IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL CLANCY, STUART LOVE, JAMES PETERS, THOMAS BRYANT, and SAMUEL PATTON, on behalf of themselves and all others similarly situated,	**Case No.: 1:22–cv–01250**
Plaintiffs,	**Judge Manish S. Shah**
v.	
THE SALVATION ARMY, an Illinois nonprofit corporation,	
Defendant.	

DEFENDANT THE SALVATION ARMY,
AN ILLINOIS NONPROFIT CORPORATION'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
AND FINAL CERTIFICATION OF THE COLLECTIVE

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INTRODUCTION

Plaintiffs seek to certify their three proposed classes for claims for unpaid wages under state law and their proposed final collective under the Fair Labor Standards Act, each of which consists of a variety of individuals with unique and specific circumstances that precludes certification. The Plaintiffs and putative class members are disaffiliated individuals ("Beneficiaries") who enrolled in one of The Salvation Army's Adult Rehabilitation Centers ("ARCs"), at no monetary cost, as part of a therapeutic program for seeking spiritual, emotional, and social assistance. Plaintiffs' class certification and collective action certification motion ("Plaintiffs' Brief" or "Pls.' Br.") is built on the faulty premise that simply because work therapy is one element of the ARC rehabilitation program, and The Salvation Army has a uniform practice of treating Beneficiaries as just that—beneficiaries, rather than employees—these claims are appropriate for class and collective action treatment. However, The Salvation Army's fundamental due process right to defend itself against each putative class member's claims, to the extent unresolved by its motion for summary judgment, necessitates highly individualized inquiries into the essential elements of Plaintiffs' claims. Plaintiffs' class certification motion fails.

First, Plaintiffs have not met their burden under Fed. R. Civ. P. 23 to propose an identifiable or definite class, because the class definitions a) are based on subjective criteria, b) require exclusions that are impossible to administer without making individualized inquiries as to each putative class member, and c) include class members who, even if the claims were cognizable, have suffered no injury. Second, again to the extent the claims can survive summary judgment, Plaintiffs have failed to establish key elements of class/collective certification, including "commonality," because their proposed common questions are not amenable to common proof and common answers; and "predominance," because any liability and damages would turn on inherently individualized inquiries that predominate over any supposedly common questions,

given Plaintiffs' own presentation of the evidence in support of class certification and given key affirmative defenses that are based on highly individualized considerations. Moreover, because of these failures, Plaintiffs are unable to meet their burden to establish typicality or that they are adequate class representatives, and any treatment of Plaintiffs' claims as a class action would not be the superior method for resolving their claims. Any one of these deficiencies is enough to defeat certification of Rule 23 classes, and for the same reasons, final FLSA certification must fail as well.

FACTUAL BACKGROUND[1]

***The Salvation Army's Mission*:** The Salvation Army is an international religious denomination and charitable organization, a branch of the Universal Christian Church, founded by William Booth in England in 1865. (Defendant The Salvation Army, an Illinois Corporation's Statement of Material Facts ("SOMF") in Support of Its Motion for Summary Judgment), ECF No. 259, ¶ 1. From the beginning, a bedrock of The Salvation Army's mission has been the provision of social services to those who face poverty and addiction. Its premise was, and remains more than 150 years later, that by ensuring that people have access to basic necessities—shelter, food, and clothing—they can begin to address the social and spiritual issues that prevent them from leading productive lives. (SOMF ¶¶ 1, 3-5, 12.)

Over the decades, The Salvation Army has continued to adapt to ever-changing circumstances and societal needs. Today, separate regionally based religious non-profit corporations operate its numerous religious and charitable programs in the United States, including

[1] The Salvation Army does not attempt to respond to all of the facts asserted in the 26-page Statement of Facts section in Plaintiffs' Brief, but rather focuses only on those facts relevant to its opposition to class and collective certification. In doing so, Defendant does not concede any fact, or any characterization of facts, asserted by Plaintiffs. Many other relevant facts are set forth in The Salvation Army's Motion for Summary Judgment ("SJ Mot.") [ECF No. 257].

Defendant The Salvation Army, which is the corporate instrumentality of The Salvation Army's Central Territory. (SOMF ¶ 2.) The Salvation Army currently operates 14 ARCs in Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, and Wisconsin. (SOMF ¶ 6.) These ARCs are a living embodiment of The Salvation Army's Christian mission and deeply held religious beliefs, and they serve thousands each year who come to the ARC seeking life-changing (and often life-saving) social and spiritual assistance. The ARCs provide a "safety net" program in the communities they serve, offering hope to those most in need. (*See* SOMF ¶¶ 3-5, 7, 11-12.)

***The ARC Experience*:** Beneficiaries who participate in the ARC Program receive a wide variety of benefits, which vary from ARC to ARC and Beneficiary to Beneficiary. The ARC provides a drug and alcohol free environment, along with a structured program designed to provide a safe space for Beneficiaries to engage in rehabilitation, to develop or deepen their faith, to build community with like individuals for emotional support and connection, to build community ties that will help to reintegrate and sustain them after they leave the ARC, and to restore relationships with family members and friends, many of which have been severed or impaired due to substance abuse and other vices. (*See* SOMF ¶¶ 110, 111, 116, 117.)

During their period of enrollment in the ARC, The Salvation Army provides for all of its Beneficiaries' day-to-day needs, most often at no expense to Beneficiaries. (SOMF ¶ 5.) The benefits provided by the ARC range from the physical (room and board, clothing, as well as access to recreational facilities) to an array of services that may have been unaffordable or otherwise inaccessible to them prior to their participation in the ARC. (*See* SOMF ¶¶ 5, 60, 62.)

***ARC Facilities*:** Within the ARC, each Beneficiary is assigned to a shared dormitory, with variations between each ARC as to the size of the dormitory and the number of Beneficiaries who share a dorm. The number of Beneficiaries per dorm also varies based on the capacity of the ARC, which may fluctuate based on a variety of factors, including but not limited to restrictions put in

place during the COVID-19 pandemic, as well as the total number of Beneficiaries at the ARC at any given time. (*See* Ex. 1 (Defendants' Amended Response to Plaintiffs' Second Set of Interrogatories) at No. 9; Ex. 2 (CENT_TSA_0315258); Ex. 3, McNeal Decl. ¶ 11.) Each dormitory is furnished, with each Beneficiary receiving his/her own bed and some form of storage, typically including a nightstand, locker, and/or dresser. (*See* Ex. 1 (Defendants' Amended Response to Plaintiffs' Second Set of Interrogatories) at No. 11.) Some ARCs also offer a single dormitory to which a designated "Beneficiary of the Week" may have access for a night or a weekend as an incentive and reward for Beneficiaries who have made exemplary progress in the program. (*See, e.g.*, *id.* (describing Room 409 of the Milwaukee ARC).)

Although the specific facilities vary from ARC to ARC, each ARC also includes various recreational communal spaces that enable Beneficiaries to build community with other Beneficiaries, while simultaneously providing a space to engage in recreational activities, free from the temptations of alcohol, drugs, and other vices. For example, the Chicago (IL) ARC includes not only shared dormitories, but also a fitness room, library/computer room, and movie room, in addition to a canteen and recreation room. The Grand Rapids (MI) ARC similarly includes a fitness room, a recreation/game room, a television room, a computer lab, a barber shop room, and an outdoor, fenced-in space with picnic tables, outdoor chairs, and a basketball hoop. The Milwaukee (WI) ARC provides a reading room, a weight room, a barber shop room, a library/computer lab, a quiet room, and a tv room. The Rockford (IL) ARC includes a recreation room, weight room, library, art room, computer lab, movie room, TV room, smoke deck, and vegetable garden. (*See* Ex. 1 (Defendants' Amended Response to Plaintiffs' Second Set of Interrogatories) at No. 16.) Each ARC additionally includes a chapel, where worship services and other meetings may be held, classrooms for counseling and classes, a dining room where Beneficiaries are provided with three free meals a day, and a canteen, where Beneficiaries can

purchase additional small items, such as toiletries, snacks, and even hot food at most ARCs. (*See id.*, Nos. 15 and 16.)

Counseling, classes, and other services: In addition to providing for Beneficiaries' physical needs, the ARC provides access to various rehabilitative services. As described more fully in Defendant's Memorandum in Support of its Motion for Summary Judgment and the accompanying Statement of Material Facts, these include:

- One-on-one spiritual counseling (SOMF ¶¶ 51, 55, 62);
- Journals or workbooks designed to help Beneficiaries reflect on their struggles, values, and goals (SOMF ¶ 61);
- Group counseling (SOMF ¶ 55);
- 12-step meetings, such as Alcoholics Anonymous and Narcotics Anonymous (SOMF ¶¶ 55, 56, 57);
- Mandatory and elective classes addressing a Beneficiary's specific goals and needs, such as Addiction Education, Fatherhood, Anger Management, Job Readiness, Life Skills, Computer Skills, and Christian Living (SOMF ¶ 57);
- Events, spiritual retreats, and community activities, including for the holidays (SOMF ¶ 60);
- Access to mental health and physical health services (SOMF ¶ 113);
- Weekly chapel services (SOMF 52);
- Daily devotions (SOMF ¶ 53);
- Regular Bible study (SOMF ¶ 52);
- Assistance with ongoing legal issues (SOMF ¶ 114);
- Support for seeking government benefits (SOMF ¶ 115);
- Help finding housing and employment opportunities. (SOMF ¶ 118.)

