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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Thomas E Perez, et al.,

No. CV-16-04499-PHX-DLR

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Plaintiffs,

**ORDER**

11

v.

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Arizona Logistics Incorporated, et al.,

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Defendants.

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This is a Fair Labor Standards Act (“FLSA”) enforcement action brought by the United States Department of Labor (“DOL”) against Defendants Arizona Logistics Incorporated doing business as Diligent Delivery Systems (“Diligent”), Parts Authority Arizona, LLC (“Parts Authority”), and Larry Browne. The DOL claims Defendants misclassified certain delivery drivers as independent contractors, adversely impacting their pay. At issue are the parties’ motions for summary judgment (Docs. 199, 201, 203, 205), which are fully briefed.<sup>1</sup>

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Summary judgment is appropriate when there is no genuine dispute as to any material fact and, viewing those facts in a light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could find for the nonmoving party based on the competing evidence. *Anderson v. Liberty Lobby*,

<sup>1</sup> Oral argument is denied because it will not aid the Court’s decision-making. See Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

1 *Inc.*, 477 U.S. 242, 248 (1986); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061  
2 (9th Cir. 2002).

3 Collectively, the motions raise six issues: (1) whether the delivery drivers are  
4 employees, rather than independent contractors, (2) whether Parts Authority and Browne  
5 are joint employers of the drivers, (3) what statute of limitations applies to the DOL's  
6 claims, (4) whether the DOL is entitled to equitable tolling of the statute of limitations; (5)  
7 whether liquidated damages are available, and (6) whether the DOL is entitled to injunctive  
8 relief. The Court addresses each issue in turn.

### 9 **A. FLSA Classification**

10 The FLSA defines "employee" as "any individual employed by an employer," 29  
11 U.S.C. § 203(e)(1), "employ" as including "to suffer or permit to work," § 203(g), and  
12 "employer" as "any person acting directly or indirectly in the interest of an employer in  
13 relation to an employee," § 203(d). Courts interpret these terms expansively to effectuate  
14 the FLSA's broad remedial purposes. *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d  
15 748, 754 (9th Cir. 1979). "Neither the common law concepts of 'employee' and  
16 'independent contractor' nor contractual provisions purporting to describe the relationship  
17 are determinative of employment status." *Nash v. Resources, Inc.*, 982 F. Supp. 1427, 1433  
18 (D. Or. 1997). Instead, "[c]ourts consider the facts as a whole and rely on six factors to  
19 analyze the economic realities of the relationship[.]" *Perez v. Oak Grove Cinemas, Inc.*,  
20 68 F. Supp. 3d 1234, 1242 (D. Or. 2014). These factors, which "are aids to determine the  
21 degree of dependence by the individual on the entity," *id.*, are:

22 (1) the degree of the alleged employer's right to control the  
23 manner in which the work is to be performed;

24 (2) the alleged employee's opportunity for profit or loss  
depending upon his managerial skill;

25 (3) the alleged employee's investment in equipment or  
26 materials required for his task, or his employment of helpers;

27 (4) whether the service rendered requires a special skill;

28 (5) the degree of permanence of the working relationship; and

1 (6) whether the service rendered is an integral part of the  
2 alleged employer's business.

3 *Real*, 603 F.2d at 754.

4 "Whether an individual is an employee or an independent contractor for purposes  
5 of the FLSA is a question of law." *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-cv-  
6 00824 JWS, 2015 WL 1299369, at \*2 (D. Ariz. Mar. 23, 2015). But the Court can answer  
7 this question on summary judgment only where the facts material to the inquiry are  
8 undisputed. *See Gillard v. Good Earth Power AZ LLC*, No. CV-17-01368-PHX-DLR,  
9 2019 WL 1280946, at \*7 (D. Ariz. Mar. 19, 2019) (finding material factual disputes  
10 precluded summary judgment on whether individuals were employees or independent  
11 contractors).

