

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

**Slepian v. Pink Jeep Tours LLC, Pink Adventure Holdings LLC, and
Herschend Adventure Holdings LLC**

Slepian · No. CV-23-08105-PCT-KML · Decided March 6, 2026

OPINION

Slepian

PER CURIAM.

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

8 9 Geoffrey H Slepian, No. CV-23-08105-PCT-KML 10 Plaintiff, ORDER 11 v. 12 Pink Jeep
Tours LLC, Pink Adventure Holdings LLC, and Herschend Adventure 13 Holdings LLC, 14
Defendants. 15 16 Plaintiff Geoffrey H. Slepian worked as a guide for defendants Pink Jeep Tour
17 Arizona, LLC and Herschend Adventure Holdings, LLC (collectively “Pink Jeep”), 18 which
operate guided jeep tours in Arizona. Slepian is the original plaintiff in this 19 collective action
involving similarly-situated guides and alleges Pink Jeep failed to pay 20 minimum wages and
overtime compensation required by the Fair Labor Standards Act 21 (“FLSA”). The parties filed
cross motions for summary judgment addressing the core 22 disputes of whether guides must be
compensated for between-tour waiting time on 23 scheduled workdays and for time spent
monitoring Pink Jeep’s tour-assignment system. 24 Pink Jeep’s motion is denied, while Slepian’s
is granted in part and denied in part. 25 I. Background 26 Pink Jeep provides scenic tours in
Sedona and Tusayan, Arizona. (Doc. 132-2 27 at 5.) Plaintiffs are a sixteen-person collective of
Pink Jeep tour guides. (Doc. 144 at 32.) 28 Guides are scheduled to work on particular days and
are assigned tours throughout 1 those scheduled workdays. (Docs. 132-2 at 13; 132-4 at 27.) Tours
are scheduled at the 2 top of every hour and sometimes every half-hour. (Docs. 132-2 at 13; 132-4
at 27.) 3 Pink Jeep uses an application for assigning tours to guides known as “the Gantt.” 4 (Doc.
132-4 at 9.) The Gantt is used to manage tour assignments and includes a queue 5 indicating
which guides are next in line for assignment based on booking and scheduling 6 variables. (Doc.
60-7 at 40.) A guide’s position in the queue is determined by several 7 factors, including how
many and what type of tours have booked and the scheduled 8 departure times. (See Docs. 60-7 at
74–86; 62-3 at 2–40.) The queue updates throughout 9 the day, and guides near the front of the
queue may be referred to as “on point.” 10 (Doc. 135-2 at 19, 31.) Pink Jeep provided training—
including a complicated 39-page 11 slide deck (Doc. 62-3 at 2–40)—and written guidance
regarding how guides should 12 interpret and use the Gantt. (Doc. 60-7 at 40, 74–86.) Guides can
check the Gantt through 13 a mobile application on their phones or on a computer in the guide

break room at Pink 14 Jeep's location. (Doc. 132-3 at 3.) 15 Pink Jeep's expectation that guides be ready to take tours on short notice requires 16 them to regularly monitor the Gantt for updates. (Docs. 60-7 at 40-41, 80; 132-2 at 9; 17 132-3 at 3.) Pink Jeep instructs guides that "regardless of status" in the queue, they must 18 be prepared to staff a tour, "assume [they] have back to back" tours, and "check in often" 19 on the Gantt to confirm staffing assignments. (Doc. 60-7 at 80.) Guides who fail to 20 monitor the schedule such that they either miss an assigned tour or are not available to 21 take a tour within five minutes after the hour are subject to progressive discipline under 22 Pink Jeep's attendance policy. (Doc. 135-2 at 27.) 23 Tours may be scheduled close to their departure time, including within minutes of 24 the start of the tour. (Docs. 135-6 at 10; 135-9 at 13.) During the busy season, multiple 25 tours can book quickly, including five or more tours in less than an hour. (Docs. 60-7 at 26 40; 135-2 at 20.) Guides must remain available for any tour that books to them. (Doc. 27 135-2 at 10.) When a tour is scheduled to depart, the assigned guide must report to the 28 departure location in uniform. (Doc. 132-4 at 11-12.) Guides who are first or second "on 1 point" are expected to remain at the departure sites until the top of the hour. (Docs. 60-7 2 at 80; 135-3 at 8-9.) Additionally, guides are sometimes instructed to stay on site five to 3 ten minutes past the hour to cover tours that book late. (Doc. 132-4 at 26.) Guides are not 4 compensated for time spent waiting to be assigned tours (including when they are "on 5 point") unless they complete discrete assignments such as clearing trail debris or 6 shoveling snow. (Docs. 132-3 at 3; 158-1 at 111.) 7 Under company policy, guides are technically free to leave company property 8 between tours. (Doc. 60-7 at 46.) Many guides find this impractical and remain close to 9 departure sites on scheduled workdays because they are required to be ready to staff a 10 tour within minutes. (E.g., Docs. 132-8 at 5-7 ("[N]o one ever told you that you had to 11 stay" at the worksite but they still "[felt] that you have to stay"); 132-9 at 12 ("[T]he 12 policy clearly states you are not required to stay on the premises, but that's kind of a 13 catch 22. If I don't stay on the premises, I might miss the tour."); 132-10 at 3, 10 14 (although formal policy did not require remaining at the worksite, stayed in a "two-block 15 radius" because was "fearful that the Gantt would change" and would miss a tour); 132- 16 11 at 5 (remained "100 square yards" from the worksite); 132-12 at 6 ("You are required 17 to be there, not on-site, but you're required to be ready at certain times whether or not 18 you're getting anything."); 132-13 at 3 ("I'm compelled to be there because, again, I 19 could be punished if I miss a tour").) 20 Slepian asserts two FLSA claims on behalf of a collective comprised of himself 21 and fifteen other current and former guides: the failure to properly pay overtime under 29 22 U.S.C. § 207, and failure to properly pay minimum wage under 29 U.S.C. § 206. (Docs. 1 23 at 13-16; 146 at 3.) As an individual, Slepian also brings claims for failure to pay 24 minimum wage under A.R.S. § 23-362 and failure to timely pay wages due under A.R.S. 25 § 23-350. (Docs. 1 at 16-19; 29 at 2.) 26 The collective seeks partial summary judgment that under the FLSA (1) between- 27 tour waiting time on scheduled workdays is compensable and (2) time spent checking or 28 monitoring the Gantt is compensable. (Doc. 144 at 8-9, 16-18.) Pink Jeep seeks 1 summary judgment in the opposite