***Work Therapy*:** Work therapy is a key pillar of the ARC Program and it supports the Beneficiaries' rehabilitation and spiritual regeneration. Work therapy is designed to (1) provide Beneficiaries the opportunity to learn much-needed life skills, discipline, work ethic, and habits

that will allow them to reclaim, and in many instances, form a sense of self-esteem and self-worth; (2) imbue them with a sense of personal accountability and pride, and help them re-enter the workforce as productive members of their respective communities; (3) reduce idle time as much as possible as their bodies and minds acclimate to daily life protected from many of the issues that plagued them outside the Program; and (4) simulate real-world work and interpersonal interactions that allow Beneficiaries to develop and use new social skills and healthy coping mechanisms in an often hectic and demanding work environment. (SOMF ¶ 75.)

Once a Beneficiary completes the intake and orientation process, the Beneficiary will receive an initial work therapy assignment and will begin work therapy consistent with the schedule for that assignment—but typically about eight hours per day, five days a week. (SOMF ¶¶ 76, 81.) The Salvation Army has a clearly stated national policy requiring only that Beneficiaries perform *up to* 40 hours per week of work therapy as a condition of the rehabilitation program (and in no way tying any amount of work therapy to the receipt of services or benefits). (SOMF ¶¶ 47, 76.) ARC records may not reflect when a Beneficiary first begins work therapy or how much time was spent on work therapy. (*See* Ex. 3, McNeal Decl. ¶ 20.)

***Gratuities*:** Beneficiaries receive a small gratuity (between $7 and $35 per week[2]). (SOMF ¶ 65.) The gratuity is provided solely based on a Beneficiary's progress through the various stages of the Program and is not tied to the quality or quantity of work therapy performed. (SOMF ¶ 65.) The amount is intended to strike a balance—not too little, not too much—to recognize progress without giving significant amounts of cash that could undermine their rehabilitation if used, for example, for drugs, alcohol, and gambling. (SOMF ¶ 65.) At times, The Salvation Army has

[2] Earlier in the relevant time period, the maximum amount of weekly gratuity was $25, but it was increased to $35 in 2023. The minimum amount of weekly gratuity also increased from $7 to $17. (SOMF ¶ 65.)

decreased an individual Beneficiary's gratuity because of non-compliance with Program rules, such as failure to satisfactorily participate in required elements of the Program. (SOMF ¶ 67.)

Beneficiaries*:* Each ARC provides a voluntary residential rehabilitation program on a charitable basis[3] to disaffiliated individuals, most often those who suffer from substance abuse and are experiencing or have experienced homelessness. (SOMF ¶¶ 3-5, 22.) Beneficiaries entering an ARC vary greatly in their personal circumstances and their motivations for and commitment to seeking rehabilitation. As discussed further below, some Beneficiaries enroll in an ARC to comply with a court order or as a condition of probation or parole. Others are referred by family or friends, or enter the ARC on their own accord. Some may have attended other rehabilitation programs in the past, while some have enrolled in an ARC previously. Some of those who have enrolled in an ARC previously may have left prior to completing the program, for whatever reason, while others may have successfully completed the program before relapsing and returning to the structured ARC environment that previously helped them. (SOMF ¶¶ 17, 24, 25, 48.)

These personal circumstances and motivations may contribute to the differing experiences and outcomes that result from each Beneficiary's participation in an ARC. Most Beneficiaries do not complete the six-month Program. (SOMF ¶ 17.) Many choose to leave because they discover that they are not ready to fully commit themselves to the very difficult and often physically and emotionally painful task of rehabilitation; others are discharged because they are unwilling to follow the rules of the Program. (SOMF ¶¶ 16-17, 37.)

[3] Beneficiaries, including four of the five Named Plaintiffs and many Opt-In Plaintiffs, have been asked to turn over their government-provided benefits to the ARC, including those provided by the Supplemental Nutrition Assistance Program ("SNAP benefits," or "food stamps"), so that the ARC could offset the costs of food. (SOMF ¶ 20.) And during the relevant class period, Beneficiaries with an income may have been asked to contribute to room and board. *See* SJ Mot. at 8-9.

***ARC Stays*:** Well over 16,000 Beneficiaries participated in the ARC program at least once during the period between March 9, 2019 and August 31, 2024.[4] (Ex. 6, Greisman Decl. ¶ 7.) Of those, 3,069 participated in an ARC Program in Illinois, 3,963 in Michigan, and 615 in Wisconsin.[5] (Ex. 6, Greisman Decl. ¶ 11) Beneficiaries' participation in the ARC program is voluntary, and Beneficiaries are free to leave the ARC program at any time and for any reason. (Ex. 4 (Green Book) at CENT_TSA_0001182 (defining Beneficiaries as those who "[v]oluntarily enter the center only to benefit from the rehabilitation program"), and at CENT_TSA_0001194 ("beneficiaries voluntarily participate in the religious and charitable rehabilitation program, including work therapy, for their own benefit, not that of The Salvation Army"); *see, e.g.*, Ex. 5, Named Plaintiff Clancy's Amended Response to The Salvation Army's First Set of Requests for Admissions, No. 3 (admitting that he "chose to enroll in the ARC")); *see also Taylor v. Salvation Army Nat'l Corp.*, 110 F.4th 1017, 1022 (7th Cir. 2024) (describing ARC Beneficiaries as "free to leave at any time").

ARC records demonstrate that Beneficiaries stay varying lengths of time in the ARC program—from less than 1 day up to graduation from the ARC program in approximately six months. (*See, e.g.,* Ex. 6, Greisman Decl. Ex. A (excerpts from CENT_TSA_0316922, tab entitled "Raw Data" showing "Days of Care")). 4,926 Beneficiaries (or 23.13% of all Beneficiaries) fully completed the ARC program and graduated from an ARC Program during the period of January

[4] Plaintiffs rely on data that aligns with different periods of time, extending from January 1, 2018 until December 22, 2023. *See* Pls.' Br. at 29; Pls.' Ex. 151, (unsigned) Declaration of Linda Woo at 1 [ECF No. 247-151]. The data relied on by The Salvation Army more closely aligns with the proposed class periods. However, the trends in the data referenced throughout the instant brief would be reflected similarly in the data upon which Plaintiffs rely.

[5] The data for Beneficiaries who participated in an ARC Program in Wisconsin is limited to the time period of March 9, 2020 to August 31, 2024, because of Plaintiffs' proposed class definition and the shorter statute of limitations applicable under Wisconsin law. *See* Pls.' Br. at 2; SAC ¶ 59(c).

1, 2018[6] to September 1, 2024. (Ex. 7, CENT_TSA_0316924 (tab entitled "Jobs & Housing Details".) 83, 181, and 6 Beneficiaries had a stay in an ARC Program in Illinois, Michigan, and Wisconsin, respectively, that lasted one day or less. (*See* Ex. 6, Greisman Decl. ¶ 13.) 952, 1,538, and 149 Beneficiaries had an ARC stay in Illinois, Michigan, and Wisconsin, respectively, that lasted 7 or fewer days. (*See* Ex. 6, Greisman Decl. ¶ 15.) And 1,943, 2,954, and 346 had an ARC stay in Illinois, Michigan, and Wisconsin, respectively, that lasted 30 or fewer days. (*See* Ex. 6, Greisman Decl. ¶ 17.) Many Beneficiaries find the ARC Program valuable and, after leaving for any reason, often enroll in another ARC Program at a later time.

***Justice-Referred Beneficiaries*:** Many Beneficiaries have enrolled in the ARC Program as the result of a Court order, either as an alternative to jail, a requirement of parole or probation, or some other mandatory arrangement. (SOMF ¶ 24.) Beneficiaries may also enroll voluntarily upon the recommendation of a court or parole or probation officer, or with the expectation that participating in the ARC program may assist them with ongoing legal issues. (SOMF ¶ 24; Ex. 3, McNeal Decl. ¶ 9.) Courts may consider a Beneficiary's decision to enroll in a drug and alcohol rehabilitation program when making decisions on an individual's sentencing or conditions of probation or parole. (*See, e.g.*, Ex. 8, Barber Tr. 138:17-19, 156:11-18 (describing leniency in sentence resulting from his participation in an ARC); Ex. 9, Fuselier Tr. 24:12-16, 46:7-13 (describing attendance at ARC as being a "term of the plea deal").)

The Salvation Army maintains records, where they were provided to the ARC for a Beneficiary, related to the source of a Beneficiary's referral, as well as specific court orders or

[6] Although the relevant period in this case begins March 9, 2019, the parties mutually agreed to utilize January 1, 2018 as the starting date for the scope of discovery. For the purposes of this brief, The Salvation Army has utilized data only after March 9, 2019 whenever possible to provide the most accurate picture regarding the class; however, for some data, as here with respect to graduation rates, the relevant documents are not limited to these dates.

probation/parole conditions. ARC records show that approximately 209, 329, and 13 Beneficiaries who had enrolled at an ARC in Illinois, Michigan, or Wisconsin, respectively, from March 9, 2019 to April 9, 2023 (March 9, 2020 to April 9, 2023 for Wisconsin)[7] had a listed referral source as one of the following: Probation Office, Parole Office, Justice Department Scott County Jail, Court/Mental Health Court, or County. (Ex. 3, McNeal Decl. ¶ 13.) The "County" category includes: State Department of Correction referrals, County Jail referrals, Lawyer referrals, Judge referrals, Attorney referrals, County Jail referrals, Public Defender referrals, Police/Police Department referrals. (Ex. 3, McNeal Decl. 13.) However, many Beneficiaries fail to identify a referral source, and records of these orders, requirements, or arrangements are not always provided to the ARC. (*See* Ex. 3, McNeal Decl. ¶ 14.)