12 The Court finds that material factual disputes and inferences to be drawn from the  
13 facts, relevant to the six factors, preclude summary judgment for any party. As non-  
14 exhaustive examples, the parties dispute: whether drivers were aware of Diligent's "Driver  
15 Code of Conduct" and whether it was actually enforced (Doc. 204 ¶ 41; Doc. 232 ¶ 41);  
16 whether Diligent set and enforced drivers' hours and, if so, whether drivers were passed  
17 over for jobs if they could not work during those times (Doc. 204 ¶¶ 36-37; Doc. 232 ¶¶  
18 36-37); whether Diligent expected drivers to check in with supervisors each day, rather  
19 than just confirm whether they would be accepting or declining a job (Doc. 204 ¶ 38; Doc.  
20 232 ¶ 38); whether Parts Authority permitted drivers to take breaks (Doc. 204 ¶¶ 125, 133;  
21 Doc. 232 ¶¶ 125, 133); whether certain Diligent clients provided tablets to drivers in order  
22 to monitor them, rather than simply to collect electronic signatures and confirm deliveries  
23 (Doc. 204 ¶ 51; Doc. 200 ¶ 56); the extent to which Parts Authority instructs drivers on  
24 how to perform their jobs (Doc. 204 ¶ 158; Doc. 232 ¶ 158); whether Diligent enforced its  
25 customers' rules regarding driver conduct (Doc. 204 ¶¶ 48, 129; Doc. 232 ¶¶ 48, 129);  
26 whether Diligent drivers are able to use slow periods to perform other work (Doc. 204 ¶  
27 40; Doc. 232 ¶ 40); whether Diligent enforces a dress code and grooming standards for its  
28 drivers (Doc. 204 ¶¶ 23, 56, 67, 161; Doc. 232 ¶¶ 23, 56, 67, 161); whether or how Diligent  
negotiates rates with its drivers (Doc. 204 ¶¶ 27-28, 30-31; Doc. 232 ¶¶ 27-28, 30-31); and

1 the relative permanence of drivers' work arrangements (Doc. 204 ¶¶ 15, 70; Doc. 232 ¶¶  
2 15, 70). The Court cannot resolve the legal question of whether the drivers were properly  
3 classified when so much about the economic realities is genuinely disputed.

#### 4 **B. Joint Employers**

5 Two or more employers may be joint employers of an employee, with each  
6 employer having individual liability for compliance with the FLSA. *Bonnette v. Cal.*  
7 *Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). “[T]he concept of joint  
8 employment should be defined expansively under the FLSA.” *Chao v. A-One Med. Servs.,*  
9 *Inc.*, 346 F.3d 908, 917 (9th Cir. 2003). To determine whether an entity qualifies as a joint  
10 employer, the Court examines the economic realities of the work arrangement. *See Torres-*  
11 *Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997). That Court considers the “circumstances  
12 of the whole activity,” and specifically examines four factors: “whether the alleged  
13 employer: (1) had the power to hire and fire the employee[ ], (2) supervised and controlled  
14 employee work schedules or conditions of employment, (3) determined the rate and method  
15 of payment, and (4) maintained employment records.” *Bonnette*, 704 F.2d at 1469-70. The  
16 Court cannot resolve this issue as a matter of law, however, if the material facts that inform  
17 the inquiry are genuinely disputed. *See Gillard*, 2019 WL 1280946, at \*9.

18 The Court finds that material factual disputes and inferences to be drawn from the  
19 facts, relevant to the four factors, preclude summary judgment on whether Parts Authority  
20 and Browne may be held liable as joint employers.

21 First, Parts Authority. At a minimum, the parties genuinely dispute whether and to  
22 what extent Parts Authority: is involved in contract formation with the drivers (Doc. 202 ¶  
23 28; Doc. 219 ¶ 28); provides tools and equipment to drivers (Doc. 202 ¶ 29; Doc. 219 ¶  
24 29); requires drivers to complete administrative paperwork (Doc. 202 ¶ 30; Doc. 219 ¶ 30);  
25 maintains records of drivers' time, hours, or other personnel matters (Doc. 202 ¶¶ 75, 76,  
26 78, 83; Doc. 219 ¶¶ 75, 76, 78, 83); disciplined drivers (Doc. 202 ¶¶ 56, 61, 64; Doc. 219  
27 ¶¶ 56, 61, 64); controlled drivers' schedules (Doc. 202 ¶¶ 35, 38, 57, 59, 60; Doc. 219 ¶¶

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1 35, 38, 57, 59, 60); and trained, directed, or supervised drivers (Doc. 202 ¶¶ 42, 43, 53, 91;  
2 Doc. 219 ¶¶ 42, 43, 53, 91).

