable that this requirement has been met.

Further, Plaintiff Hardie's testimony, testimony of drivers and Defendant's own evidence reflects that Plaintiff Hardie's experiences are typical of the Class as a whole. He was subjected to the same policies as all other drivers.

4. Plaintiff Hardie and His Counsel Will Fairly and Adequately Protect the Interests of the Class.

The fourth prerequisite for certification is a finding that Plaintiff Hardie will "fairly and adequately protect the interest of the class." CR 23(a)(4). This test is satisfied if the named Plaintiff is able to prosecute the action vigorously through qualified counsel, and the Plaintiff does not have interests antagonistic to those of absent class members. *See Hansen v. Ticket Track*, Inc., 213 F.R.D. 412, 415 (W.D. Wash. 2003).

Plaintiffs' counsel are qualified as they have extensive experience certifying, litigating, and settling class actions, including wage and hour actions involving the same laws and

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regulations at issue here. *See* Rekhi Decl. ¶¶ 4-13 Plaintiffs' counsel has worked extensively to investigate this case and is dedicated to litigating the Class claims. *See* Rekhi Decl. ¶ 14.

With respect to the second element, Plaintiff Hardie's claims against Defendant are coextensive with, and not antagonistic to, the claims asserted on behalf of the Class. Indeed, Plaintiff Hardie and Class members have suffered the same injuries: they have not been paid for their statutorily mandated wages and missed breaks. Plaintiff Hardie seeks to hold the Defendant responsible for its systematic course of wage and hour abuses. Plaintiff Hardie is committed to prosecuting this action vigorously on behalf of the Class: Mr. Hardie has agreed to participate fully in the litigation and has already devoted efforts to that end. Rekhi Decl. ¶ 15. Among other things, Mr. Hardie has provided records and declarations, responded to discovery requests, sat for deposition, and is prepared to testify at trial. *Id*. He has retained competent and experienced counsel. *See, generally*, Rekhi Decl. ¶¶ 4-13. Accordingly, the adequacy requirement is satisfied.

C. Plaintiff Hardie Meets the Requirements Under Rule 23(b)(3).

1. Common Factual and Legal Questions Concerning Defendant's Conduct Predominate Over Any Individual Damages Issues.

Predominance "is not a rigid test, but rather contemplates a review of many factors, the central question being whether 'adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.'" *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn.App. 245, 254, 63 P.3d 198 (2003) (*quoting* 1 Newberg & Conte, Newberg on Class Action, § 4:25, at 4-86(3rd ed. 1992). The requirement "is not a demand that common issues be dispositive, or even determinative. . . . '[A] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.'" *Id*. In deciding this,

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the Court "is engaged in a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." *Behr*, 113 Wn.App. at 323.

Plaintiff Hardie satisfies all the requirements of CR 23(b)(3). This case is particularly well-suited for class certification because it involves common legal questions regarding the lawfulness of Defendant's uniform policies and practices. To prevail on the claims, Plaintiff Hardie must demonstrate:

- Defendant has failed to pay drivers for all their hours worked, including at the prevailing wage rate as required;
- Defendant has failed to pay drivers the overtime compensation for their hours worked in excess of eight hours per day or forty hours per week;
- Defendant has failed to provide drivers with proper rest breaks;
- Defendant has failed to provide drivers with proper meal breaks;
- Defendant has failed to pay drivers all their earned wages upon termination; and
- Defendant has willfully committed the above violations.

At some point, the amount of damages to which each member of the Class is entitled must be calculated. The fact that those damages vary, as in all wage and hour class actions, does not preclude certification. *See Chavez* 190 Wash. 2d at 523 ("Where individual damages are small, the class vehicle is usually deemed to be superior"); *see also, Rodriguez v. Carlson*, 166 F.R.D. 465, 479 (E.D. Wash. 1996). Because common issues predominate over any individualized issues, the predominance requirement is satisfied.

2. Plaintiff Hardie Satisfies the Superiority Requirement.

Before granting certification under CR 23(b)(3), the Court must find that a class action is the superior means of adjudicating this controversy. "This requirement focuses upon a

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comparison of available alternatives." *Sitton*, 116 Wn. App. at 256. Factors to be considered include "conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities." *Id.* at 257 (citation omitted). The Court also looks at the interest of Class members in individually controlling the prosecution of claims, the extent of any litigation already commenced by Class members, the desirability of concentrating the suit in this forum, and any difficulties that may be encountered in managing the action. CR 23(b)(3)(A)–(D). Here, resolving this matter on a class wide basis is superior to any other method, including joinder and individual lawsuits.