Moreover, ARC records will not necessarily show where Beneficiaries voluntarily chose to enroll at an ARC to avoid potential parole violations or otherwise to comply with a court order, parole or probation requirements, or to show positive personal improvement to a court or parole or probation officer in the future. (*Id.* ¶ 14.) ARC staff members typically make notations in a Beneficiary's individual file about court dates, specific requests by that Beneficiary for the ARC to contact a court, probation officer, parole officer, or other member of the justice system on their behalf, or other entries indicating connections to the justice system. (*Id.* ¶ 15.) These notations, however, are dependent on information provided by each Beneficiary and generally do not include a description of the specific legal issues the Beneficiary is facing or whether their ARC enrollment is connected to an ongoing legal matter. (*Id.*)

[7] The data referenced with respect to the referral sources of individuals was collected for the FLSA collective action period, and thus does not extend to the same time periods as the data for the state-law putative classes.

***Intake and Orientation Process*:** Each ARC implements an intake process for new Beneficiaries. This intake process typically includes a number of steps. At intake, the rehabilitative purpose, goals, expectations, rules and requirements of the Program are presented in writing and orally by an Intake Clerk or Coordinator. (SOMF ¶¶ 26, 28-31.) Beneficiaries are given the opportunity to ask questions and review all documents and forms so that they can make an informed decision about enrolling in the Program. (SOMF ¶ 32.) Beneficiaries are also given the policies and documents explaining the charitable nature of the Program and its faith-based mission. (SOMF ¶¶ 28-32, 35.) After enrollment, details about the Program, including the rules and requirements, are reinforced during the earliest stages of the Program in an orientation class—to ensure that Beneficiaries are fully aware of the nature and requirements of the Program and provided an additional opportunity to ask questions and understand the Program. (SOMF ¶ 33.) The intake and orientation process may also include initial counseling sessions for the Beneficiary.

Some aspects of the intake and orientation process vary from ARC to ARC, including that there may be fewer or additional steps, each step may have varying complexity, and the steps could take differing amounts of time. These steps vary not only based on the individual ARC, but also based on other circumstances, such as the day and time of day that a new Beneficiary arrives at the ARC, the available staffing at the ARC, the relevant time period during which the Beneficiary arrived at the ARC (such as during the COVID-19 pandemic), and an individual Beneficiary's personal needs and circumstances. (Ex. 10, McNeal Tr. 124:15-127:17; Ex. 3, McNeal Decl. ¶ 18.)

This intake and onboarding process will typically be complete within one week, and beneficiaries typically do not receive a work therapy assignment or begin any work activities as part of work therapy until the intake and onboarding process is complete. (Ex. 10, McNeal Tr. 126:19-127:4; Ex. 3, McNeal Decl. ¶ 18.) A Beneficiary may also have a delayed start of work therapy because of personal circumstances, such as Nathaniel Townsend, who was allowed to hold

off on starting his work therapy assignment for three days because he was "really feeling bad" and was "messed up from . . . going back down the same road again," and Arthur Richardson, who had a two-week COVID-19 quarantine at the start of his enrollment at the ARC. (Ex. 11, Townsend Tr. 112:11-113:5; Ex. 12, Arthur Richardson. Tr. 49:3-13.) As a result of the varying intake and onboarding process, many Beneficiaries who leave within the first seven days of their stay at an ARC will not have begun performing any work therapy or will have performed very few hours of work therapy. (Ex. 3, McNeal Decl. ¶ 19.)

LEGAL STANDARD

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks and citation omitted). Under Rule 23(a), Plaintiffs must show that the classes are sufficiently numerous, the claims are typical of the class, Plaintiffs will adequately represent the interests of the class, and common questions exist. Rule 23(b)(3) further requires that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As a prerequisite to class certification, the Seventh Circuit further requires that the class definition "must be definite enough that the class can be ascertained," and district courts should "insist on details of the plaintiff's plan for notifying the class and managing the action" and "should consider also whether the administrative burdens can be eased[.]" *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659, 664 (7th Cir. 2015) (internal quotation marks and citation omitted). "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Plaintiffs must present evidentiary proof on all elements and the Court must engage in a "'rigorous analysis.'" *Id.* at 350-51 (citation omitted). When the plaintiff cannot

affirmatively demonstrate with evidentiary proof that all requirements of Rule 23 are met, class certification must be denied. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

The Rule 23 inquiry "begins, of course, with the elements of the underlying cause of action," and merits questions are considered where relevant to determining whether the Rule's prerequisites are satisfied. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013); *Comcast*, 569 U.S. at 28 (Rule 23 analysis "will frequently 'overlap with the merits of the plaintiff's underlying claim' because a 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (quoting *Dukes*, 564 U.S. at 351).

With respect to final certification of a FLSA collective action, a court will assess whether plaintiffs share similar or disparate factual and employment settings; whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and fairness and procedural concerns. *Solsol v. Scrub, Inc.*, No. 13 CV 7652, 2017 WL 2285822, at *3 (N.D. Ill. May 23, 2017) (granting decertification). While the standards for FLSA certification under Rule 216(b) may be similar to the standard for Rule 23 class certification, they are not identical. Certification under Rule 216(b) does not guarantee certification under Rule 23, or vice versa. *Kramer v. Am. Bank & Tr. Co., N.A.*, No. 11 C 8758, 2017 WL 1196965, at *11 (N.D. Ill. Mar. 31, 2017) (noting that many of the same issues are considered under the standards for Rule 23 and Rule 216(b), but the parties may make different arguments regarding each).

ARGUMENT

I. Plaintiffs' Proposed Rule 23 Classes Are Not Sufficiently Definite or Identifiable

Plaintiffs fail to meet their requisite burden to establish that their three proposed classes under Illinois, Wisconsin, and Michigan state law are sufficiently definite and identifiable. The Seventh Circuit requires that a class "be defined clearly and based on objective criteria" —in other

words, that it be ascertainable. *Mullins*, 795 F.3d at 659. Proper identification of the class is required to ensure that individuals actually harmed by the defendant's conduct will be the recipients of the awarded relief. "Thus, the class definition cannot be so broad as to include individuals without standing to maintain the action on their own behalf." *Strow v. B&G Foods, Inc.*, 348 F.R.D. 446, 449 (N.D. Ill. 2025) (citing *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at *2 (N.D. Ill. Mar. 20, 2001)).

Plaintiffs propose certifying three classes under the following definition:

> [A]ll persons who, between March 9, 2019 [or March 9, 2020] and the date of final judgment: (1) are, were, or will be enrolled in any Salvation Army Adult Rehabilitation Center or other programs operated by Defendant with similar work requirements in [Illinois, Wisconsin, or Michigan] – including, but not limited to, Alcohol Rehabilitation Programs, Adult Rehabilitation Programs, and Corps Salvage and Rehabilitation Centers; (2) did not or will not enroll in the ARC Program to comply with a court order or condition of probation or parole; (3) perform, performed, or will perform work for Defendant; and (4) were, are, or will be paid less than the applicable [Illinois, Wisconsin, or Michigan] minimum wage.

Second Amended Complaint ¶ 59(a)-(c) ("SAC").[8]

First, the relevant records are insufficient to ascertain all (a) individuals who "enrolled" in an ARC and also performed "work," or (b) individuals "who did not or will not enroll in the ARC

[8] Plaintiffs' Brief cites their Second Amended Complaint as the source of their proposed class definitions, but they describe their proposed class in Plaintiffs' Brief slightly differently. *See* Pls.' Br. at 2. Plaintiffs seek Rule 23 certification of "three nearly-identically defined state law classes" as follows:

> All persons enrolled in any Salvation Army Adult Rehabilitation Center in [Illinois, Michigan, or Wisconsin], respectively between [March 9, 2019 (Illinois and Michigan) or March 9, 2020 (Wisconsin)] and the date of final judgment who did not or will not enroll in the program to comply with a court order or as a condition of probation, parole, or community supervision.

Id. Plaintiffs have not amended the proposed class definitions in their Second Amended Complaint and have not stated that they are, in fact, seeking to certify classes that are different than those that they previously pleaded. To the extent Plaintiffs' Brief indicates that they are intending to change their proposed class definitions, the definitions in Plaintiffs' Brief also fail for the same reasons as the classes proposed in the Second Amended Complaint, as discussed below.

Program to comply with a court order or condition of probation or parole"[9] (individuals who will be referenced hereinafter as "Justice Referred"). Therefore, the classes cannot be ascertained. Second, Plaintiffs' proposed classes include a significant number of individuals who would not be entitled to recover under the applicable state statutes, and it would be difficult if not impossible without an individualized inquiry into each putative class member's circumstances to ascertain which members of the proposed class may have viable claims for damages. For these reasons, class certification should be denied. *See, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-15 (7th Cir. 2006) (affirming denial of class certification where class definition was not sufficiently definite or identifiable, because it included putative class members who would have no damages); *see also All. to End Repression v. Rochford*, 565 F.2d 975, 977-78 (7th Cir. 1977) (class definitions must be definite enough that the class can be ascertained).

A. Plaintiffs' Class Definition Requires Exclusion of Groups of Individuals Who Cannot Be Identified Without Individualized Assessment

Plaintiffs have proposed class definitions that exclude individuals who "did not or will not enroll in the ARC Program to comply with a court order or condition of probation or parole," as well as those who have not performed "work for Defendant." SAC ¶ 59(a)-(c).[10] Determining who these individuals are, to exclude them, would require individualized fact-finding and legal

[9] Plaintiffs classify these individuals as those "who did not or will not enroll in the program to comply with a court order or as a condition of probation, parole, or community supervision" in Plaintiffs' brief. Pls.' Br. at 2. Both versions of this definition suffer from the same flaws.