3 Second, Browne. At a minimum the parties genuinely dispute whether and to what  
4 extent: Browne is involved in Diligent’s day-to-day operations (Doc. 207 ¶¶ 3-9; Doc. 220  
5 ¶¶ 3-9); Diligent’s customers and drivers know of and interact with Browne (Doc. 207 ¶¶  
6 10, 12, 13; Doc. 220 ¶¶ 10, 12, 13); and Browne was personally involved in contract  
7 formation, setting the terms of work, hiring, and firing (Doc. 207 ¶¶ 14, 15, 20, 22, 23;  
8 Doc. 220 ¶¶ 14, 15, 20, 22, 23).

9 The Court cannot resolve the legal question of whether Parts Authority and Browne  
10 are joint employers when so much about the economic realities is genuinely disputed.

### 11 **C. Statute of Limitations**

12 The FLSA imposes a two-year statute of limitations for actions brought to recover  
13 damages for an employer’s failure to pay the federal minimum wage or overtime pay.  
14 *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016). Where claims arise from  
15 an employer’s willful violation of the FLSA, the statute of limitations may be extended to  
16 three years. *Id.* “A violation is willful if the employer knew or showed reckless disregard  
17 for the matter of whether its conduct was prohibited by the FLSA.” *Id.* (internal quotation  
18 and citation omitted). Reckless disregard includes “failure to make adequate inquiry into  
19 whether conduct is in compliance” with the FLSA, 5 C.F.R. § 551.104, and an employer  
20 thus acts willfully by “disregard[ing] the very ‘possibility’ that it was violating the statute.”  
21 *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003). The Court, however, will not  
22 “presume that conduct was willful in the absence of evidence.” *Id.* at 909. Moreover, the  
23 Court will not resolve a statute of limitations argument on summary judgment if there are  
24 genuine and material fact disputes touching on whether the employer’s conduct was willful.  
25 *See Gillard*, 2019 WL 1280946, at \*10.

26 To the extent the DOL seeks a summary judgment ruling that Diligent and Parts  
27 Authority acted willfully, its motion is denied. If the Court cannot determine as a matter  
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1 of law that Diligent and Parts Authority violated the FLSA by misclassifying the drivers,  
2 it necessarily cannot say as a matter of law that they did so willfully.

3 Diligent and Parts Authority seek the opposite: a ruling that, even assuming they  
4 misclassified the drivers, they did not do so willfully. But the Court finds that material  
5 factual disputes and inferences to be drawn from the facts preclude summary judgment on  
6 willfulness. For example, Diligent relies heavily on the fact that it relied on legal advice  
7 when crafting its independent contractor model, but the DOL points out that an independent  
8 law firm concluded in 2000 that Diligent's drivers likely were employees. The DOL also  
9 questions whether the legal opinion Diligent solicited was predicated on an accurate  
10 understanding of the economic realities—an issue that, as explained above, is rife with  
11 factual disputes. (*See* Doc. 214 at 26-27.)

12 As for Parts Authority, reasonable inferences can be drawn in favor of either party  
13 on this issue. For example, Parts Authority argues that the law governing joint employer  
14 relationships was unsettled at the time, but “the absence of binding authority directly on  
15 point is not dispositive.” *Flores*, 824 F.3d at 907. Parts Authority also argues that it relied  
16 on Diligent's representations that its independent contractor model had been challenged and  
17 upheld in court, but the DOL notes that Parts Authority did not take affirmative action of  
18 its own to assure compliance. Moreover, before procuring drivers through Diligent, Parts  
19 Authority employed its own employee drivers to provide the same services, which arguably  
20 should have put Parts Authority on notice that Diligent's independent contractor model  
21 might not be FLSA-compliant. Although the DOL's willfulness allegations against Parts  
22 Authority are no doubt weaker than those against Diligent, the Court cannot say on  
23 summary judgment that there is no competing evidence on this point, or that reasonable  
24 inferences cannot be drawn in favor of either party. Summary judgment on this issue is  
25 denied.

#### 26 **D. Equitable Tolling**

27 Next, the parties quarrel over whether the DOL is entitled to equitable tolling of the  
28 statute of limitations as of April 2012. “Equitable tolling is a rare remedy to be applied in

1 unusual circumstances, not as a cure-all for an entirely common state of affairs.” *Wallace*  
2 *v. Kato*, 549 U.S. 384, 396 (2007). The Ninth Circuit has instructed that equitable tolling  
3 is available only in “extreme cases” and should be “applied sparingly.” *Lee v. Venetian*  
4 *Casino Resort, LLC*, 747 Fed. App’x 607, 608 (9th Cir. 2019). There are three principal  
5 situations when equitable tolling may be appropriate: (1) when the plaintiff is prevented  
6 from asserting a claim by wrongful conduct on the part of the defendant; (2) when  
7 extraordinary circumstances beyond a plaintiff’s control made it impossible to file a claim  
8 on time; and (3) when a party is unable to obtain vital information bearing on the existence  
9 of the claim. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999); *Cervantes v.*  
10 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011).