direction, claiming that time spent monitoring the 2 Gantt is not compensable. Beyond Gantt-checking time, Pink Jeep also seeks summary 3 judgment arguing plaintiffs are unable to prove damages with the provided evidence, 4 “gap time” recovery is unavailable under the FLSA, Slepian did not have a “reasonable 5 expectation” of payment for the disputed categories such that his Arizona wage statute 6 claim is doomed, and treble damages are unavailable under the same statute due to a 7 reasonable good-faith dispute. (Doc. 146 at 2.) 8 II. Legal Standard 9 A court must grant summary judgment “if the movant shows that there is no 10 genuine dispute as to any material fact and the movant is entitled to judgment as a matter 11 of law.” Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 12 (1986). The movant bears the burden of presenting the basis for the motion and 13 identifying evidence it believes demonstrates the absence of a genuine issue of material 14 fact. *Id.* at 323. A genuine dispute exists if “the evidence is such that a reasonable jury 15 could return a verdict for the nonmoving party,” and material facts are those “that might 16 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 17 477 U.S. 242, 248 (1986). 18 “The evidence of the non-movant is to be believed, and all justifiable inferences 19 are to be drawn in his favor.” *Id.* at 255. But a non-movant cannot rest on mere 20 allegations or denials and must instead show there is “sufficient evidence supporting the 21 claimed factual dispute . . . to require a jury or judge to resolve the parties’ differing 22 versions of the truth at trial.” *Id.* at 249 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. 23 Co.*, 391 U.S. 253, 289 (1968)). 24 III. Analysis 25 A. Compensability of Waiting Time Between Tours 26 Plaintiffs seek partial summary judgment that guides’ between-tour waiting time 27 was compensable work under the FLSA. FLSA’s compensability inquiry turns on 28 whether the employee is “engaged to wait” or “waiting to be engaged.” *Owens v. Loc.*

1 No. 169, *Ass’n of W. Pulp & Paper Workers*, 971 F.2d 347, 350 (9th Cir. 1992), as
2 amended (Aug. 18, 1992) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). 3 Idle time is compensable only when “the employee is unable to use the time effectively 4 for his own purposes.” *Owens*, 971 F.2d at 350 (quoting 29 C.F.R. § 785.15). Courts 5 consider seven non-exhaustive factors to determine whether an employee is “so restricted 6 during on-call hours as to be effectively engaged to wait.”¹ *Id.* at 351, 354. No one factor 7 is determinative. *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 936 (9th Cir. 8 2004). Courts use the *Owens* factors to determine “whether [an employee] is so restricted 9 during on-call hours as to be effectively engaged to wait” or if, conversely, he could use 10 this time as his own. *Kennedy v. Las Vegas Sands Corp.*, 110 F.4th 1136, 1146 (9th Cir. 11 2024). An employee who an employer engages to wait must be compensated, whereas 12 employees who can use waiting times effectively for their own purposes need not be. 13 *Owens*, 971 F.2d at 350. The two predominant factors in determining whether an 14 employee’s on-call waiting time is compensable are “(1) the degree to which the 15 employee is free to engage in personal activities; and (2) the agreements between the 16 parties.” *Id.* 17 Viewing the record in the light most favorable to Pink Jeep, there are disputed 18 issues of material fact regarding whether, and to what extent, guides could use between- 19