[10] Additionally, the class definitions broadly include individuals who "will be enrolled" in an ARC in the future, "will not enroll in the ARC program to comply with a court order or condition of probation or parole" in the future, or "will be paid less than the applicable . . . minimum wage" in the future. Individuals who may enroll in an ARC in the future (after the date of final judgment in this case, which is the end date for the class period defined by Plaintiffs) would be entirely speculative and impossible to identify. Moreover, any individual who will not have performed any work activities in connection with The Salvation Army during the class period can have no claim for unpaid wages. For these additional reasons, the class definitions are overly broad and not ascertainable. The summarized class definitions in Plaintiffs' Brief also reference future conduct (excluding those "who did not or will not enroll"), and thus those definitions fail as well. *See* Pls.' Br. at 2.

determinations, including whether they subjectively enrolled "in the ARC Program to comply with a court order or condition of probation or parole." "[C]lasses that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement" of ascertainability and should not be certified. *Mullins*, 795 F.3d at 660 (collecting cases). Plaintiffs' proposed definitions fail this standard.

As an initial matter, Plaintiffs' claim that Justice Referred individuals are "easily identifiable" from The Salvation Army's data is incorrect. Pls.' Br. at 20, 29. To be sure, The Salvation Army does have some relevant records (where they were provided to the ARC for a Beneficiary, related to specific court orders or probation/parole conditions). But these records are wholly insufficient to satisfy the ascertainability requirement because, in a significant number of instances, this information was not provided to the ARC and the Beneficiary's prior status and motivation for enrolling in the ARC is unknowable. (*See* Ex. 3, McNeal Decl. ¶ 14.)

Moreover, discovery in this case demonstrates that these records are insufficient to reliably identify whether individuals should be excluded as Justice Referred. Earlier in this case, The Salvation Army attempted to use its records to **exclude** Justice Referred individuals from the distribution list that was used to issue the FLSA notice and Opt-In Form.[11] (Jackson Decl. ¶ 15, Ex. 13.) The parties also required FLSA Opt-In Plaintiffs to certify their status in the Opt-In Form, which states as follows:

> I did not enroll in the ARC Program to comply with a court order or condition of probation, parole, or community supervision. In simple terms, I was not enrolled in the ARC to avoid being sent to jail or prison or being prosecuted for a crime. I understand that if it

[11] Justice Referred individuals, with the same criteria defined by Plaintiffs, are also excluded from the definition of the FLSA collective, and therefore the data regarding the members of the conditionally certified collective is relevant to the same exception in the Rule 23 class definitions, as it shows exactly how this exclusion has already failed in this case.

> is later determined that this representation is incorrect, I will not be eligible to remain in this lawsuit.

ECF No. 106-6 (Opt-In Form). Despite all these efforts, individuals selected as part of the sample of Opt-In Plaintiffs to participate in discovery—the parties agreed to representative written discovery of just 55 of more than 1700 Opt-In Plaintiffs—later had to be dismissed or had their opt-in forms withdrawn because their opt-in forms were inaccurate and they had, in fact, been Justice Referred. (*See* Jackson Decl. ¶ 15.) During the process of selecting this sample of only 55 Opt-In Plaintiffs, 30 individuals who had opted in and were initially selected for the sample were either dismissed, had their opt-in forms withdrawn, or Plaintiffs' counsel voluntarily withdrew from their representation.[12] (*See id.;* ECF Nos. 117 (5 Opt-in Plaintiffs dismissed); 178 (3 discovery Opt-in Plaintiffs withdrawn); 242 (10 discovery Opt-in Plaintiffs withdrawn); and 183 (7 discovery Opt-in Plaintiffs withdrawn.); and 266[13] (5 discovery Opt-in Plaintiffs withdrawn).

Plaintiffs' counsel has refused to confirm the reasons for withdrawal as to certain Opt-In Plaintiffs, making it impossible for The Salvation Army to definitively confirm whether the withdrawal was based on the Justice Referred status. (*Id.*) At least two of these Opt-In Plaintiffs were individuals who The Salvation Army identified to Plaintiffs' counsel as individuals it believed were Justice Referred and not properly part of this litigation. (*Id.* ¶ 16 & Ex. 14; *see also* ECF No. 178 (withdrawing consent form for Dameion Hartig); ECF No. 238 (withdrawing consent form for Aaron Stewart).) One of these individuals had self-identified as referred by a drug court in his intake forms (which The Salvation Army utilized to exclude individuals as justice-referred

[12] Plaintiffs also did not oppose The Salvation Army's motion to dismiss six Opt-In Plaintiffs who opted in before the notice period. ECF No. 116. Plaintiffs' counsel later represented to this Court that across all three wage-and-hour class and collective actions against The Salvation Army (*Clancy*, *Massey*, and *Acker*), eight pre-notice plaintiffs were dismissed because they were not properly part of the class or collective definition. ECF No. [174 at 4].

[13] Plaintiffs withdrew these 5 discovery Opt-In Plaintiffs, which demonstrate the ongoing issues created by Plaintiffs' flawed proposed definitions, just hours before the filing of the instant Opposition brief.

from receiving notice), while the other failed to self-identify as justice-referred, but closer inspection of his individual file revealed that he was in fact court-ordered to attend the ARC program. (Jackson Decl. ¶ 17.) Plaintiffs previously admitted to the Court that identification of Justice Referred individuals could not be done based simply on Salvation Army records, in part because individuals "have required legal assistance in determining whether their ARC attendance was necessary to avoid jail or prison time or prosecution." ECF No. 174 at 10. In short, accurate identification of all putative class members who are Justice Referred can only be completed through individualized inquiries.

Additionally, Plaintiffs' definition of Justice Referred individuals includes not only those who were directly ordered to participate in the ARC program by a court or as a condition of probation or parole, *but also* those individuals who chose of their own volition to participate in an ARC Program as their selected method of complying with a court order, probation, or parole, or in an effort to avoid a parole or probation violation. Given this, an assessment of The Salvation Army's records of an individual's referral status would not be sufficient to determine whether an individual is Justice Referred and, therefore, excluded from the classes, as defined by Plaintiffs themselves. Such a determination would additionally require information about each putative class member's individual, subjective, reason for enrolling in the ARC program and whether it was done "voluntarily" to satisfy a court order or condition of probation or parole.

Even if class definitions dependent on this kind of subjective determination were appropriate, which they are not (*Mullins*, 795 F.3d at 660), The Salvation Army's records do not necessarily contain the relevant information to determine whether an individual's subjective reason for enrolling in an ARC, particularly when such enrollment was not required by a court order but was otherwise motivated by the Beneficiary's desire to "comply with" a court order, to avoid a parole or probation violation, or to influence the outcome of ongoing or upcoming legal

proceedings. *See supra* at 9-10, 14-16. During this litigation, the parties have disagreed about the meaning of certain Salvation Army records and notations, including those related to Justice Referred individuals, and these same issues and disagreements will apply to putative members of the proposed Rule 23 classes. (Jackson Decl. ¶ 18.) Therefore, Plaintiffs' proposed classes are not ascertainable.

Finally, Plaintiffs' class definitions require that class members performed "work for Defendant." SAC ¶ 59(a)-(c).[14] As examined further below, The Salvation Army does not maintain timecards for time spent in work therapy because it was not an employer of the Beneficiaries. The Salvation Army's records are not intended to, and do not, reflect when a Beneficiary started work therapy in some instances. Therefore, without individualized evidence as to each Beneficiary, individuals who did not perform work therapy cannot be reliably identified and excluded from the classes.

B. The Putative Classes Include Individuals with No Claims for Damages

For class certification purposes, Plaintiffs must establish that the members of each class would be eligible for damages if Plaintiffs were to prevail. Plaintiffs cannot satisfy this low bar. The Seventh Circuit in *Oshana* affirmed the denial of class certification when the class definitions were not sufficiently definite because many putative class members would not be able to show damages. Class certification is not appropriate where the proposed class will include a substantial number of individuals for whom there could be no liability. *See Oshana*, 472 F.3d at 513-15; *see*

[14] To the extent Plaintiffs seek to apply the class definitions in Plaintiffs' Brief, the distinction between those Beneficiaries who did, and those who did not, perform work activities will cease to matter (because the definitions in Plaintiffs' Brief are not contingent on class members having performed any work). But then the class definitions would become even more impermissibly broad. In particular, if the class definitions are not limited to Beneficiaries who actually performed work therapy, the proposed classes would necessarily include even more individuals who could have no claim for unpaid wages because they never performed the very activity for which Plaintiffs claim they should have been paid minimum wage.

also Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 776 (7th Cir. 2013) (holding that where there is a large number "of class members each harmed to a different extent (and many not harmed at all)," a Rule 23(b)(3) class would be unmanageable); *McGlenn v. Driveline Retail Merch., Inc.*, No. 18-cv-2097, 2021 WL 165121, at *5, *9-10 (C.D. Ill. Jan. 19, 2021) (denying certification where a substantial number of putative class members had not suffered any actual injury and individual inquiries would be required to prove both causation and damages); *Panwar v. Access Therapies, Inc.*, No. 12–cv–00619, 2015 WL 329013, at *4 (S.D. Ind. Jan. 22, 2015) (finding class definition for state law wage claim not ascertainable, and thus not certifiable, because it included individuals who "did not suffer damages from underpayment").[15]

Liability in this case presents immense calculation problems that Plaintiffs simply ignore. First, Plaintiffs' class definitions, which encompass individuals who "enrolled" in an ARC and "perform, performed, or will perform work" for The Salvation Army (SAC ¶ 59), include individuals who will have no claim to damages at all, because any claimed unpaid wages will be dwarfed by the value of The Salvation Army's affirmative defenses applying offsets against damages. Second, even to the extent Plaintiffs' class definitions properly exclude those who have not performed work (*see supra* at 15, 19 n.14 and *infra* at 22 n.16), and are thus owed no wages,

[15] While it is true that "a class will often include persons who have not been injured by the defendant's conduct," *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009), Plaintiffs' class definitions are flawed in numerous ways such that they "include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct" and therefore "the class is defined too broadly to permit certification." *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 824 (7th Cir. 2012). Courts in this Circuit, when assessing whether a class is defined too broadly, look at the distinction between putative class members "who *were not* harmed and those who *could not* have been harmed." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014). Here, Plaintiffs' class definitions include a great number of individuals who *could not* have been harmed by an alleged failure to pay wages, because they performed no work at all for which they can claim wages. *Infra* at 22 n.16. Plaintiffs' class definitions *also* fail because they include a great number of individuals who *were not* harmed, because their claimed damages will be outweighed by The Salvation Army's defenses. This is not a case where a small handful of class members may ultimately have no damages after presenting individualized proof, but instead there are several fatal flaws affecting approximately more than 24-38% or more of the proposed classes. *See infra* at 24.

these individuals cannot be identified, in order to be excluded, without individualized evidence as to each Beneficiary's experience.