11 The DOL began investigating Diligent in April 2015. While the investigation  
12 progressed, DOL asked Diligent to enter into an agreement tolling the limitations period  
13 from April 13, 2012, through April 14, 2016. The agreement provided that it would be  
14 effective when signed by representatives of both parties. Diligent signed the agreement;  
15 the DOL did not. Several months later, the DOL asked Diligent to enter into a second  
16 agreement, which sought to extend the tolling period through April 14, 2017. This  
17 agreement also provided that it would be effective when it is signed by representatives of  
18 both parties. Diligent again signed; the DOL again did not. In August 2016, Diligent  
19 notified the DOL that it was withdrawing its consent to the tolling agreements, evidently  
20 because it “changed its mind.” Thereafter, the DOL did not ask Diligent or Parts Authority  
21 to enter into any other tolling agreements.

22 Diligent raises a strong argument that the DOL’s failure to sign these tolling  
23 agreements render them invalid. By their terms, the tolling agreements became effective  
24 upon the signatures of both parties, but the DOL never signed either agreement. Under  
25 similar circumstances, the First Circuit found a tolling agreement to be invalid. *See U.S.*  
26 *v. Spector*, 55 F.3d 22, 25-26 (1st Cir. 1995). In arguing otherwise, the DOL relies on  
27 *Harris v. Bruister*, No. 4:10cv77-DPJ-FKB, 2013 WL 6805155, at \*7-8 (S. D. Miss. Dec.  
28 20, 2013), which concluded that the government’s failure to sign a tolling agreement did

1 not render it unenforceable. But unlike here and in *Spector*, the agreements in *Harris* did  
2 not include language expressly providing that they would take effect upon the signatures  
3 of both parties. *Id.*

4 But the Court need not resolve this issue. The DOL argues that, regardless of  
5 whether these tolling agreements are enforceable, Diligent knowingly and voluntarily  
6 waived its statute of limitations defense by signing these agreements and acting in  
7 accordance with them. The Court agrees. A defendant's signature on an agreement is  
8 strong evidence of a valid waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).  
9 And on this score the Court finds *Harris* persuasive. There, the district court concluded  
10 that "even if the tolling agreements are not enforceable contracts for lack of execution, they  
11 still reflect a valid waiver." *Harris*, 2013 WL 6805155, at \*8. Diligent evidenced a  
12 knowing and voluntary intent to relinquish its statute of limitations defense when it signed  
13 these tolling agreements, and although no representative of the DOL signed these  
14 agreements, they reflect Diligent's intent, and both parties operated as if it was in force—  
15 the DOL, by not filing suit earlier, and Diligent by entering into a second tolling agreement  
16 even after the DOL failed to execute the first, and providing notice when it decided to  
17 withdraw its consent to the tolling agreement. *See Id.* The Court therefore finds that  
18 Diligent has waived its statute of limitation defense.

19 This does not resolve the issue as to Parts Authority, however, because Parts  
20 Authority did not sign any tolling agreement with the DOL. And having reviewed the  
21 parties' briefs, the Court finds no basis for tolling the statute of limitations as to Parts  
22 Authority. The DOL argues that equitable tolling as to Parts Authority is appropriate  
23 because Parts Authority intended to mislead drivers about their classification status. But  
24 the evidence the DOL cites merely supports that Parts Authority considered its drivers  
25 independent contractors and communicated that classification decision to them.  
26 Misclassification itself is not a basis for equitable tolling. "To grant equitable tolling in  
27 such circumstances would void the statute of limitations entirely, as any FLSA plaintiff  
28 would qualify." *Prentice v. Fund for Pub. Interest Research, Inc.*, No. C-06-7776 SC,



1 2007 WL 2729187, at \*3 (N.D. Cal. Sep. 18, 2007). The DOL fails to offer evidence of  
2 “extraordinary circumstances beyond [its] control [that] prevented [it] from filing [its]  
3 claims sooner,” or of misconduct by Parts Authority apart from the alleged  
4 misclassification itself. *Id.* The DOL therefore is not entitled to equitably toll the statute  
5 of limitations with respect to its claims against Parts Authority.

