THE HONORABLE MONICA BENTON
Noted for Hearing: March 22, 2019
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

KRIS HARDIE, individually and on behalf of all others similarly situated, Plaintiff, v. BEST PARKING LOT CLEANING INC., a Washington Corporation, Defendant.	No. 17-2-27730-4 KNT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION & RELIEF REQUESTED

Plaintiff Kris Hardie, on behalf of a certified Class of all non-exempt drivers who have worked for Defendant Best Parking Lot Cleaning Inc. ("Defendant" or "BPLC") for any length of time since October 24, 2014, (the "Class period") respectfully requests this Court to grant summary judgment in favor of Plaintiff and the Class on the issues and claims listed below in §III. Plaintiff and the Class have raised claims that, during the Class period, Defendant failed to pay all their earned wages for overtime work, prevailing wage work including travel time, missed rest breaks, and Defendants' willful failure for paying such wages.

As set forth below, the wage and hour violations in this case arise from Defendant's common practices and policies that affect all Class members. Plaintiff can show that, for each issue and claim raised, the parties do not genuinely dispute any genuine issue of material fact concerning that issue or claim, and therefore Plaintiff and the Class are entitled to judgment as a matter of law. Plaintiff is not moving the Court of summary judgment on other claims or issues.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Relevant Procedural Background

Plaintiffs Kris Hardie and Ty Bufanda filed this lawsuit on October 24, 2017. On November 26, 2018, the Court granted Plaintiffs' motion to file a second amended complaint, removing Mr. Bufanda as a named Plaintiff. Dkt. No.131. Mr. Bufanda remains a member of the Class. On December 14, 2018, the proposed Class was certified for wage violations under Washington law, including whether Defendant willfully failed to pay the Class for all their overtime work, work performed during mobilization time, and rest breaks. *See* Order Granting Plaintiff's Motion for Class Certification dated December 14, 2018. Trial is scheduled for May 6, 2019. Dkt. No. 42.

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B. Defendant's Wage and Hour Practices at Issue Are Uniformly Applied to the Class.

Defendant is in the business of providing street cleaning and parking lot cleaning services to both private and governmental entities. Dkt. No. 71 at 1-2. When BPLC bids on public works contracts, it files a document confirming its intent and assurance that it will pay the appropriate prevailing wages to its drivers for all their work performed on the public works contracts. Declaration of Daniel Cairns in Support of Plaintiff's Motion for Partial Summary Judgment ("Cairns Decl."), Ex. 1 at 34:5-10. In order for the drivers to work on these prevailing wage jobs, BPLC provides specialized vehicles to clean streets and parking lots. *See generally* Dkt. No. 72 at 1-2. BPLC's drivers receive training to operate these specialized vehicles. Cairns Decl., Ex. 2 at 47; *see* Ex. 3 at 85:13-16.

BPLC's drivers receive dispatch instructions the day before they are scheduled to work. *Id.*, Ex. 2 at 6; *see* Ex. 3 at 99:13-100:3. On a typical work day during the Class period, drivers are required to arrive at Defendant's Puyallup facility and clock in. *Id.*, Ex. 3 at 54:1-20; 54:21-55:3; Dkt. No. 53 ¶ 8. After clocking in, they get their paperwork, which includes a driver sheet, job slips, other documents, and keys. Cairns Decl., Ex. 3 at 68:25-69:14. Drivers are required to perform pre-trip inspections as required by law. *Id.* at 69:14-16, 70:5-8; Ex. 4; Dkt. No. 53 ¶ 9. Drivers drive their truck and arrive at the job site to begin cleaning the surface using scrubbing brushes or vacuums on the trucks. *See* Dkt. No. 71 at 1. This process usually entails scrubbing with brooms or using a mounted pressure washer. *Id.*, Ex. 1 at 30:18-23; Ex. 19. Throughout the work day, drivers are required to track their work on the "driver sheets" provided by Defendant. *Id.*, Ex. 5; Ex. 3 at 146:12-147:10.

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At the end of the day, BPLC requires the driver to return the trucks and equipment to its facility. *Id.*, Ex. 5. Once the driver reaches the facility, drivers perform post-trip inspections, turn in all paperwork related to the work performed for the day, and the keys, clock out, and go home. *Id.*, Ex. 3 at 54:12-20; 68:25-69:14; 70:13-15; Dkt. No. 53. ¶ 8-9. This routine is common to the certified Class of drivers. Cairns Decl., Ex. 4; Ex. 3 at 146:12-147:10.