If The Salvation Army were found to be the Beneficiaries' employer under the FLSA, The Salvation Army is entitled to offsets against any purportedly owed wages—including equitable and other offsets against damages and/or credits against the minimum wage to account for the value of certain benefits received by the Beneficiaries. Whether The Salvation Army violated state wage laws would have to be calculated plaintiff-by-plaintiff and week-by-week. That is because Plaintiffs allege that they were not provided with the required minimum wage, and then also allege that they expected to receive compensation in the form of room, board, benefits, and rehabilitation services provided through the ARC Program. Therefore, if Plaintiffs are found to be "employees" under the applicable laws—and they are not—The Salvation Army could only have violated the law for a given plaintiff in a given week if the value of the in-kind compensation that was provided to him was less than the minimum wage for the specific hours that the individual worked. And where those offsets exceed the amounts that could be claimed as wages, the individual plaintiff would fall outside of any class seeking unpaid wages.

Recent cases highlight that this Court should account for the complexity and individualized nature of these calculations when deciding whether to certify a class action, rather than treating these calculations as a function of damages and leaving them for later. For example, *Klick v. Cenikor Foundation* involved claims by participants in a nonprofit rehabilitation center for "individuals with alcohol and/or drug addiction" who brought claims for allegedly unpaid wages associated with work performed by the participants as part of their long-term inpatient treatment program. 94 F.4th 362, 366 (5th Cir. 2024). The Fifth Circuit remanded questions of FLSA collective action certification because the trial court needed to determine, as part of its assessment of whether putative members of the collective were "similarly situated," whether the defendant's

offset defense (seeking to apply equitable offsets to allegedly owed wages) would create "wide and obvious liability variations" before the court could certify the collective action. *Id.* at 373.[16]

A determination of whether liability could exist at all will depend on a variety of key factors. More specifically, a fact finder would need to assess at least the following: the length of time a putative class member was enrolled in an ARC, how much of that time they spent performing activities that are considered "work," and the many individual factors that would be assessed to calculate the value of applicable offsets (which include both equitable offsets and offsets available under applicable state law and the FLSA, as discussed further below). For example, the evidence shows that the ARCs have onboarding processes that may take from approximately one day to typically less than one week before a Beneficiary receives a work therapy assignment and begins work. (Ex. 10, McNeal Tr. 126:19-127:4.) The onboarding process, routines and schedules would vary across the ARCs and at various times during the proposed class period. (Ex. 3, McNeal Decl. ¶ 17.)

Because The Salvation Army has, at all times, operated the ARC as a rehabilitation program, rather than an employment opportunity, for its Beneficiaries, the available records do not identify, particularly for those Beneficiaries who only remained at an ARC for a short period of time, how much time was spent on other ARC activities and how much work activity was actually performed. (*See* Ex. 3, McNeal Decl. ¶ 20.) While there are records that list the gratuities paid to Beneficiaries each week, which purport to include work therapy hours, these records are not time sheets, are not intended to—and do not—reflect actual hours of work activity performed (as Beneficiaries are not employees of The Salvation Army) or the date and time when a Beneficiary

[16] As discussed *infra* at 39-40, the standard for certifying FLSA collective actions and Rule 23 class actions is similar, although the Rule 23 standard is even more rigorous.

began work therapy.[17] (*See id.*) To determine these facts, which are not summarized in Salvation Army records, individualized evidence (in particular, testimony) as to each stay would be required. Thus, the proposed class definitions are not reasonably ascertainable or manageable.

Here too, these offsets and/or credits against minimum wage also apply to the entirety of the proposed classes. They certainly impact whether there is any liability as to any individual putative class member (even assuming those individuals who performed no work therapy can be removed from the class), based on an individualized assessment. A few examples of individuals, from the small sample of Opt-In Plaintiffs selected to participate in discovery, who enrolled in ARCs for a short period of time—such that they would have performed extremely minimal work therapy activities—illustrate the individualized nature of the inquiry. *See, e.g.*, *supra* at 22 n.16 (describing the six-day and one-day stays of Opt-In Plaintiffs Vences and Vola); Ex. 18, CENT_TSA_0277444 (beneficiary file of Opt-In Plaintiff Chad Gregor) (describing his 25-day stay). The value of food, housing, gratuities paid, and the many other benefits received by these Beneficiaries during their short stays at an ARC would greatly exceed the value of minimum wage for the few hours they may have performed work activities and, therefore, the application of appropriate offsets would reduce any potential damages for those individuals to zero.

[17] For example, The Salvation Army's records demonstrate that Opt-In Plaintiff Vences was enrolled at the Waukegan, Illinois ARC for a total of six days, from September 17, 2021 (a Friday) until he left the ARC on September 23, 2021 (a Thursday). (Ex. 15, CENT_TSA_0236053 (Beneficiary file of Daniel Vences).) He testified that he did not begin any work therapy assignment until his fourth day at the ARC, which would have been Monday September 20, 2021. (Ex. 16, Vences Tr. at 108:1-109:5.) Salvation Army gratuity records appear to note that he engaged in a flat 40 hours of work therapy in what would have been (at absolute most) up to three days of work therapy assignments, which is not consistent with the work therapy programs and schedules. (*See* Ex. 15 (Beneficiary file of Daniel Vences) at CENT_TSA_0236097; SOMF ¶¶ 76, 81.) As just one other example of many, The Salvation Army's records demonstrate that Opt-In Plaintiff Michael Vola was enrolled at the Rockford, Illinois ARC for one day — June 8, 2020 - June 9, 2020. (Ex. 17, CENT_TSA_0236429 (Beneficiary file of Michael Vola).) Based on The Salvation Army's onboarding practices, Mr. Vola would not have begun work therapy on the day he arrived at the ARC. (*See* Ex. 3, McNeal Decl. ¶ 18.) However, The Salvation Army's gratuity records note an impossible 32 total hours of work therapy for Mr. Vola during his 1-day stay. (*See* Ex. 17 (Beneficiary file of Michael Vola) at CENT_TSA_0236471.)

To ascertain actual hours of work therapy requires an individualized assessment of a large number of putative class members, likely all of them. With reference to the simple example of those individuals who stayed in the ARC program for fewer than seven days, The Salvation Army's data from March 1, 2019 to August 31, 2024 shows that these individuals represent a significant percentage (approximately 29.8%) of all individuals who participated in ARCs in Illinois, Wisconsin, and Michigan. Specifically:

- Out of 3,069 individual Beneficiaries who stayed in ARCs in Illinois during this time period, there were 952 (31.0%) stays of seven or fewer days and 83 (2.7%) stays for one day or less;
- Out of 3,963 individual Beneficiaries who stayed in ARCs in Michigan during this time period, there were 1,538 (38.8%) stays of seven or fewer days and 181 (4.56%) stays for one day or less;
- Out of 615 individual Beneficiaries who stayed in ARCs in Wisconsin during this time period, there were 149 (24.2%) stays of seven or fewer days and 6 (0.97%) stays for one day or less.[18]

(*See* Ex. 6, Greisman Decl. ¶¶ 11, 13, 15, 17.) The minimal work activities during short stays would almost certainly be outweighed by the value of the various rehabilitative benefits that are provided from the first day in the ARC. In such instances, a putative class member could have no viable claims, as discussed further *infra* at 31-34. Moreover, some Beneficiaries leave the program even before starting work therapy and, so, do not fall within Plaintiffs' class definitions (as set forth in their Second Amended Complaint). Importantly, because they performed no work activities, they are owed no damages. These individuals cannot, however, be excluded without an individualized inquiry into the factors identified above. For these reasons, the proposed class definitions are not reasonably ascertainable or manageable.

[18] As with the data referenced *supra* at 8-10, the data for Beneficiaries in Wisconsin is limited to the period from March 9, 2020 to August 31, 2024 because of the Wisconsin proposed class definition.

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN UNDER RULE 23(a)

A. Plaintiffs Do Not Satisfy Rule 23(a)(2)'s Commonality Requirement.

Plaintiffs must establish "commonality" for each of their three proposed classes. Fed. R. Civ. P. 23(a). Plaintiffs baldly assert that a single common question is sufficient to establish commonality here. *See* Pls.' Br. at 30. They are mistaken. For commonality, "[w]hat matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (citation omitted). *See also McFields v. Dart*, 982 F.3d 511, 517 (7th Cir. 2020) (commonality is not met when "the claims of every class member will not rise or fall on the resolution" of the common question, but instead "requires an individualized, plaintiff-specific assessment") (internal quotation marks and citation omitted); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) ("A question is not common ... if its resolution 'turn[s] on a consideration of the individual circumstances of each class member.'") (quoting 7A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1763 (3d ed. 2005)).

Here, to the extent Plaintiffs' claims can survive summary judgment, the threshold elements required to determine whether there is liability—and to what extent—would require individualized inquiries that cannot be decided with common evidence. As presented, Plaintiffs' proposed common questions are deficient because they cannot be resolved fully on a class-wide basis.