tour time for their own purposes. Plaintiffs emphasize that tours often book close to 20 departure, guides must be available on short notice, and the combination of assignment 21 volatility and progressive discipline effectively requires guides to remain at or near the 22 departure sites, arguing this precludes them from effectively using waiting time for their 23 own purposes. (Doc. 144 at 3–6, 8–16.) In opposition, Pink Jeep points to written policies 24 describing between-tour time as “personal time” and providing for advance notice before 25 tours, and evidence that guides were permitted to leave company property and engage in 26 1 The factors are whether (1) there was an on-premises living requirement; (2) there were excessive geographical restrictions on the employees’ movements; (3) the frequency of 27 calls was unduly restrictive; (4) a fixed time limit for responding was unduly restrictive;

(5) an on-call employee could easily trade on-call responsibilities; (6) use of a pager 28 could ease restrictions; and (7) the employee could actually engage in personal activities during on-call time. Owens, 971 F.2d at 350. 1 personal activities until required to report for a scheduled tour. (Doc. 162-1 at 7, 9, 11, 2 16–17.) 3 These competing accounts create genuine factual disputes regarding several 4 considerations central to whether guides were “engaged to wait,” including the practical 5 geographic constraints on guides between tours (Docs. 132-6 at 6; 145 at 7; 158 at 21), 6 the frequency and timing of last-minute bookings and assignment changes (See, e.g.,

7 Docs. 135-6 at 10; 135-9 at 13; 132-6 at 6; 145 at 8; 158 at 29–30), the response time 8 actually required to report for tours (Docs. 145 at 5, 9; 158 at 30), the extent to which 9 guides could engage in meaningful personal pursuits (Docs. 145 at 9–10; 158 at 19, 32), 10 and whether and how the discipline policy enforced continuous availability (Docs. 145 at 11 5, 10; 158 at 13, 33, 36). Resolving those disputes would require the court to weigh 12 competing evidence and assess credibility. See Anderson, 477 U.S. at 255; see also Berry 13 v. Cty. of Sonoma, 30 F.3d 1174, 1180 (9th Cir. 1994) (“Whether and to what extent 14 employees are able to use on-call time for personal activities is a question of fact,” as is 15 “[w]hether there was an agreement between the employer and the employees that 16 employees would receive compensation only for actual work conducted while on- 17 call[.]”). Because these factual disputes are material to whether guides could use waiting 18 time for their own purposes, plaintiffs’ motion for partial summary judgment is denied as 19 to between-tour waiting time. 20 B. Compensability of Monitoring the Gantt 21 Plaintiffs move for summary judgment that time spent monitoring the Gantt 22 scheduling system is compensable. (Doc. 144 at 16–18.) Pink Jeep moves for summary 23 judgment in the reverse direction, arguing Gantt-checking time was at most de minimis 24 and not compensable. (Doc. 146 at 14–16.) 25 The FLSA requires employers to compensate employees for all hours worked. 26 Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (work 27 includes physical or mental exertion “controlled or required by the employer and pursued 28 necessarily and primarily for the benefit of the employer”); Armour & Co. v. Wantock, 1 323 U.S. 126, 132–34 (1944) (holding activities done predominantly for employer’s 2