C. The Class Performed Work Upon Public Works and Are Entitled to Prevailing Wage for Such Work.

Defendant identifies the job title for Plaintiff and the Class as "truck driver-other." *Id.*, Ex. 6. During the Class period, Defendant has applied the following job classifications to the work done by the Class when they work upon a public works contract:

- **WAC 296-127-01393 – Street sweepers (nonconstruction)**: Except on construction projects, "street sweepers perform cleaning or sweeping work under a public works maintenance contract that requires the use of power brooms (sweepers), power vacuums, power blowers, or power washers" including "***Driving a street sweeping vehicle*** . . ." (Emphasis added).
- **WAC 296-127-01354 – Operating engineers (equipment operators)**: WAC 296-127-01393 specifies that "***Operation of street sweeping equipment*** during and after a public works construction project would fall under the classification of Operating engineers (equipment operators), WAC 296-127-01354 . . ." (Emphasis added).
- **WAC 296-127-01398 – Truck drivers:** "The work of truck drivers includes, but is not limited to, truck driving to do the following: (1) Delivery, discharge of materials, ***travel time***, and other work . . . (3) ***Mobilization*** of contractors' equipment . . . (4) ***Driving and operating*** various types of trucks at, ***on or for*** the project." (Emphasis added).

See, e.g., Cairns Decl., Exs. 7-9; *See also* Dkt. No. 72 at 2.

Class members performed work within one of the above definitions when they worked upon a public works project for Defendant during the Class period. Cairns Decl., Exs. 7-9. They were either "operating street sweeping equipment," "driving a street sweeping vehicle," "driving and operating" a truck, or performing related work pursuant to the public works contract. *Id.*

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D. Defendant Classified Plaintiff and the Class as Truck Drivers When They Were Equipment Operators.

Throughout the Class period, BPLC has routinely classified the drivers of its street sweepers as Truck Driver rather than Power Equipment Operator. For example, BPLC recently filed a prevailing wage affidavit (Affidavit 842987) for work upon the King County Transportation Department's "NE Novelty Hill Road Sidewalk" construction project. Cairns Decl., Ex. 9. Defendant filed the affidavit with the Washington Department of Labor and Industries ("LNI") on February 15, 2019 classifying its drivers as "Truck Drivers." *Id*. This is a construction project,[1] and thus the work performed by BPLC's drivers is "the operation of street sweeping equipment during and after a public works construction project." *See* WAC 296-127-01354; Dkt. No. 53 ¶¶ 9-10; Dkt. No. 54 ¶ 13, Dkt. No. 55 ¶ 10, Dkt. No. 56 ¶ 10, Dkt. No. 57 ¶ 11. Indeed, Rebecca Craig personally testified that she considers such BPLC vehicles to be "trucks with cleaning equipment mounted on them." Cairns Decl., Ex. 1 at 32:7-8. She also testified that none of the company's trucks deliver any materials to jobsites. *Id*. at 69:22-70:1.

Shown in the chart below is the variance of the pay rates for prevailing wage work for these two job classifications:

Classification	**Prevailing Wage Rate**
King County Power Equipment Operators Brooms WAC 296-127-01354	$56.90
King County Truck Drivers Other Trucks WAC 296-127-01398	$54.30

[1] *See* https://aqua.kingcounty.gov/kcdot/roads/cip/addlInfo.aspx?CIPID=1133864&TopicPath=overview/1133864.inc ("This non-motorized project will *construct* an estimated 1,200 feet of cement concrete curb . . .") (emphasis added).

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See https://fortress.wa.gov/lni/wagelookup/prvWagelookup.aspx (identifying the rates effective from February 15, 2019). The wage rate for Truck Drivers is lower than that for Power Equipment Operators. Yet, Defendant chooses to pay Class members as Truck Drivers and not Power Equipment Operators, despite its acknowledgement that their work is to operate equipment upon a public works construction project. This misclassification was common to Class members during the Class period. *See, e.g.*, Cairns Decl., Exs. 7-10.

E. Defendant's Purported "4/10 Agreements" Are Not Dated and Do Not State the Name of the Public Works Project with Specificity.

Plaintiff and Class members often worked for more than 8 hours in a day when they performed work for Defendant upon public works projects. *See, e.g.*, *id.*, Ex. 11 at D-003756, D-003758, D-003760. Defendant states it obtained "4/10 agreements" from all its drivers, which purport to waive the drivers' right to overtime pay on such projects after eight hours of work, until they work ten hours in a day. *Id.*, Ex. 3 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.* at 127:24 – 128:12. Indeed, Defendant testified that if a driver doesn't sign the agreement, the driver cannot work. *Id*. at 127:24-128:3.

Defendant asserts that during the Class period the 4/10 agreements were based on two different forms. *Id.* at 127:4 – 131:8. The first form is included in Defendant's handbook and reads:

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Overtime and Time Reporting

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.

Id., Ex. 2 at 7. Even though the Employee Handbook states that it "is not a contract of employment," nevertheless, on its last page it states:

By signing the Acknowledgement sheet I also understand that I agree with and will adhere to the individual policies for:

- Drug and Alcohol Abuse
- Driver Tool List
- Water Hydrant Valve & Wrench Replacement
- Personal Protective Equipment
- NO Passengers in Vehicle
- 4/10 Overtime

Id. at 5, 58. The handbook is not signed by Defendant, only by the employee. *Id.* at 58.