#### 6 **E. Availability of Liquidated Damages**

7 Next, both Diligent and Parts Authority argue that they have established, as a matter  
8 of law, a good faith defense precluding liquidated damages. An employer who violates the  
9 FLSA “shall be liable to the employee or employees affected in the amount of their unpaid  
10 minimum wages, or their unpaid overtime compensation, as the case may be, and in an  
11 additional equal amount as liquidated damages.” 29 U.S.C. § 216(b) But if the employer  
12 shows that it acted in “good faith” and that it had “reasonable grounds” to believe that its  
13 actions did not violate the FLSA, “the court may, in its sound discretion, award no  
14 liquidated damages[.]” 29 U.S.C. § 260. “To avail itself of this defense, the employer must  
15 establish that it had an honest intention to ascertain and follow the dictates of the Act and  
16 that it had reasonable grounds for believing that its conduct complied with the Act.” *Flores*,  
17 824 at 904-05 (cleaned up, with internal quotations and citations omitted). “Whether the  
18 employer acted in good faith and whether it had objectively reasonable grounds for its  
19 action are mixed questions of fact and law.” *Id.*

20 The Court has determined that it cannot not say as a matter of law whether Diligent  
21 or Parts Authority acted willfully; material factual disputes and inferences to be drawn  
22 from the facts preclude a definitive answer to that question on summary judgment. Given  
23 that determination, the Court necessarily cannot find as a matter of law that Diligent and  
24 Parts Authority acted in good faith. The Court reserves on this question, just as it reserves  
25 on the willfulness issue.

#### 26 **F. Availability of Injunctive Relief**

27 Lastly, Diligent argues that injunctive relief is inappropriate because its drivers are  
28 independent contractors. The Court finds material factual disputes preclude summary

1 judgment on the issue of the drivers' FLSA classification. As such, the Court cannot take  
2 injunctive relief off the table at this time.

3 **G. Summary**

4 All parties have moved for summary judgment on most of the issues in this case.  
5 But their briefing is littered with disputes of fact, and even though many of the issues raised  
6 are questions of law, the Court cannot answer those questions in a summary judgment  
7 posture if the facts material to the inquiries are genuinely disputed or if reasonable  
8 inferences may be drawn in favor of either party on those facts. The Court therefore denies  
9 summary judgment on the ultimate issue of the drivers' FLSA classification, on the  
10 applicable statute of limitations, and on Diligent's and Parts Authority's good faith  
11 affirmative defenses to liquidated damages. The Court finds that the DOL is entitled to  
12 equitably toll the statute of limitations as to its claims against Diligent because, by signing  
13 the tolling agreements and acting in accordance with them, Diligent evidenced a knowing  
14 and voluntary decision to waive its statute of limitations defense for that period. But as to  
15 the DOL's claims against Parts Authority, the Court grants summary judgment for Parts  
16 Authority and against the DOL on the issue of equitable tolling.

17 **IT IS ORDERED** as follows:

- 18 1. Diligent's motion for summary judgment (Doc. 199) is **DENIED**.
- 19 2. Parts Authority's motion for summary judgment (Doc. 201) is **GRANTED IN**  
20 **PART** and **DENIED IN PART** as explained herein.
- 21 3. The DOL's motion for summary judgment (Doc. 203) is **DENIED**.
- 22 4. Browne's motion for summary judgment (Doc.205) is **DENIED**.

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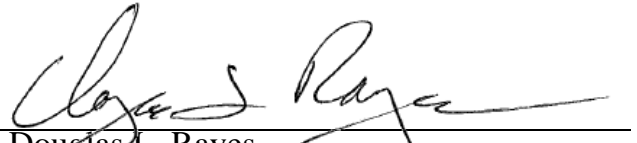
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5. The parties shall appear for a telephonic trial scheduling conference before Judge Douglas L. Rayes on **April 14, 2022, at 11:00 a.m.** (Arizona time). Call-in instructions will be provided via separate email. The parties shall come to the trial scheduling conference prepared to discuss the DOL's motion to modify the scheduling order (Doc. 260).

Dated this 31st day of March, 2022.

  
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Douglas L. Rayes  
United States District Judge