benefit are compensable). Preliminary or postliminary activities occurring outside an employee's core tasks are compensable if they are integral and indispensable to the employee's principal activities. See 29 U.S.C. § 254(a)(2); see also *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 33–37 (2014). The compensability inquiry therefore turns on whether Gantt-checking is required (expressly or in practice) for Pink Jeep's benefit, whether it is intrinsic and necessary to performing the principal work of guiding tours, and whether the time involved is more than de minimis. *Id.* at 35; *Lindow v. United States*, 738 F.2d 1057, 1062–64 (9th Cir. 1984). Here, plaintiffs cite evidence that guides spend at least ten to twenty minutes each day checking the Gantt, with many spending “significantly more” time. (Docs. 144 at 5; 12 145 at 4.) Pink Jeep trained guides to check the Gantt often, especially because their queue positions changed continuously. (Docs. 60-7 at 40; 161-1 at 34.) And in order to avoid progressive discipline for missing tours, guides needed to monitor the Gantt. (Doc. 15 145 at 3, 5–6, 10; 62-1 at 24–25.) As an example, one guide explained that Gantt-checking was required because “if you want to make your tour on time, you need to be checking it every half hour because it can change quickly.” (Doc. 135-10 at 7.) Pink Jeep argues guides were not required to check the Gantt at all and could (somehow) learn of assignments without frequent monitoring. (Docs. 158 at 19; 162-1 at 20 10.) This argument is unconvincing, especially because Pink Jeep explicitly encouraged guides to use the Gantt for frequent schedule checking. (Docs. 60-7 at 40; 161-1 at 33– 22 34; 62-1 at 24–25.) Pink Jeep further argues that discipline was tied to missing tours rather than failing to monitor the Gantt (Docs. 146 at 15; 162-1 at 5–6), without addressing the obvious fact that the only way to not miss a tour—and thereby avoid discipline—was to be familiar with the tour schedule (see Doc. 135-10 at 7). Additionally, checking the Gantt appeared to be by far the most common way to understand when a guide is assigned a tour. (Doc. 135-2 at 19.) Pink Jeep identifies no clear alternative to checking the Gantt to learn of tour assignments other than “calling in” (Doc. 62-1 at 25), which it did not encourage or train guides to do. (See Doc. 60-7 at 40 2 (“We prefer guides to use the Internet Gantt.”).) Given the Gantt's vital importance in tour scheduling and Pink Jeep's strong preference that guides use it, checking the Gantt was integral and indispensable to the guides' principal work of performing tours. *Integrity Staffing*, 574 U.S. at 35; *Buero v. Amazon.com Servs., Inc.*, 61 F.4th 1031, 1037 6 (9th Cir. 2023). Integral and indispensable activities like Gantt-checking are still not compensable if they are de minimis. *Lindow*, 738 F.2d at 1062–64. “There is no precise amount of time that may be denied compensation as de minimis.” *Id.* Instead, to determine whether time is de minimis, the court must consider (1) “the practical administrative difficulty of recording the additional time”; (2) the aggregate amount of additional time worked; and (3) the regularity of the additional time worked. *Id.* at 1063. Claims that might be minimal on a daily basis can be substantial when aggregated. *Id.* Applying these factors, Gantt-checking time was not de minimis. First, the administrative difficulty of recording Gantt-checking time appears minimal. Pink Jeep maintains a simple and straightforward policy for tracking work hours that

would permit guides to easily tally their Gantt-checking time. (See Docs. 60-7 18 at 45; 62-1 at 28.) Employees also must log into the Gantt using a unique ID, raising the 19 possibility that tracking Gantt-checking time could be automated. (See Doc. 135-5 at 13.) 20 Either way, the administrative burden appears minimal. 21 Second, the guides’ testimony shows Gantt-checking time is substantial when 22 aggregated. (See, e.g., Docs. 60-2 at 39 (at least 30 minutes to over an hour each day); 23 135-3 at 5 (30 minutes per day); 135-4 at 16–17 (9 hours per week); 135-5 at 13 (10-20 24 minutes per day); 135-6 at 18–19 (3-4 hours per week and up to 6-7 hours in the slow 25 season); 135-7 at 16–17 (20 minutes to 2 hours per day); 135-8 at 18 (3 hours per week); 26 135-9 at 14–18 (around 30 minutes per day on average); 135-10 at 5 (20-40 minutes per 27 day); 135-11 at 12 (4-5 hours per week); 135-12 at 7–9 (30 minutes up to a few hours a 28 day); 135-13 at 4–5 (1-2 hours a day); 135-14 at 4 (30-90 minutes per day).) And 1 although it might be challenging to determine the exact time spent checking the Gantt, it 2 appears possible to “reasonably determine or estimate the average time.” *Rutti v. Lojack 3 Corp.*, 596 F.3d 1046, 1059 (9th Cir. 2010). 4 Pink Jeep identifies extremely limited and somewhat misleading testimony to 5 support its argument that Gantt-checking time was *de minimis*. For instance, Pink Jeep 6 highlights one guide who estimated he only spent five to ten minutes per day checking 7 the Gantt during peak season (Doc. 132-10 at 11), but neglects to mention that the same 8 guide on an “average” day would spend nearly thirty minutes checking the Gantt. (Doc. 9 135-9 at 14–18.) The two other guides cited by Pink Jeep estimated they still checked the 10 Gantt fifteen to twenty minutes per day. (Docs. 132-6 at 26; 132-7 at 10.) Although there 11 is no set threshold for what constitutes *de minimis* work, courts regularly determine that 12 more than ten minutes per day exceeds the *de minimis* threshold. See *Lindow*, 738 F.2d at 13 1062–63 (collecting cases). Based on the testimony of the guides, there is no dispute of 14 fact that guides spent at least ten to twenty minutes per day checking the Gantt, and often 15 substantially more. 16 Finally, the record indicates the time spent checking the Gantt occurred with 17 regularity. Uncompensated work occurs with “regularity” when it happens routinely as 18 part of the job (e.g., each shift), whether or not it takes the same number of minutes each 19 time. See *Cadena v. Customer Connexx LLC*, 107 F.4th 902, 913 (9th Cir. 2024) (treating 20 work as regular where employees were required to perform it every shift and explaining 21 that day-to-day time variations bear on the administrative difficulty of recording, not 22 regularity). Here, guides checked the Gantt every workday and were implicitly required 23 to do so given Pink Jeep’s policy they would be punished if they missed a tour. See *Rutti*, 24 596 F.3d at 1059. The *Lindow* regularity prong—just like the aggregate amount and 25 administrative difficulty prongs—is satisfied in favor of the guides. 26 Based on the evidence, no reasonable jury could find Gantt-checking was not 27 integral and indispensable to the guides’ work, nor could it find the aggregate time spent 28 was *de minimis* or too difficult to calculate. Accordingly, time spent checking the Gantt is 1 compensable. Any dispute as to the precise amount of compensable time goes not to 2 liability but to damages. Plaintiffs’ motion for summary judgment on this issue is 3 granted, and Pink Jeep’s is denied. 4 C. Pink Jeep’s Motion