The second 4/10 agreement form is separate document, signed by both the driver and Defendant's representative. Below is an example of this second form:

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ANNUAL OVERTIME 4/10 AGREEMENT

Re: Company Policies

To Best Parking lot Cleaning Inc. Employees

In accordance with 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 overtime.

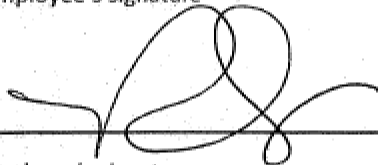
Please sign and return the following:

I understand and accept Best Parking Lot Cleaning's policy to work up to ten hours per day, four days per week, before overtime is paid.

Kris Harsie

Employee's printed name

Employee's signature



Employer's signature

Thank you,

Rebecca Craig, President

Id., Ex. 12. The document is not dated, nor does it state the public works project to which it applies. Instead, it purports to be an "annual agreement" but again, without specifying the applicable year.

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Defendant's two types of 4/10 agreements were uniformly applied to the Class. *Id*., Ex. 3 at 129:13-14.

F. Defendant Uniformly Failed to Pay Prevailing Wage Pay to Class Members for All Their Work Upon Public Works Projects, Including "Mobilization Time."

For every public works project during the Class period, Plaintiff and the Class were required to perform pre-trip inspections (Pre-Op.), post-trip inspections (Post-op) inspections of Defendant's sweeping equipment, drive the sweeping equipment to various worksites, fill up the sweeping equipment with water as needed, and perform sweeping work using that equipment. Dkt. No. 54 ¶¶ 13-15, 17; Dkt. No. 55 ¶ 10-12; Dkt. No. 56 ¶¶ 9-10, 12; Dkt. No. 57 ¶¶ 4, 12-13; Dkt. No. 59 ¶¶ 5, 11; Dkt. No. 49 ¶¶ 6, 9-10; Cairns Decl., Ex. 2 at 47, 51.

To document this work, Defendant required all drivers to fill out driver sheets[2], which identify their hours worked and the type of work they performed each day. Cairns Decl., Ex. 5 ("We pay you off of your Driver Sheets."); Ex. 3 at 146:12-147:10. A driver sheet includes information such as the truck number, the start and end time, pre-op[eration] and post-op[eration] work, arrival and departure times, the job sites visited, the "actual time on job site," travel time, meal breaks (if any were taken), and the total hours paid to driver. *Id.* The driver sheet categorizes driver time into seven different categories. Here is an example of the time categorization portion of the driver sheet:

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[2] A representative driver sheet is attached to the Declaration of Daniel Cairns in Support of Plaintiff's Motion for Partial Summary Judgment as Ex. 13.

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LUNCH BREAK HRS: ________
NOT CHARGED TO COMPANY
OTHER OFF CLOCK HRS: ________
NOT CHARGED TO COMPANY
BROKEDOWN TIME: ________
SHOP & OTHER WORK HRS: ________

PRE-OP & POST-OP: .50
TRAVEL TIME: 1.50 + .50 wash truck.
ACTUAL TIME ON JOB SITE: 9.50
TOTAL HRS DRIVER TO BE PAID: 12.0

Cairns Decl., Ex 13.

When working on a prevailing wage job, Defendant only pays Plaintiff and the Class a prevailing wage for time identified as the "actual time on job site." *See id.*, Ex. 14 *contra* Ex. 3 at 81:25-82:16. All other driver time is paid at a non-prevailing wage rate. Cairns Decl., Exs. 14, 20-21. Class members are not paid prevailing wage for time spent conducting pre-op, post-op, travel time[3] (transporting the sweeper truck to the work site and returning the sweeper truck to Defendant's workshop), or performing maintenance on the sweeper equipment when it breaks down. Defendant pays all this time at a "non-prevailing" pay rate. *Id.*

For example, Defendant's March 15, 2015 driver sheet for Plaintiff Hardie shows he worked exclusively on a prevailing wage project, identified as "Flatiron 405." Id., Ex. 13. For that day, Defendant paid Mr. Hardie the prevailing wage rate for 9.5 hours of his work, the "actual time on job site," and paid him a non-prevailing wage rate for 2.5 hours of "TRAVEL BRKDOWN ETC. HRS." A review of the driver sheet, shows that "TRAVEL BRKDOWN ETC. HRS" is the sum of "pre-op & post-op," travel time, and breakdown time. *Id.*, Ex. 14.

In sum, Defendant uniformly and only paid the Class the prevailing wage rate for their "actual time on job site" and a non-prevailing wage rate for all other work related to the public work projects during the Class period.

[3] Rebecca Craig testified that the company defines "travel time" as "in between jobs" and "to and from jobs." Cairns Decl., Ex. 1 at 31:9-12.

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G. Defendant Failed to Allow Plaintiff and the Class Sufficient Time to Take Rest Breaks.

Defendant has no policy or procedures relating to Class members' missed rest breaks. Cairns Decl., Ex. 3 at 56:22-58:4, 94:24-96:13; Ex. 2. Defendant has failed to enact any proactive method to ensure that Class members have taken their required rest breaks. Cairns Decl., Ex. 3 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. *Id*. at 56:22-58:4.