B. Plaintiffs' Motion Belies Their Assertions of Common Questions

Plaintiffs focus the crux of their commonality argument on a single question: "whether The Salvation Army employs the class members[.]" Pls.' Br. at 30. Whether Plaintiffs were "employees" is an ultimate legal question. But to answer that question requires answering a series

of additional questions first—as Plaintiffs admit and as required by the law. And those threshold questions will require individualized analysis and will result in varied answers—which would then result in varied answers to Plaintiffs' proposed "common" question.

The lion's share of the evidence demonstrates, as a matter of law, that Plaintiffs were not employees of the Salvation Army. *See generally*, SJ Mot. Summary judgment is appropriate on this basis. However, to the extent this matter is not resolved on summary judgment, because Plaintiffs seek to rely on specific and varied individual evidence as to the various factors that must be analyzed to determine Plaintiffs' "employee" status, such evidence demonstrates that this issue would also not be appropriate for resolution on a class-wide basis. The issues identified by plaintiffs in describing the putative classes are exactly the types of issues and inquiries that the Supreme Court has found to be inappropriate for class treatment. *See generally*, *Dukes*, 564 U.S. 338.

Under the applicable state laws, the definition of a covered "employee" depends on the application of statutory definitions as well as a long series of case law-based tests (*see* SJ Mot. at 54-55). The Seventh Circuit has adopted a flexible approach to "examine the 'economic reality' of the working relationship" to determine employment status, and has "declined to apply multifactor tests in the employment setting when they 'fail to capture the true nature of the relationship' between the alleged employee and the alleged employer." *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290-91 (7th Cir. 2016) (citations omitted). But the Seventh Circuit has recognized the utility of applying a "primary beneficiary" test. *See Doe I v. Univ. of Ill.*, No. 18-CV-2227, 2018 WL 11507775, at *3 (C.D. Ill. Dec. 21, 2018) (citation omitted). Plaintiffs must also prove that they had an "expectation of compensation[.]" *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); *see also* SJ Mot. at 29-31, 32-33, 41.

Plaintiffs specifically identify a list of 13 questions they also claim are "common," and each one feeds into the ultimate question of whether Beneficiaries are "employees." Pls.' Br. at 30-31. And on their face, many of the 13 questions, such as "To what extent and how does Defendant control ARC participants' labor?," "Do ARC participants perform the same tasks as workers who The Salvation Army classifies as employees and pays minimum wage?," and "What is the character of the work that ARC participants perform for The Salvation Army?" (Pls.' Br. at 31),[19] most, if not all, will be answered differently by each class member and so they are not amenable to common proof. The common policies presented in The Salvation Army's various handbooks and each Beneficiary's signed admittance statements explicitly acknowledging that the Beneficiary is "a beneficiary and not an employee" (among other things), support The Salvation Army's motion for summary judgment. *See* SJ Mot. at 9-10, 27, 28 n.26). However, ignoring these, Plaintiffs instead rely on individualized anecdotes to support their arguments.

For example, in support of their contention that putative class members were required to perform work activities 40 hours per week to receive any services or benefits, Plaintiffs cite to a variety of individualized evidence. *See* Pls.' Br. at 6. This individualized evidence includes single statements quoted from materials that are specific to individual ARC locations and, in many cases, specific to the experience of a single ARC staff member at a single point in time. *Id.*

These highly individualized anecdotes are not instructive as to the large potential classes at issue here, particularly as to different ARCs within the relevant states and across a class period of more than six years. Plaintiffs' individual evidence includes:

[19] The Salvation Army references these questions posed by Plaintiffs solely for purposes of responding to their motion for class certification, without conceding that each of these questions is applicable to the question of whether Beneficiaries are employees of The Salvation Army. *See* SJ Mot. at 18-31.

- Statements[20] from five Opt-In Plaintiffs regarding their purported understandings of the work expectations and the possibility for discharge from the ARC. *Id.* at 7 n.6.[21]

- Three individual anecdotes purporting to show that certain Beneficiaries were discharged or warned about discharge from an ARC after varying periods of time when unable to perform work therapy. *Id.* at 7.[22]

- The apparent individual, but distinct, understandings of some Named and Opt-In Plaintiffs that benefits and services at the ARC were made available only if the Beneficiary engaged in work therapy. *Id.* at 9.[23]

- Anecdotes from several Named and Opt-In Plaintiffs that they had to make up missed work therapy to various degrees. *See id.* at 8.[24]

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[20] *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (recognizing that differences in the representations made to members of the putative class would defeat commonality, which necessarily would defeat predominance); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, MDL No. 1703, 2007 WL 4287511, at *9 (N.D. Ill. Dec. 4, 2007) (holding that individual issues predominated because "each plaintiff will have been exposed to a different representation or mix of representations").

[21] One of these Opt-In Plaintiffs participated an ARC in Wisconsin, and three in Illinois. *See* ECF No. 259-97, Plaintiff Brian Sinotte's Objections and Responses to Defendant The Salvation Army's First Set of Interrogatories ("Interrogatory Responses"), No. 3 (Wisconsin); ECF No. 259-98, Plaintiff Darreo Graham's Interrogatory Responses, No. 3 (Illinois); ECF No. 259-130, Plaintiff Juan Gomez's Interrogatory Response, No. 3 (Illinois); ECF No. 259-104, Plaintiff Brandon Fuselier's Interrogatory Responses, No. 3 (Illinois). Opt-In Plaintiff Walker did not participate in an ARC in any of the states in which Plaintiffs propose Rule 23 class certification. ECF No. 259-117, Plaintiff William Walker's Interrogatory Responses, No. 3 (Iowa). And Plaintiffs present no anecdotes in support of this point from any Opt-In Plaintiff who participated in an ARC in Michigan.

[22] Only one anecdote comes from an Opt-In Plaintiff, who participated in an ARC in Wisconsin. ECF No. 259-83, Plaintiff Samuel Patton's Interrogatory Responses, No. 3. Plaintiffs also rely on general testimony that Beneficiaries *can* be discharged from the ARC within a week of becoming unable to perform work therapy, and an example from outside of Wisconsin, Illinois, and Michigan. *See id.* at 7.

[23] Four of the anecdotes are from Beneficiaries outside of Illinois, Wisconsin, and Michigan. *See* ECF No. 259-81, Plaintiff Stuart Love's Interrogatory Responses, No. 3 (Missouri); ECF No. 259-106, Plaintiff Jon Crisel's Interrogatory Responses, No. 3 (Missouri); ECF No. 259-117, Plaintiff William Walker's Interrogatory Responses, No. 3 (Iowa); ECF No. 259-105, Plaintiff DeAris Barber's Interrogatory Responses, No. 3 (Iowa).

[24] One of these participated in a Wisconsin ARC, five in a Michigan ARC, and four in an Illinois ARC. *See* ECF No. 259-83, Plaintiff Samuel Patton's Interrogatory Responses, No. 3 (Wisconsin); ECF No. 259-82, Plaintiff James Peters' Interrogatory Responses, No. 3 (Michigan); ECF No. 259-84, Plaintiff Thomas Bryant's Interrogatory Responses, No. 3 (Michigan); ECF No. 259-110, Plaintiff Nathaniel Townsend's Interrogatory Responses, No. 3 (Michigan); ECF No. 259-133, Plaintiff Teon McClain's Interrogatory Responses, No. 3 (Michigan); ECF No. 259-129, Plaintiff Anthony Ellis's Interrogatory Responses, No. 3 (Michigan); ECF No. 259-80, Plaintiff Michael Clancy's Interrogatory Responses, No. 3 (Illinois); ECF No. 259-104, Plaintiff Brandon Fuselier's Interrogatory Responses, No. 3 (Illinois); ECF No. 259-126, Plaintiff Matthew Nutt's Interrogatory Responses, No. 3 (Illinois); ECF No. 259-114, Plaintiff Stephanie Tisserat's Interrogatory Responses, No. 3 (Illinois). Three of these Named and Opt-In

- Alleged overlap between very specific tasks in very specific roles at certain ARCs, rather than any evidence that could be common to each putative class member. *See id.* at 17.

Plaintiffs assert each of these points, and the individualized and different evidence, to support their claim that the question of whether they were "employees" is a common one. In fact, none of these anecdotes are supported by the stated national policy requiring only that Beneficiaries perform *up to* 40 hours per week of work therapy as part of the rehabilitation program (and in no way tying any amount of work therapy to the receipt of services or benefits). (Ex. 19, Program Instruction Manual at CENT_TSA_0315497.) Importantly, as noted above, these anecdotes represent a very small percentage of the potential classes and are simply insufficient to demonstrate that *all class members* are employees under the relevant state laws. Relevant Supreme Court case law also holds that individualized anecdotes that are self-serving and inconsistent with common policy and practice, even if credited, are not appropriate to demonstrate commonality or for class treatment more broadly. *See Dukes*, 564 U.S. at 358-59 (where anecdotes represented a small percentage of potential class, particularly in the relevant states, even if they were all true, they would not demonstrate a defendant-wide practice to establish the existence of any common question); *see also Pichardo v. Bos. Post Food Corp.*, No. 22-CV-9157, , at *4 (S.D.N.Y. Apr. 16, 2025) (denying class certification for state law wage claim because anecdotal evidence from a handful of employees, without statistical analyses, was insufficient to demonstrate a policy violating the employees' rights); *Darling v. Dignity Health, Dignity Cmty. Care*, No. 20-cv-06043, 2022 WL 1601408, at *8 (N.D. Cal. Apr. 26, 2022) (denying class certification because 11

Plaintiffs participated in ARCs outside of Wisconsin, Illinois, and Michigan. ECF No. 259-81, Plaintiff Stuart Love's Interrogatory Responses, No. 3 (Missouri); ECF No. 259-106, Plaintiff Jon Crisel's Interrogatory Responses, No. 3 (Missouri); ECF No. 259-105, Plaintiff DeAris Barber's Interrogatory Responses, No. 3 (Iowa).

declarations with anecdotal testimony failed as a matter of common proof on elements of plaintiffs' wage claim).