for Summary Judgment 5 Pink Jeep also seeks summary judgment arguing plaintiffs cannot prove damages, 6 “gap time” is not recoverable under the FLSA, Slepian’s Arizona wage statute claim fails 7 for lack of a “reasonable expectation” of payment for the disputed categories, and treble 8 damages are not available due to a reasonable good-faith dispute. (Doc. 146 at 2.) 9 i. Damages Computation 10 The parties disagree not only about the amount of damages, but also about how 11 they may be proved. Under the FLSA, a plaintiff bears the initial burden to prove he 12 performed work for which he was improperly compensated and to produce sufficient 13 evidence to show the amount and extent of that work “as a matter of just and reasonable 14 inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Where the 15 employer’s records are inadequate or inaccurate, an employee need not prove damages 16 with absolute precision; instead, the burden shifts to the employer to come forward with 17 evidence of the precise amount of work performed or evidence negating the 18 reasonableness of the employee’s inference. *Id.* at 687–88. At summary judgment, the 19 question is whether the non-movant has produced admissible evidence from which a 20 reasonable jury could find uncompensated work and approximate damages under this 21 framework. See *Celotex*, 477 U.S. at 322–24.

22 Rule 1006 permits parties to prove damages using summaries of voluminous 23 evidence that cannot be conveniently examined in court, provided the underlying 24 materials are admissible and were made available to the opposing party. *Fed. R. Evid.* 25 1006; *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). 26 Separately, testimony based on “scientific, technical, or other specialized knowledge” 27 must satisfy Rule 702, and a party may not evade Rule 26’s disclosure requirements by 28 offering expert opinion as lay testimony under Rule 701. *Fed. R. Evid.* 701–02; *United 1 States v. Figueroa-Lopez*, 125 F.3d 1241, 1245–46 (9th Cir. 1997); *Fed. R. Civ. P.* 2 26(a)(2). If a party’s damages calculation depends on specialized analysis rather than 3 straightforward arithmetic based on personal knowledge and admissible records, the party 4 must provide expert testimony admissible under Rule 702. *Daubert v. Merrell Dow 5 Pharms., Inc.*, 509 U.S. 579, 589–95 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 6 137, 147–49 (1999). And where damages evidence is not properly disclosed under Rule 7 26, Rule 37(c)(1) authorizes exclusion unless the failure was substantially justified or 8 harmless. *Fed. R. Civ. P.* 26(a)(1)(A)(iii), 37(c)(1); *Yeti by Molly, Ltd. v. Deckers 9 Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). 10 Here, Pink Jeep argues plaintiffs cannot establish damages. (Docs. 146 at 5–12; 11 164 at 4–6.) On this record, however, Pink Jeep’s damages arguments do not entitle it to 12 judgment as a matter of law. Slepian (or any individual opt-in) could obviously prove 13 damages through testimony and payroll records. See *Mt. Clemens*, 328 U.S. at 687–88. 14 Nonetheless, Pink Jeep’s briefing challenges both the admissibility and reliability of 15 plaintiffs’ disclosed damages computations and the sufficiency of plaintiffs’ damages 16 proof more generally. In Pink Jeep’s view, defects in the computations counsel disclosed 17 and the absence of expert testimony preclude plaintiffs from proving damages at all. 18 Because these disputes about plaintiffs’ calculations go to the amount and permissible 19 scope of recovery rather than a