Until January of 2018, Defendant did not provide training to Class members on taking rest breaks. *Id*. at 60:6-9. Defendant claims rest-breaks are self-regulated by Class members. Cairns Decl., Ex. 3 at 57:11-16, 94:24-96:13. Sworn declarations of Class members confirm they routinely missed rest-breaks. Dkt. No. 54 ¶ 8, Dkt. No. 55 ¶ 7, Dkt. No. 56 ¶ 7, Dkt. No. 57 ¶ 6, Dkt. No. 58 ¶ 6, Dkt. No. 59 ¶ 6, Dkt. No. 47 ¶ 6, Dkt. No. 58 ¶ 5. Class members frequently remain on duty, even when they can take brief breaks from active work. Dkt. No. 53 ¶¶ 11-13; *see* Cairns Decl., Ex. 15 at 55:10-24. Plaintiff and the Class were often in or nearby their vehicles when they could take a break. S*ee id*. 55:10-24. They were often required to end breaks early to respond to dispatch or other workers. Dkt. No. 53 ¶¶ 11-13.

When Class members missed rest breaks, Defendant failed to compensate them for the missed rest breaks. Dkt. No. 54 ¶ 8, Dkt. No. 55 ¶ 7, Dkt. No. 56 ¶ 7, Dkt. No. 57 ¶ 6, Dkt. No. 58 ¶ 6, Dkt. No. 59 ¶ 6, Dkt. No. 47 ¶ 6, Dkt. No. 58 ¶ 5; *see* Cairns Decl., Ex. 13.

Defendant instructs Class members that they did not have set working hours. *Id*., Ex. 2 at 6. That is, when they finished the last job of the day, returned the truck to the shop, and finished their paperwork, they were free to go home. *Id*.; *see* Dkt. No. 72 at 5:21-24. The faster they

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completed their work, the earlier they got off from work. *See id*. Defendant changed its rest break policy and practices after the filing of this lawsuit. *See id.*, *also see generally* Dkt. No. 13 at 6.

III. STATEMENT OF ISSUES

Should summary judgment be granted on the following issues and claims:

1. As to the Class' overtime claims:

a. Whether Defendant's purported "4/10 Agreements" violate RCW 49.28.010, RCW 49.28.065, and WAC 296-127-022 as a matter of law;

b. Whether, because Defendant did not have valid "4/10 Agreements" for its employees, those Class members are entitled to overtime pay at the prevailing wage rate for all prevailing wage hours worked between eight and ten hours during the Class period;

2. As to the Class' claims for unpaid prevailing wage rate work:

a. Whether, under RCW 39.12.020, "mobilization time" – and all other Class members' work on Defendant's public works projects – must be paid at the prevailing wage rate of pay as a matter of law;

b. Whether Defendant uniformly failed to pay Class members for "mobilization time" and other applicable work on public work projects at the appropriate prevailing wage rate during the Class period;

c. That, because "mobilization time" and the other such work must be paid at the appropriate prevailing wage rate of pay, the Class is entitled to unpaid wages from Defendant as a matter of law;

3. As to the Class' claims for unpaid rest breaks:

a. Whether Defendant failed to provide mandatory rest breaks to the Class as a matter of law;

b. Whether Defendant failed to pay the Class for those missed rest breaks as a matter of law, and as such the Class is entitled to unpaid wages from Defendant; and,

4. As to Plaintiff's and the Class' willfulness claims:

a. Whether the above identified wage violations were "willful" under RCW 49.52.050 as a matter of law.

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IV. EVIDENCE RELIED UPON

Plaintiff relies upon the Declaration of Daniel Cairns, and the exhibits attached thereto, and the pleadings and papers on file in this case.

V. AUTHORITY AND ARGUMENT

A. Summary Judgment Standard.

The purpose of summary judgment is “to avoid a useless trial” and to allow for early resolution of issues. *Balise v. Underwood*, 62 Wash. 2d 195, 199, 381 P.2d 966, 968 (1963); CR 56(a); *See also Pelton v. Tri-State Memorial Hosp.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (Div. 3, 1992) (citing *Young v. Key Pharm, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). Summary judgment is appropriate if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

The moving party bears the initial burden of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. In deciding a motion for summary judgment, the court considers “the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party.” *Schaaf v. Highfield*, 127 Wash. 2d 17, 21, 896 P.2d 665, 667 (1995).

Thereafter, the non-moving party must go beyond the pleadings and identify specific facts evidencing a genuine issue for trial. CR 56(e), *Young v. Key Pharm., Inc.*, 112 Wash. 2d at 225 (1989). The non-moving party may not rely on “mere allegations or denials of his pleading” to resist a motion for summary judgment. CR 56(e). Mere disagreement, bald assertions that an issue of material fact exists, denials, unsupported assertions, speculation, or conclusory statements of fact are not sufficient to defeat a motion for summary judgment; the defendant must produce persuasive evidence to support its claim. *Grimwood v. Univ. of Puget Sound*, 110

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Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citations omitted); *Pelton*, 66 Wn. App. at 355. If a defendant's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then there is no genuine issue as to any material fact and summary judgment is appropriate. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young*, 112 Wn.2d at 225.