3. Class Treatment Allows for the Fair and Efficient Resolution of Common Claims that Would Otherwise Go Without Redress.

A class action may be superior if class litigation of common issues will reduce litigation costs and promote greater efficiency, or if no realistic alternative exists. *Chavez* 190 Wash. 2d at 523. Here, forcing numerous drivers to litigate the alleged pattern or practice of underpaying statutory wage claims in repeated individual trials runs counter to the very purpose of the class action. Class treatment conserves judicial resources and promotes consistency and efficiency of adjudication. *Id*. at 522. Given the number of proposed Class members and the clear common issues, a class action is the most appropriate means of adjudicating the claims arising out of Defendant's common course of conduct. Additionally, it is likely that most Class members lack the resources necessary to obtain their own legal counsel to ascertain the extent to which they are legally entitled to damages.

4. This Case Presents No Management Difficulties.

"[O]ne of the elements that goes into the balance to determine the superiority of a class action in a particular case" is "manageability." *Sitton*, 116 Wn.App. at 257 (citation omitted).

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"[A]ny complex class action is likely to present a challenge," but there are "a variety of tools available to deal with [any] challenges" that may arise. *Id*. at 256, 259–60; *see also Miller*, 115 Wn. App. at 826. Courts, including those in Washington, routinely find that class actions involving wage violations are manageable. Trial courts have a "variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined." *Chavez*, 190 Wash. 2d at 521 (*citing Sitton*, 116 Wn. App. at 255). Washington Courts have held that individual issues within a class do not make a class action unmanageable. *Id*.("…the fact that individual issues might take some time to resolve does not make a class action unmanageable.") (*citing Miller*, 115 Wn. App. at 825-26; 1 Newberg & CONTE, supra, § 4.25, at 4-83.).

Here, the Court will not face any difficulties managing and resolving the case. The central questions in this case are whether:

- Defendant has failed to pay drivers for all their hours worked, including at the prevailing wage rate as required;
- Defendant has failed to pay drivers the overtime compensation for their hours worked in excess of eight hours per day or forty hours per week;
- Defendant has failed to provide drivers with proper rest breaks;
- Defendant has failed to provide drivers with proper meal breaks;
- Defendant has failed to pay drivers all their earned wages upon termination; and
- Defendant has willfully committed the above violations.

Class claims can be proven with common evidence taken from or based on the Defendant's own records and the testimony of the Class. Rekhi Decl., Ex. A at 30:18-19, 32:24-

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33:1 (records maintained for three years). Using Defendant's pay and time records, Plaintiff will calculate unpaid (or underpaid) wages for each employee. Defendant created driver sheets that show hours worked. With respect to mobilization pay issue, Defendant's also created "water sheets" to show when a driver obtained water. Rekhi Decl., Ex. A at 80:13-15. These show locations and times when drivers picked up a load enroute to a prevailing wage job site.

Further, Courts commonly allow representative employees to prove violations with respect to all employees. *Chavez*, 190 Wash. 2d at 522; *see also, Anfinson*, 174 Wn.2d at 874–876 (approving use of representative evidence for Washington wage claims). Courts have long employed class-wide aggregate damage formulas in a variety of contexts, thus obviating the need for individual damage determinations. *See, e.g., Alvarez*, 339 F.3d at 914–15, aff'd, 126 S. Ct. 514 (2005) (approving an approximated award of class-wide damages); *Olson v. Tesoro*, 2007 WL 2703053, *6 (W.D. Wash. Sept. 12, 2007) (approving representative evidence to address damages).

Because class treatment of these issues is both manageable and superior to other methods of adjudicating the controversy, certification of the Class is appropriate.

5. Appropriate Notice Can Be Provided to Class Members.

To protect their rights, absent class members must be provided with the best notice practicable when an action is certified under CR 23(b)(3). CR 23(c)(2); *see also, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974). Defendant has maintained proposed Class members' last known mailing addresses. Rekhi Decl., ¶ 3. As a result, notice can be sent directly via First Class mail to all proposed Class members. In addition, notice can be published on a website maintained and updated by Plaintiffs' attorneys. Class members will be able to use the site to

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stay apprised of important dates and to access the notice form and other key documents. Together, these approaches will provide the best practicable notice to the Class members. If certification is granted, Plaintiffs will submit a detailed notice plan and form to the Court.

V. CONCLUSION

For the foregoing reason, Plaintiffs request the Court grant the relief requested as stated in Section I, above.

Signed on October 22, 2018 at Seattle, WA.

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I certify this memorandum contains less than 8,400 words, which complies with Local Civil Rules.

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