complete absence of proof, summary judgment is denied. 20 First, plaintiffs need only produce evidence from which a jury could find 21 uncompensated work and approximate its extent “as a matter of just and reasonable 22 inference.” *Mt. Clemens*, 328 U.S. at 687. Here, plaintiffs point to guides’ representative 23 testimony regarding uncompensated between-tour waiting time and Gantt-checking time, 24 which together with payroll and timekeeping records would permit a jury to estimate any 25 resulting underpayment to guides. (Doc. 160 at 10.) Crediting such evidence, a 26 reasonable jury could approximate damages despite disputes about exact amounts. See 27 *Mt. Clemens*, 328 U.S. at 687–88; *Brock v. Seto*, 790 F.2d 1446, 1448–49 (9th Cir. 1986) 28 (explaining employers cannot avoid back-wages liability because damages are imprecise 1 when the imprecision stems from employer recordkeeping failures). In short, the 2 possibility plaintiffs’ estimates may be imperfect or rely in part on representative 3 testimony does not defeat the claim at summary judgment. See *Mt. Clemens*, 328 U.S. at 4 687–88; *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455–57 (2016) (approving 5 representative proof where each class member could have relied on the sample in an 6 individual action); *Monroe v. FTS USA, LLC*, 860 F.3d 389, 411–13 (6th Cir. 2017) 7 (holding representative testimony can be used to award back wages for similarly-situated 8 employees). 9 Neither has Pink Jeep shown that plaintiffs’ damages theory necessarily depends 10 on expert testimony. Plaintiffs’ disclosed damages calculations use testimony-derived 11 estimates of off-the-clock time and payroll data to compute unpaid wages and minimum- 12 wage shortfalls. (Doc. 147-1 at 37–38.) This is straightforward arithmetic applied to 13 business records and testimony about hours worked, not a technical model requiring 14 specialized analysis. See *Fed. R. Evid.* 701–02; cf. *Daubert*, 509 U.S. at 589–95. Pink 15 Jeep’s challenges to particular assumptions and inputs may affect the weight or 16 admissibility of specific damages figures, but they do not establish that expert testimony 17 is required. 18 Pink Jeep does correctly identify certain baseline overtime-calculation errors. 19 Overtime must be computed by workweek, the FLSA does not permit averaging hours 20 over multiple weeks, and payments for periods when no work is performed (including 21 vacation or sick leave) are not hours worked for overtime purposes. 29 U.S.C. 22 § 207(a)(1); 29 C.F.R. §§ 778.104, 778.218–19. But again these errors go to the proper 23 measure of damages, not to whether plaintiffs can prove them at all. Pink Jeep’s 24 arguments may support recalculating and narrowing the amount, but they do not establish 25 plaintiffs lack any evidence from which a jury could find uncompensated work and 26 approximate damages. See *Mt. Clemens*, 328 U.S. at 687–88; *Brock*, 790 F.2d at 1448– 27 49. 28 Finally, Pink Jeep’s concerns about impermissible stacking go to the permissible 1 categories of recovery, not whether a jury could award damages at all. Plaintiffs cannot 2 obtain duplicative recovery for the same unpaid wages under overlapping federal and 3 state theories, see *Rios v. Lux Interior & Renovation LLC*, No. CV-23-01686-PHX-DJH, 4 2025 WL 871021, at *10 (D. Ariz. Mar. 20, 2025), but that principle only supports 5 limiting the final award, not granting summary judgment to wipe out damages evidence 6 entirely. 7 In short, Pink Jeep’s damages criticisms go to the admissibility of particular 8 summaries, the proper measure