Questions of fact may be determined on summary judgment "when reasonable minds could reach but one conclusion" *Hartley v. State*, 103 Wash. 2d 768, 775, 698 P.2d 77, 81 (1985); *see also McKee v. Am. Home Prod., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).

B. Defendant Uniformly Violates the Prevailing Wage Laws as to the Class.

The Washington Prevailing Wage Act provides, in part: "The hourly wages to be paid to laborers, workers, or mechanics, upon all public works . . . shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." RCW 39.12.020. Washington's prevailing wage law for public works, RCW 39.12, "is remedial and must be construed liberally in order to fulfill its purposes." *Heller v. McClure & Sons*, Inc., 92 Wash. App. 333, 338, 963 P.2d 923, 926 (1998). The intended beneficiaries of the Prevailing Wage Act are the workers, not the government contractors or their assignees. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 297, 49 P.3d 135, 139 (2002). The term "upon all public works" should be defined broadly to serve the purposes of the act. Those workers on public works projects who are classified as "laborers, workers, or mechanics" are entitled to the prevailing wage when their work directly relates to the prosecution of the work that is contracted to be performed and necessary for the completion of that work. *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 340, 963 P.2d 923, 927 (1998).

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1. ***Defendant's 4/10 Agreements are Invalid and Unenforceable.***

Defendant failed to pay its drivers for overtime worked on prevailing wage jobs according to RCW 49.28.010. In Washington, a worker is entitled to overtime for all hours worked in excess of eight on any day for work performed on prevailing wage projects. RCW 49.28.010. Further, the worker is entitled to overtime compensation for all hours worked in excess of 40 hours per week.

A narrow exception to the eight-hour work day rule is provided in RCW 49.28.065. Under the exception, an employer may enter into an agreement with its employees to allow the employee to work up to 10 hours a day, four days a week, without receiving the overtime. The employee is still entitled to overtime for all hours worked in excess of 40 during the work week. RCW 49.28.065. The agreements are generally referred to as "4/10 Agreements."

LNI, which is the Washington agency charged with enforcing prevailing wage laws, has promogulated regulations relating to valid 4/10 agreements. Because of LNI's experience, judgement, and expertise in this specialized field, Washington courts give deference to LNI's interpretations. *Superior Asphalt & Concrete v. Dep't of Labor & Indus. of the State*, 84 Wash. App. 401, 405, 929 P.2d 1120, 1122 (1996). WAC 296-127-022(3) sets forth that the following requirements for a valid and enforceable 4/10 agreement:

> (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.

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WAC 296-127-022(3) (emphasis added). In keeping with the liberal construction given to prevailing wage laws, 4/10 Agreements are strictly construed. 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).

Defendant states it obtained 4/10 agreements from all Class members in the form of two agreements that were uniformly entered into and signed by the Class. Cairns Decl., Ex. 3 at 127:4-131:8; *see also* 122:14-23. The first form is part of Defendant's handbook. Cairns Decl., Ex. 2 at 7 ("In signing the Employee Handbook you will agree . . ."). The second form is separate document. *Id.*, Ex. 12.

The parties do not dispute that neither purported 4/10 agreement is dated nor contains the identity of the prevailing wage project. The statement in the handbook does not form a binding agreement, nor was it signed by Defendant. *See* Cairns Decl., Ex. 2 at 5, 58.

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, signed by both parties voluntarily, and state the name of the public works project with specificity.

First, neither agreements, at the time of signing, "state the name of the public works project with specificity" and are not "entered into separately for each public works project." Rather, Defendant simply makes copies of the document for different projects. Cairns Decl., Ex. 3 at 140:11-12, 21-24. This is inconsistent with WAC 296-127-022(3)(d)-(e).

Second, neither agreement is dated as required by WAC 296-127-022(3)(b). *Id.*, Ex. 2 at D-000372; Ex. 12. Although the second form is labeled an "annual agreement," it does not even contain a year by which it can be identified.

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Third, Defendant testified that all employees were required to sign the agreement as a condition of continued employment; i.e. they did not have choice, and thus Class members did not "voluntarily" agree. *Id.*, Ex. 3 at 127:24 – 128:12. "Voluntarily" means "intentionally; without coercion." *Voluntarily*, BLACK'S LAW DICTIONARY (10th ed. 2014);[4] *See also Pac. Land Partners, LLC v. State, Dep't of Ecology*, 150 Wash. App. 740, 755, 208 P.3d 586, 593 (2009) (discussing ordinary and usual meaning of "voluntarily"). As Washington courts recognize, the threat of losing one's means of livelihood is "tantamount of coercion." *Seattle Police Officers' Guild v. City of Seattle*, 80 Wash. 2d 307, 309–10, 494 P.2d 485, 487 (1972) (discussing *Garrity v. State of N.J.*, 385 U.S. 493, 497, 87 S. Ct. 616, 618, 17 L. Ed. 2d 562 (1967)). Further, because the 4/10 agreements lacked a project identifier at the time of signing, the drivers cannot know to what they are "voluntarily" agreeing.