Plaintiffs also rely on individualized evidence throughout, including to support their positions that the Beneficiaries were subject to The Salvation Army's "total control," that they had an expectation of compensation, and that work therapy trumps the other beneficial activities in which Beneficiaries participated in the ARCs. *See, e.g.*, Pls.' Br. at 4-8, 11, 17-18, and 26; *see also infra* at 35-37. All such individualized support is in contradiction to The Salvation Army's common policies applicable to all ARCs and Beneficiaries, which makes certification inappropriate.

C. Plaintiffs Fail to Show Typicality or Adequacy.

Because as set forth *supra* at 19-24, the putative classes include individuals who have no claim to damages under applicable state laws, it follows that the claims of the Named Plaintiffs are not typical of the claims of all the members of the proposed classes. As such, the Named Plaintiffs are not adequate class representatives. *See Oshana*, 472 F.3d at 514 (affirming denial of class certification where named plaintiff's claim for damages was not typical of the proposed class, which included several individuals who had no damages claims). Additionally, because the named Plaintiffs cannot sustain their burden on commonality for the proposed classes (*supra* at 24-29), they also cannot meet their burden under Rule 23 to prove typicality or adequacy. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge," and "also tend to merge with the adequacy-of-representation requirement[.]"); *Priddy v. Health Care Serv. Corp.*, 870 F. 3d 657, 660 (7th Cir. 2017) ("[T]he party seeking certification must show numerosity, commonality, typicality, and adequacy, though commonality and typicality 'tend to merge.'") (citing *Gen. Tel. Co.*, 457 U.S. at 157 n.13).

III. PLAINTIFFS HAVE NOT SATISFIED THE REMAINING REQUIREMENTS TO CERTIFY THEIR PROPOSED CLASSES.

A. Plaintiffs Do Not Satisfy Predominance.

Plaintiffs also cannot satisfy the "far more demanding" predominance requirement of Rule 23(b)(3) for the same reasons they cannot show definiteness, ascertainability, commonality, or typicality, and for the additional reason that they offer no method for determining damages through classwide proof. *Comcast*, 569 U.S. at 34-35 (Plaintiffs must "establish[] that damages are capable of measurement on a classwide basis," and "[w]ithout presenting [an appropriate] methodology, [plaintiffs] cannot show Rule 23(b)(3) predominance[.]"). Predominance is not satisfied where liability determinations are individual and fact-intensive. *See Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 891 (7th Cir. 2011).

1. Each Potential Offset Requires Individualized Inquiries and Calculations

The Salvation Army seeks, as affirmative defenses, several different forms of offset and/or credits against the minimum wage. While Plaintiffs attempt to mischaracterize these defenses as merely a calculation of "damages" (Pls.' Br. at 45), these issues go well beyond the calculation of damages and directly to the determination of ultimate liability. Such offsets or credits that may be applicable to Plaintiffs' claims include: offsets for meals and lodging under federal, Illinois, and Wisconsin law (*e.g.*, 29 U.S.C. § 203(m) ("Section 3(m)"); Ill. Admin. Code tit. 56, § 210.200, Wis. Stat. Ann. § 104.035), and equitable offsets under common law for the value of the numerous benefits received by Plaintiffs from participation in an ARC program.[25] Courts must consider these potential defenses when assessing the predominance requirement, rather than save them for post-

[25] The parties have not yet conducted individualized calculations with respect to offsets or damages. Instead, these calculations will be prepared by experts during a second phase of expert discovery to be completed after the Court's decisions as to class certification and summary judgment.

certification proceedings. *See, e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010) ("[I]t is … well established that courts must consider potential defenses in assessing the predominance requirement."); *Clark v. Experian Info., Inc.*, 233 F.R.D. 508, 512 (N.D. Ill. 2005), *aff'd*, 256 F. App'x 818 (7th Cir. 2007) (predominance fails where "affirmative defenses will require a person-by-person evaluation of conduct to determine whether [a defense] precludes individual recovery").

Each of these offsets requires consideration of different criteria, many of which are specific to the individual putative class member. For example, the Illinois meal and lodging offset is calculated based on the "reasonable cost" of these items, which would at a minimum depend on the specific ARC location out of four total ARCs in Illinois (which, for instance, have different available facilities that will affect the per-Beneficiary value), and the timeframe and length of the Beneficiary's stay. Ill. Admin. Code tit. 56, § 210.200. The Salvation Army's Expert, Valentin Estevez, Ph.D., has explained that the calculation of equitable offsets against any alleged unpaid wages would encompass a broad range of considerations, including the value of food, clothing, housing, counseling, vocational training, skills developed, education received, transportation, improved socioeconomic outcomes, among other benefits received. (*See* Ex. 20, Supplemental Expert Report of Valentin Estevez, Ph.D. at 9, 24-26.)[26] Which benefits were received, and the value of each of these benefits, would necessarily be highly individualized, and would also vary widely depending on other factors, such as the relevant ARC location, the timeframe of the Beneficiary's stay, and the length of such stay. (*Id.* at 23-26.) Dr. Estevez made clear that these calculations would require specific information about each Beneficiary, such as the Beneficiary's testimony and socio-economic data pre- and post-ARC stay. (*Id.* at 9.) Plaintiffs have entirely

[26] Any equitable offset would also need to include the amount of the weekly gratuity paid to the Beneficiary.

mischaracterized Dr. Estevez's opinions and the impact of equitable offsets, in an attempt to frame all offsets as "damages" that can be addressed through basic formulae. *See* Pls.' Br. at 48-49.

For example, just one factor in calculating offsets—and thus determining whether there is liability—would be the subjective value a putative class member attributed to their participation in the ARC. During discovery, Named and Opt-In Plaintiffs testified to appreciating the benefits of participation, ranging from long-term sobriety to more consistent and stable employment to obtaining highly compensated salaried jobs. *See, e.g.*, SOMF 86 (at the time of his deposition, Named Plaintiff Clancy had remained sober for at least four years, since his last enrollment at an ARC); SOMF 92 (Named Plaintiff Stuart Love obtained employment after completion of the ARC Program; he testified that in 2022 it was the first time he had earned so much money in a single year); SOMF 100 (Named Plaintiff Thomas Bryant became employed as a certified substance use disorder clinician, a career path that his time in the ARC helped him to determine). Another factor to be calculated would be the actual value of a Beneficiary's improved circumstances following an ARC stay—regardless of Plaintiff's subjective perception of the value. These improved circumstances would encompass any number of scenarios, including increased housing stability; connections and reconnections with family, friends, and community; sobriety; access to education and resources; improved physical and mental safety; and much more.

To determine whether a putative class member has a claim for unpaid wages, a fact finder would have to weigh the value of the offset against the hours worked in each relevant location and for the appropriate time periods. While the parties have not prepared expert damages calculations to date, the record demonstrates that a substantial number of putative class members would *not* be owed wages because the value of the benefits they received (and therefore, the value of the offsets against any damages) from The Salvation Army and participating in the ARC program outweighed the minimum wage for the hours they would have allegedly performed "work activities." *See,*

supra at 23, 31. Dr. Estevez explained that Beneficiaries may have no damages, or "negative damages," as a result of the value of potential offsets, such as Beneficiaries who "received a roof over their head for one night, and perhaps several meals, and then [left] the ARC without ever having performed work therapy." (Ex. 20, Supplemental Expert Report of Valentin Estevez, Ph.D. at 11.)[27]

To determine whether The Salvation Army has any liability to putative class members requires a highly fact-intensive and individualized inquiry. These types of analyses have been found insufficient to support class treatment or even to meet the lower threshold of FLSA collective certification. *See, e.g.*, *Hawkins v. Securitas Sec. Servs. USA, Inc.*, 280 F.R.D. 388, 400 (N.D. Ill. 2011) (denying class certification in part because individual issues predominated and Rule 23(b)(3) was not satisfied where offset defense in wage claim turned on individual questions "that would overwhelm any efficiencies gained by trying common issues in a class proceeding"); *Klick*, 94 F.4th at 373 (remanding collective action certification issues to trial court to address the impact of offsets on liability to putative class members); *see also Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 618-19 (E.D. Wis. 2024) (denying FLSA collective certification in part because of individualized defenses, such as offsets against wages); *Aboin v. IZ Cash Inc.*, No. 20-CV-03188, 2021 WL 3616098, at *6 (S.D. Tex. June 29, 2021) (wage deduction analysis too individualized); *Marquis v. Sadeghian*, No. 19-CV-626, 2021 WL 6621686, at *7 (E.D. Tex. Dec. 30, 2021) (unable to collectively determine whether compensation violated FLSA based on varying hours worked and varying types of compensation received, including housing).

[27] As discussed *supra* at 15, individuals such as those described in this example are not proper members of the class, both because they fall outside of the class definition and because they have no claim for damages. However, to identify these individuals to exclude them from the class will require individualized testimony at numerous mini-trials.