and scope of recovery, and the weight of plaintiffs’ 9 proposed calculations—not to whether plaintiffs can present sufficient evidence for a jury 10 to award unpaid wages at all. Accordingly, Pink Jeep is not entitled to summary judgment 11 on the grounds that plaintiffs cannot establish damages. 12 ii. Gap Time Recovery 13 Pink Jeep seeks summary judgment arguing plaintiffs’ claim depends on an 14 impermissible gap-time theory. The FLSA requires covered employers to pay employees 15 a minimum wage and to pay overtime compensation at one-and-one-half times the 16 employee’s regular rate for hours worked in excess of 40 in a workweek. 29 U.S.C. 17 §§ 206(a), 207(a)(1). “Gap time” is uncompensated “time that is not covered by the 18 overtime provisions because it does not exceed the overtime limit” and “is not covered by 19 the minimum wage provisions because, even though it is uncompensated, the employees 20 are still being paid a minimum wage when their salaries are averaged across their actual 21 time worked.” *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 n.6 (9th Cir. 1999). Courts 22 commonly distinguish between “pure” gap time (unpaid straight-time work in non- 23 overtime workweeks) and “overtime” gap time (unpaid straight-time work in workweeks 24 where the employee worked more than 40 hours). *Gomley v. Crossmark, Inc.*, No. 1:13- 25 CV-00420-BLW, 2015 WL 1825481, at *6 (D. Idaho Apr. 22, 2015). 26 The Ninth Circuit has not definitively resolved whether the FLSA permits 27 recovery of gap time as a standalone theory, but it has recognized the concept and noted 28 the doctrinal uncertainty. *Adair*, 185 F.3d at 1062 n.6. The prevailing view is that pure 1 gap-time claims are not cognizable where employees are still paid a minimum wage 2 when their wages are averaged across their actual time worked. *Id.*; *Gomley*, 2015 WL 3 1825481, at *6 (citing *Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 4 192, 201–02 (2d Cir. 2013)); see also *Davis v. Abington Mem’l Hosp.*, 765 F.3d 236, 244 5 (3d Cir. 2014) (“Courts widely agree that there is no cause of action under the FLSA for 6 ‘pure’ gap time wages”). 7 Courts are more divided on the viability of overtime gap-time claims under the 8 FLSA. The Ninth Circuit has not directly addressed the issue, and some Ninth Circuit 9 district courts have declined to recognize them. See, e.g., *Canh Le v. DirecTV, LLC*, No. 10 2:16-CV-01369-SVW-AS, 2017 WL 6939087, at *19 (C.D. Cal. Nov. 2, 2017). But 11 absent clear authority on the point, this court recognizes the viability of overtime gap- 12 time claims because doing so is more consistent with *Skidmore* deference, FLSA’s 13 statutory purposes, and Ninth Circuit precedent arising in an analytically-analogous 14 context. *Sanchez v. Republic Servs. Customer Res. Ctr. W. LLC*, No. CV-24-02499-PHX- 15 KML, 2025 WL 1248931, at *3–5 (D. Ariz. Apr. 30, 2025) (citing *Skidmore v. Swift & 16 Co.*, 323 U.S. 134, 140 (1944)); see also *Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th 17 Cir. 1982); *Conner v. Cleveland Cnty., N.C.*, 22 F.4th 412, 425 (4th Cir. 2022).

18 Plaintiffs may not recover for pure gap-time wages, see *Adair*, 185 F.3d at 1062 19 n.6, but their theory is not limited to that category. Plaintiffs allege Pink Jeep required 20 them to perform uncompensated work during scheduled workdays, including between- 21 tour waiting time and Gantt-checking, and that those uncompensated hours (when 22 included) pushed some workweeks

over forty hours or dropped their effective hourly rate 23 below the minimum wage. (Docs. 147-1 at 39, 48; 160 at 14; 145 at 7.) On this record, 24 and drawing all reasonable inferences in their favor, a reasonable jury could return a 25 verdict for plaintiffs on their overtime-gap claims. Accordingly, Pink Jeep is not entitled 26 to summary judgment on a gap-time theory. 27 iii. Arizona Wage Claims 28 The parties dispute whether the compensation Slepian seeks qualifies as “wages” 1 that were “due” under Arizona law, particularly in light of competing evidence about 2 Pink Jeep’s policies and promises. Arizona’s wage statutes authorize an employee to 3 bring a civil action when an employer fails to pay wages due. A.R.S. § 23-355(A). Wages 4 are defined as “nondiscretionary compensation due an employee in return for labor or 5 services rendered . . . for which the employee has a reasonable expectation to be paid.” 6 A.R.S. § 23-350(5). An employee’s “reasonable expectation” of payment may be 7 “defined by contract,” including an implied agreement “based upon [the parties’] past 8 dealings.” *Zavaleta v. OTB Acquisition LLC*, No. CV-19-04729-PHX-JAT, 2021 WL 9 824419, at *5 (D. Ariz. Mar. 4, 2021). A reasonable expectation may also arise from the 10 employer’s “policy or practice” of making the payment. See *Morgan v. Freightliner of 11 Ariz., LLC*, No. CV-16-00498-TUC-CKJ, 2017 WL 2423491, at *7 (D. Ariz. June 2, 12 2017). Additionally, a specific promise of compensation not memorialized in a contract, 13 when coupled with continued performance on that promise, can establish a reasonable 14 expectation of payment. *Schade v. Diethrich*, 760 P.2d 1050, 1062 (Ariz. 1988). 15 Therefore, the crucial question in evaluating an Arizona wage claim at summary 16 judgment is whether a reasonable jury could find that the employee is seeking 17 compensation owed for labor or services rendered under conditions that gave him a 18 reasonable expectation of being paid. 19 The parties agree that only Slepian’s individual claim for failure to timely pay 20 wages is at issue. (Docs. 146 at 16–17; 160 at 20–21.) Pink Jeep argues Slepian cannot 21 satisfy Arizona’s “reasonable expectation” element because its policies expressly stated 22 guides would not be paid for between-tour waiting time or related off-the-clock activities 23 (Docs. 73-3 at 3–4; 60-7 at 46; 161-1 at 35), and Slepian read and understood those 24 policies at the outset of his employment (Doc. 146 at 17). Pink Jeep also relies on 25 evidence that Slepian routinely reviewed his time records without reporting 26 discrepancies. (See Docs. 161-1 at 35; 73-3 at 3.) 27 Viewing the evidence in the light most favorable to Slepian, a reasonable jury 28 could find Pink Jeep made a broader promise he would be paid by the hour for all hours 1 worked. (See Docs. 62-1 at 14 (Pink Jeep human resources director stating guides are 2 “paid by the hour for all hours worked”); 60-7 at 56 (offer letter indicating hourly pay 3 and non-exempt status); 60-2 at 48 (Slepian testifying he was an hourly employee); 60-6 4 at 18 (employee manual outlining hourly work for non-exempt employees and 5 guaranteeing overtime pay according to applicable federal and state laws).) Under 6 Arizona law, specific promises of compensation like these, coupled with continued 7 performance on those promises, can establish a reasonable expectation of payment. 8 *Schade*, 760 P.2d at 1062. At minimum, Slepian has raised a material factual dispute as to 9 whether he reasonably expected timely payment of overtime wages if his total 10 compensable