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, Defendant cannot establish that any of its purported 4/10 agreements are valid as a matter of law. As such, Defendant is required to pay the Class the prevailing overtime rate for all their prevailing wage worked in excess of eight hours a day during the Class period, as required by RCW 49.28.010.

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 eight. Cairns Decl., Exs. 13, 16-17; Dkt. No. 53, Ex. C. This practice is uniform to the Class. Cairns Decl., Exs. 20-21.

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[4] Alternately, "of one's own free will or accord, without compulsion, constraint, or undue influence by others." *Voluntarily*, The New Shorter Oxford English Dictionary (1993). Coercion is defined as "[c]ompulsion of a free agent by . . . economic force . . ." *Coercion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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The facts necessary for determining whether the Class must be paid the prevailing wage overtime rate for prevailing wage work in excess of eight hours per day during the Class period are undisputed by the parties. Based on these undisputed facts, the Court should find that, because Defendant did not pay the prevailing wage overtime rate of pay to Class members who performed eight to ten hours of prevailing wage during the Class period, the Class is entitled to the unpaid overtime rate for such work from Defendant. Accordingly, Plaintiff and the Class are entitled to judgment as a matter of law on this claim.

2. *Washington's Prevailing Wage Law Requires Payment for All Work Upon A Public Work Project.*

The Washington Supreme Court, LNI, and the Washington State Attorney General's Office have all determined that work done off-site, such as pre-op, post-op, and travel time is prevailing wage work. For example, LNI's industrial statistician has determined that 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).[5]

The Office of the Attorney General opined in 1967, that RCW 39.12 is broad enough to encompass work performed off-site, for example, while preparing vehicles or 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

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

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employed on the project site itself. It is sufficient, for purposes of this statute, that they be "employed in the performance of the contract."[6]

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.

In *Heller v. McClure & Sons, Inc.*, 92 Wash. App. 333, 340, 963 P.2d 923, 927 (1998), an employee of a contractor performed on site maintenance on the contractor's equipment and sought compensation at the prevailing wage rate. The Washington Court of Appeals held that the mechanic employee was entitled to the prevailing wage because the work was "directly related to the prosecution of the [contracted] work" and was "necessary for the completion of that work." *Heller,* 92 Wash.App. at 337, 963 P.2d 923. The Washington Supreme Court later clarified the standard that "those workers on public works projects who are classified as 'laborers, workers, or mechanics' are entitled to the prevailing wage when their work directly relates to the prosecution of the work that is contracted to be performed and necessary for the completion of that work." *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 303, 49 P.3d 135, 142 (2002).

[6] "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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Here, the pre-op, post-op, travel time, and other time spent working on prevailing wage projects for Defendant by the Class, as described above in §II.C., is work for the performance of the respective public works contracts. Defendant required the Class to check vehicles before and after driving them, to transport specialized trucks to the public work job sites to perform the required cleaning work, and to return the vehicles to the shop after performing their duties on the public works projects. Dkt. No. 53 ¶¶ 9-10 ; Dkt. No. 54 ¶ 13, Dkt. No. 55 ¶ 10, Dkt. No. 56 ¶ 10, Dkt. No. 57 ¶ 11. Defendant also required them to fill up the trucks with water prior to reaching to the public works job sites. Cairns Decl., Ex. 3 at 69:2-14. These tasks all directly relate to the prosecution of the work and are necessary for the completion of that work. For example, without the specialized trucks at the job site, the work cannot be performed. Oftentimes, without water, the work cannot be performed. Without conducting pre-and post-op inspections, the work cannot be completed. Defendant's 30(b)(6) designee testified that pre-trip inspections were required by law. *Id.*, Ex. 3 at 70:8. That is why Defendant uniformly required Class members to perform these duties attendant to their work for the public works contracts.

As such, this work performed by the Class for Defendant must be compensated at the prevailing wage rate. For example, under any of the above designations, mobilization time is prevailing wage work: it is either operation of equipment, driving a street sweeping vehicle, or "travel time." No reasonable mind can dispute this fact. However, Defendant does not pay the prevailing wage rate for this or the other prevailing wage work performed by the Class that is not categorized as "actual time on job site." *Compare* Cairns Decl., Ex. 18 *with* Ex. 11; *also* Exs. 20-21; Dkt. No. 54 ¶ 13; Dkt. No. 55 ¶ 10; Dkt. No. 56 ¶ 10; Dkt. No. 57 ¶ 11.