2. Plaintiffs Intend to Rely on Individualized Proof to Establish That They Were "Employees."

As explained *supra* at 27-29, Plaintiffs' theory for class treatment of their claims hinges on individualized and varied experiences and anecdotes in several areas that will inform the question of whether Plaintiffs were "employees" under state law. If summary judgment is not granted and Plaintiffs are allowed to present the same or similar evidence at trial (which is unknown, because Plaintiffs have wholly failed to present any trial plan to the Court), the undisputed evidence, submitted by The Salvation Army in support of summary judgment, on each of the factors that Plaintiffs outline in support of their claim that they were "employees" largely contradicts the individual evidence presented by Plaintiffs to date. Therefore, for The Salvation Army to respond to, and for the Court to analyze, each of Plaintiffs' assertions will require significant individualized assessment if the classes are certified and this case proceeds to trial. These individualized issues would predominate over Plaintiffs' purported "common" question—because they would each need to be determined and resolved based on the Plaintiffs' individualized evidence, and The Salvation Army's responsive evidence, prior to being able to reach any answer on the supposedly common question.

For example, Plaintiffs rely on three individual anecdotes purporting to show that certain Beneficiaries were discharged or threatened with discharge from an ARC after varying periods of time when unable to perform work therapy in specific instances. One anecdote is drawn from an email from ARC staff in Illinois noting that someone *could* be discharged, another an anecdote from an email from staff at an ARC outside of the states in which Plaintiffs seek Rule 23 class certification, and the third anecdote comes from the testimony of a single Opt-in Plaintiff that he

was discharged after an unknown time of being unable to work. Pls.' Br. at 7.[28] The evidence also includes the apparent individual, but distinct, understandings of some Named and Opt-In Plaintiffs that benefits and services at the ARC were made available only if the Beneficiary engaged in work therapy. *Id.* at 9. And the evidence references anecdotes from several Named and Opt-In Plaintiffs that they had to make up missed work therapy to various degrees. *See id.* at 8. Plaintiffs also rely on a slew of individualized experiences related to a purported understanding that room, board, and benefits were being supplied at ARCs only in exchange for a Beneficiary performing work therapy, which is outlined *supra* at 28. Plaintiffs assert each of these points, and the individualized and different evidence, to support their claim that the question of whether they were "employees" is a common one. But they are wrong.

By contrast to Plaintiffs' individualized evidence, however, many other Named and Opt-In Plaintiffs had vastly different experiences. Various Plaintiffs testified about instances where they were unable to perform work therapy but were not discharged from the ARC Program or otherwise denied any ARC benefits or services—including housing or meals. *See* SOMF 47 (citing various examples, including Named Plaintiff Love (missed two weeks of work therapy because of a pre-existing shoulder injury), Opt-In Plaintiff Richardson (missed work therapy because of COVID-19 quarantine), Opt-In Plaintiff Poynter (missed work therapy because of COVID-19 quarantine), and Opt-In Plaintiff Bida (missed work therapy to attend mandatory court dates)). Contrary to Plaintiffs' assertion that they were required to perform work therapy in exchange for in-kind benefits like meals and housing, many Named and Opt-In Plaintiffs turned over their SNAP benefits to The Salvation Army to help "offset the cost of [] room, board, and clothing," which

[28] Plaintiffs also rely on general testimony that Beneficiaries *can* be discharged from the ARC if unable to perform work therapy. *See id.* at 7 n.6.

"strongly counsels against a holding that [they] received the in-kind benefits in exchange for [their] work." *See* SJ Mot. at 46; *Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996). These individual experiences will need to be explored to adequately resolve Plaintiffs' supposedly "common" question, and they demonstrate exactly why limited individual anecdotes are insufficient to support class treatment. *See Dukes*, 564 U.S. at 358-59.

3. Damages Calculations Would Be Too Individualized to Permit Class Treatment

Plaintiffs present no damages model whatsoever; nor do they present any trial plan to address damages in support of their motion. At this stage, courts regularly require putative class plaintiffs to demonstrate their plan to manage the action. *Mullins*, 795 F.3d at 664; *see Van v. Ford Motor Co.*, No. 14-cv-8708, 2018 WL 4635649, at *8 (N.D. Ill. Sept. 27, 2018) (denying class certification in part because the plaintiffs "have not explained how this case could proceed through trial without holding a separate evidentiary hearing for each putative class member"). Plaintiffs recognize the importance of demonstrating a trial plan to proceed with their three proposed classes and FLSA collective. *See* Pls.' Br. at 44-45. However, Plaintiffs conclusorily state that "individualized damage calculations would not be onerous or complicated[.]" *Id.* at 45. And Plaintiffs largely ignore the evidence that the various potential offsets and/or credits against minimum wage—particularly an equitable offset necessarily involve individual considerations that, contrary to Plaintiffs' inaccurate representation, cannot be resolved thorough a simple "mechanism" for calculating them. (*See, e.g.*, Ex. 20, Supplemental Expert Report of Valentin Estevez, Ph.D. at 11 (explaining the various individual criteria that need to be considered and the analysis that would need to be conducted) and 25-26 (describing the various ARC services that would need to be valued and calculated for equitable offsets).)

Plaintiffs' arguments are insufficient under *Comcast*, particularly where the calculation of these offsets and potential damages impacts the question of ultimate liability and whether putative class members have viable claims. *See Langendorf v. Skinnygirl Cocktails, LLC*, 306 F.R.D. 574, 584 (N.D. Ill. 2014) (Shah, J.) (finding the plaintiff failed to show that common issues predominated in part "since the issue of damages is bound up with the issue of injury in this case") (internal quotation marks and citation omitted); *Murphy v. Pro. Transp., Inc.*, No. 14-cv-378, 2017 WL 5665901, at *8 (S.D. Ill. Nov. 27, 2017) (denying class certification even when there were some common questions for claims brought under the Illinois Prevailing Wage Act, but that "complex individualized inquiries would be required to determine damages"); *Blakes v. Ill. Bell Tel. Co.*, No. 11 CV 336, 2013 WL 6662831, at *13 (N.D. Ill. Dec. 17, 2013) (decertifying FLSA collective action where issues regarding calculations went beyond mere damages calculations but to the question of liability); *see also Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 425 (D.D.C. 2017) (denying class certification under Rule 23(b)(3) where an expert's damages formula would require evaluating individualized defenses and calculating individualized damages).

B. Class Litigation is Not Superior or Manageable.

Given the lack of commonality, the predominance of individual issues, and the need for separate mini-trials to determine liability and damages for each class member, a class action is not the superior method to adjudicate these claims. *See, e.g.*, *Reed v. Advoc. Health Care*, 268 F.R.D. 573, 595 (N.D. Ill. 2009) (class action not superior where plaintiffs cannot establish injury with common proof sufficient to satisfy the predominance requirement). And Plaintiffs have not presented any trial plan to alleviate these manageability concerns. Instead, they merely assert that "[t]he trial plan for this action is well marked by established precedent." Pls.' Br. at 44. Plaintiffs never explain how the Court should address any of the host of individualized inquiries necessary

to prove their claims, much less how the defined class members can even be identified (or excluded individuals properly identified for exclusion from the class). As noted above, *supra* at 23-24, there are thousands of individuals for whom individualized inquiries will need to be conducted for potential exclusion from Plaintiffs' proposed classes. *See Espenscheid*, 705 F.3d at 773 (affirming decertification of class due to "infeasible" trial plan, where "to determine damages would … require 2341 separate evidentiary hearings" and noting class treatment would be unmanageable where class members include those who have been harmed to different extents and those who have not been harmed at all).

IV. Plaintiffs Cannot Satisfy Their Burden for Collective Action Certification Under The FLSA

The Seventh Circuit has held that the standard for certification of a collective action is largely the same as the Rule 23 class action certification standard. *See Espenscheid*, 705 F.3d at 772. While the certification standard under Rule 23 is more rigorous than for collective certification, the FLSA requires a showing that the members of the collective are similarly situated. Plaintiffs cannot meet that standard here.

For many of the same reasons outlined above, final certification of the FLSA collective action should be denied and the collective should be decertified. In particular, there are numerous disparate factual circumstances, as outlined above, that require an individualized assessment as to liability and damages. Additionally, The Salvation Army's affirmative defenses, such as offsets and/or credits against the minimum wage, will need to be applied individually to each Plaintiff and, just as under the state law claims, will impact whether there is any liability to Plaintiff—beyond just the mere calculation of damages. *See, e.g.*, *Klick*, 94 F.4th at 373-74 (remanding FLSA certification decision for consideration of the impact of offsets on liability to class members); *Laverenz*, 746 F. Supp. 3d at 618-19 (denying FLSA collective certification in part because of

individualized defenses, such as offsets against wages). These offsets and credits include the same equitable offset described above at 20-21. But under the FLSA, The Salvation Army will also seek application of the FLSA's 3(m) offset, which is an offset against damages for "the reasonable cost … to the employer of furnishing such employee with board, lodging, or other facilities[.]" 29 U.S.C. § 203(m)(1). The 3(m) offset varies by individual, including based on the ARC location in which the individual stayed (because of the different facilities available at each ARC, as well as the fair value of the facilities based on the particular locality) and the time period of their stay. (Ex. 20, Supplemental Expert Report of Valentin Estevez, Ph.D. at 23-26.)

For each of these reasons, individual issues are substantial, the collective is not similarly situated, and interests of fairness and administration are not served by requiring a series of mini-trials to resolve all of these issues through a collective action mechanism. The collective should be decertified. *Solsol*, 2017 WL 2285822, at *3 (granting decertification).

CONCLUSION

Based on the foregoing, Plaintiffs' motion should be denied and the conditionally certified collective action decertified.

Dated: May 23, 2025

Respectfully submitted,

/s/ Toni Michelle Jackson

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2025, true and correct copies of the documents listed below were served on all counsel of record via the Court's CM/ECF system:

1. Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Final Certification of the Collective.
2. Declaration of Toni Michelle Jackson and accompanying exhibits.

Dated: May 23, 2025

Respectfully submitted,

/s/ Toni Michelle Jackson
Toni Michelle Jackson

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