hours in a workweek exceeded forty once all hours worked are properly 11 counted. Accordingly, Pink Jeep is not entitled to summary judgment on Slepian's 12 Arizona wage claim. 13 iv. Treble Damages 14 Arizona law permits treble damages in some unpaid-wage cases. Under A.R.S. 15 § 23-355(A), an employee may recover "an amount that is treble the amount of the 16 unpaid wages" when an employer fails to pay wages due, but only as a punitive, 17 discretionary remedy that is not available where the employer's withholding was based 18 on a reasonable good-faith dispute. A.R.S. § 23-352(3); *Sanborn v. Brooker & Wake* 19 Prop. Mgmt., 874 P.2d 982, 984 (Ariz. Ct. App. 1994). Treble damages are generally 20 reserved for circumstances where an employer delays payment without reasonable 21 justification or seeks to defraud employees of earned wages. *Crum v. Maricopa Cnty.*, 22 950 P.2d 171, 175 (Ariz. Ct. App. 1997); *Wood v. Nw. Hosp., LLC*, 473 P.3d 729, 737 23 (Ariz. Ct. App. 2020). Treble damages are not recoverable if the employer withheld 24 wages based on a good-faith belief that it owed nothing more. *Sanborn*, 874 P.2d at 984; 25 see also *Olson v. McKesson Corp.*, No. CV-04-2428-PHX-SMM, 2006 WL 2355393, at 26 *3 (D. Ariz. Aug. 14, 2006). 27 Pink Jeep points to evidence that could demonstrate its good faith. (Docs. 60-7 at 28 2 Slepian's minimum wage claim under A.R.S. § 23-362 et seq. also survives; Pink Jeep did not move for summary judgment on that claim. (See Doc. 160 at 23.) 1 || 49, 51; 147-1 at 3-4.) But viewing the evidence as a whole in the light most favorable to 2|| Slepian, the record permits a contrary inference that Pink Jeep's broader hourly-pay || promise created an expectation Slepian would be paid for all hours worked, and that Pink Jeep nevertheless withheld wages due. (See Docs. 62-1 at 14; 60-7 at 56; 60-6 at 18.) On ☐☐ this record, the court cannot determine as a matter of law whether Pink Jeep's 6 || withholding reflected a reasonable good-faith dispute or an unjustified refusal to pay 7\| wages due. See A.R.S. §§ 23-352(3), 23-355; *Wood*, 473 P.3d at 737-38. Accordingly, 8 || summary judgment is denied as to treble damages. 9 IT IS ORDERED plaintiffs' motion for partial summary judgment (Doc. 144) is || GRANTED IN PART and DENIED IN PART. 11 IT IS FURTHER ORDERED Pink Jeep's motion for summary judgment (Doc. 146)is DENIED. 13 IT IS FURTHER ORDERED no later than March 16, 2026, the parties shall file 14|| a joint statement identifying the dates they are available for trial from October 6, 2026, 15 || to November 25, 2026. The parties must identify each five-day period (excluding 16 || Mondays) during that time period they are available. If a party or counsel has a conflict during that period, the joint statement must list the conflict, the specific dates of the 18 || conflict, and, if the conflict is a trial in another court, the likelihood the trial will proceed || as scheduled. Once the parties identify the dates they are available, the court will set deadlines for the filing of pretrial documents. 21 IT IS FURTHER ORDERED the parties shall contact Magistrate Judge 22 || Kimmins's chambers within three days of this order to schedule an additional settlement 23 || conference. 24 Dated this 6th day of March, 2026. 25 Honorable Krissa M. Lanham 28 United States District Judge -17-

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