In addition, even when Defendant paid the Class at a prevailing wage rate, it misclassified its drivers and paid a wrong, lesser rate amount. Under RCW 39.12.015, LNI's industrial

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statistician shall make all determinations of the prevailing rate of pay. LNI publishes such determination on the its website.[7] Defendant claims that "[t]he L&I investigator confirmed that the Department's Industrial Statistician had concluded several years before Hardie's complaint that truck driver was the appropriate classification." Dkt. No. 71 at 3. Defendant has produced no evidence to support this hearsay statement. Defendant's statement runs counter to the plain language regulation stating the appropriate scope of work is covered by WAC 296-127-01354. *See* WAC 296-127-01393 ("Operation of street sweeping equipment during and after a public works construction project would fall under the classification of . . . WAC 296-127-01354"). Defendant's incorrect application of the prevailing wage laws is reflected in the recently-filed Affidavit 842987, wherein Defendant paid Class members at the truck driver rate for their work driving a "TRUCK MOUNTED PICK UP SWEEPER." Cairns Decl., Ex. 9.

In contrast, to Defendant's preferred rate classification, LNI Determination 09272011, published September 27, 2011, confirms that "vacuum/vactor/eductor trucks (vactor trucks)," whose "primary purpose . . . is to perform work on the job site moving or extracting fluid, gas, semi-solids, etc. through the use of a high pressure system" is Power Equipment Operator and not Truck Driver.[8] As the LNI industrial statistician states,

> [M]y conclusion, consistent with department directives since at least early 2004, is that the proper worker classification for this type of work is under the Power Equipment Operators (Operating Engineers) scope of work, WAC 296-127-01354.

Id.

Further, LNI clarified that "the Truck Driver classification is properly used for individuals who drive vehicles for the specific purpose of hauling both upon and to, delivering

[7] *See* https://fortress.wa.gov/lni/wagelookup/prvWagelookup.aspx
[8] https://www.lni.wa.gov/TradesLicensing/PrevWage/files/Policies/VactorTruckOperation.pdf

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and placing materials, and from a construction project. That activity is in contrast to the primary purpose served by the vactor truck." *Id.* As previously noted, none of the company's trucks deliver any materials to jobsites. Cairns Decl., Ex. 1 69:22-70:1.

The facts necessary for determining whether the Class should be paid the appropriate prevailing wage rate for prevailing wage work are undisputed by the parties. There is therefore no genuine issue of material fact on this claim. Based on these undisputed facts, the Court should find that, under RCW 39.12.020, all prevailing wage work performed by the Class upon public works projects must be paid at the proper prevailing wage rate of pay. Accordingly, the Class is entitled to judgment as a matter of law on the claims for unpaid wages for such undercompensated work.

C. Defendant's Rest Break Policy Violates Washington Law; Defendant is Required to Pay the Class for Missed Rest Breaks.

Under Washington law, rest breaks, are "conditions of labor" governed by RCW 49.12 *et seq*. "The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. "This statutory language evidences a strong legislative intent that employees be afforded healthy working conditions and adequate wages." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 852, 50 P.3d 256, 262 (2002). Pursuant to this statutory authority, LNI promulgated regulations in WAC 296-126 to protect employee health, safety, and welfare. *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 685, 267 P.3d 383 (2011). WAC 296-126-092 provides that 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).

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An employer's failure to provide employees the 10-minute paid rest breaks violates WAC 296-126-092(4). The Washington Supreme Court has held that rest breaks are "hours worked" and must be paid. *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d. 822, 831-32, 287 P.3d 516 (2012). Employees who do not receive rest breaks, as required by WAC 296-126-092 may recover unpaid wages and, for willful violations, exemplary damages under RCW 49.52. *See Wingert*, 146 Wash. 2d at 848-49 (recognizing implied cause of action for missed rest breaks under chapter 49.12 RCW: "When the employees are not provided with the mandated rest period, their workday is extended by 10 minutes.").

Moreover, "[t]he plain language of WAC 296–196–092 imposes a mandatory obligation on the employer." *Pellino*, 164 Wn. App. at 688 (2011). This obligation requires more than simply "not 'stand[ing] in the way of employees who choose to take breaks.'" *Id.* at 687. The Washington Supreme Court has made it clear "***[i]t 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***." *Lopez Demetrio v. Sakuma Bros. Farms*, 183 Wash. 2d 649, 658, 355 P.3d 258, 263 (2015) (emphasis added).

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.

Like in *Chavez*, here Defendant has no policy or procedures relating to missed rest breaks or for ensuring that rest breaks are taken. Cairns Decl., Ex. 2 at 7, Ex. 3 at 56:22-58:4, 94:24-

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96:13. Defendant has failed to enact any proactive method to ensure that Class members have taken their required rest breaks. Cairns Decl., Ex. 3 at 56:22-58:4, 94:24-96:13. Defendant does not record rest breaks. *Id.* at 57:2-10. Defendant does not schedule or monitor rest breaks. Cairns Decl., Ex. 3 at 56:22-58:4.

As Defendant admitted during its 30(b)(6) deposition,

> **Q. Does Best schedule time for its drivers to take rest breaks? Or is it just left up to the driver?**
>
> A. Self-regulating.
>
> **Q. Okay. So Best doesn't do anything to schedule rest breaks.**
>
> A. No.
>
> **Q. Okay. And it's completely self-regulating. Correct?**
>
> A. Yes.
>
> **Q. Does Best have any policy in place for what happens if somebody misses a rest break?**
>
> A. No. It hasn't been an issue, --

Id. at 94:24-95:10.

As such, Defendant failed to promote meaningful break time with the result that the Class did not take all the rest breaks as mandated by WAC 296-126-092(4). Dkt. No. 54 ¶ 8; Dkt. No. 55 ¶ 7; Dkt. No. 56 ¶ 7; Dkt. No. 57 ¶ 6; Dkt. No. 58 ¶ 6; Dkt. No. 59 ¶ 6; Dkt. No. 47 ¶ 6; Dkt. No. 48 ¶ 5. And when drivers missed rest breaks, Defendant failed to compensate them for the missed rest breaks. Dkt. No. 54 ¶ 8; Dkt. No. 55 ¶ 7; Dkt. No. 56 ¶ 7; Dkt. No. 57 ¶ 6, Dkt. No. 58 ¶ 6, Dkt. No.59 ¶ 6, Dkt. No. 47 ¶ 6, Dkt. No. 48 ¶ 5. Plaintiff and the Class regularly work long hours, often over eight in a day, entitling them to sometimes two or more paid 10-minute

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rest breaks. *See, e.g.*, *id.*, Ex. 11 at D-003756, D-003758, D-003760. The evidence is clear and undisputed that Defendant violated Washington rest break laws. Not only did Defendant fail to comply with the terms of the law, it also failed to act affirmatively to ensure that breaks were taken by Plaintiff and the Class.

D. Defendant Willfully Committed the Above Violations

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash. 2d 291, 300, 996 P.2d 582, 586 (2000). Consistent with this long and proud history, the legislature has determined that, under RCW 49.52, it a misdemeanor for any employer to:

> (1) [] collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or
>
> (2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract . . .

RCW 49.52.050. The companion statute, RCW 49.52.070, provides that:

> Any employer . . . who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees.

Under RCW 49.52.050 and .070, employees are entitled to recover exemplary damages against an employer who willfully violates wage laws. As the Washington Supreme Court has held, RCW 49.52 *et seq*. "must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 159, 961 P.2d 371, 375 (1998); *see also Durand v. HIMC Corp.*, 151 Wash. App. 818, 835, 214 P.3d 189, 199 (2009) ("We liberally construe the wrongful withholding statute . . ."). The critical determination in a case for double damages under RCW 49.52.070 is whether the

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employer's failure to pay wages was "willful." *Id*. "Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Id.* at 159–60 (citations and quotation marks omitted). Nonpayment of wages is willful when it is the result of a knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment. *Id*.

Washington courts have resolved the issue of willfulness at summary judgment. "Ordinarily, the issue of whether an employer acts 'willfully' for purposes of RCW 49.52.070 is a question of fact . . . However, where . . . there is no dispute as to the material facts, we will resolve the case on summary judgment." *Id.* at 160 (citations omitted); *see also* Jumamil v. Lakeside Casino, LLC, 179 Wash. App. 665, 685–86, 319 P.3d 868, 878–79 (2014).

Given the undisputed facts in this case, Defendant's acts and omissions here constitute "willful" violations of Washington prevailing wage and rest break laws. The standard to establish a "willful" wage violation is not high. The Washington Supreme Court explains:

> [O]ur test for "willful" failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means "merely that the 'person knows what he is doing, intends to do what he is doing, and is a free agent. The nonpayment of wages is willful "when it is the result of a knowing and intentional action.

Schilling, 136 Wash.2d. at 159–60 (internal quotations omitted). Here, Defendant had actual or constructive knowledge of the following: Defendant intentionally chose not pay the Class at the overtime rate for all prevailing wage work between eight and ten hours a day during the Class period; Defendant willfully failed to pay the appropriate prevailing wage rate for all prevailing wage work performed by the Class during the Class period, including mobilization time, travel time, pre-op, and post-op work; and, Defendant willfully failed to provide the Class with all rest breaks or pay for their missed breaks.

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There are two circumstances where an employer's failure to pay wages is ***not*** willful: "the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and the employee regarding the payment of wages." *Id.* at 160. In such circumstances, the employer bears the burden of establishing the exception to willfulness applies. Here, there is no careless error and no bona fide dispute exists whether such wages are due. The above-described wages are due automatically given the undisputed facts here as discussed above.

Thus, the facts necessary for determining whether Defendant willfully failed to pay the above-described wages to the Class are undisputed by the parties. Based on these undisputed facts, the Court should find that Defendant willfully committed the above-described wage violations. Accordingly, the Class is entitled to judgment as a matter of law under RCW 49.52.070 and therefore entitled to exemplary damages from Defendant for all such unpaid wages.

VI. CONCLUSION

For the foregoing reason, Plaintiffs request the Court grant partial summary judgment in favor of Plaintiff and the Class.

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1 Signed on February 22, 2019 at Seattle, WA.
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