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,

Plaintiffs,

v.

THE SALVATION ARMY, an Illinois nonprofit corporation,

Defendant.

Case No.: 1:22–cv–01250

Judge Manish S. Shah

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND FINAL CERTIFICATION OF THE COLLECTIVE

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I. INTRODUCTION

In Defendant's Opposition to Class and Final Collective Certification, it acknowledges the central factual premise of Plaintiffs' Motion: that The Salvation Army applies common policies uniformly across all ARCs and participants. *See, e.g.*, Dkt. 268, Def.'s Mem. in Opp'n to Pls.' Mot. for Class Cert. ("Opp.") at 30. Nonetheless, Defendant raises a series of meritless challenges that confuse issues of ascertainability and individualized damages calculations as barriers to certification. Each of these arguments fails. Plaintiffs easily satisfy the requirements of Rule 23(a) and 23(b)(3). They identify common questions that drive the resolution of the litigation and predominate over individualized questions. The Court and the parties have the resources and tools to handle any tailored claims administration issues. Accordingly, the Court should grant Plaintiffs' Motion to resolve, on a class- and collective-wide basis, whether The Salvation Army employs ARC participants and has failed to pay them the minimum wage. The legal question of employment, with its factual underpinnings, should be litigated once for each Rule 23 class and FLSA collective, and not repeatedly across 16,000 individual trials as Defendant absurdly suggests. Class and collective actions exist precisely for situations like this, and Defendant's newfound arguments to the contrary are baseless.[1]

First, Defendant's contention that class members cannot be ascertained due to the presence of "justice referred" participants is contradicted by Defendant's own extensive recordkeeping practices and admissions. Defendant's belated attempts to obscure the parties' shared understanding of this term through its submission of new, contradictory testimony lack credibility and do not undermine ascertainability.

[1] Defendant previously indicated it wished to "dispose of the entire case" through a "global summary judgment ruling" for the whole of the putative classes and collective. Dkt. 285, Tr. of Proc. - Tel. Status Hearing (Apr. 2, 2025) at 9:3-15.

Second, Defendant's arguments regarding individualized issues around its affirmative defenses and damages calculations mischaracterize both the law and the facts. The only offsets to the minimum wage potentially available—limited to housing, food, and gratuity—are straightforward to calculate using Defendant's detailed computerized records. Defendant's suggestion of complex equitable offsets, involving intangible purported benefits, is wholly unsupported by law.

Third, Defendant's claim that individualized experiences undermine commonality and predominance disregards the uniformity of Defendant's core policies and practices across all ARCs. Plaintiffs have demonstrated numerous critical common legal and factual questions—including whether ARC participants qualify as employees and whether Defendant unlawfully withholds minimum wages—which will drive the resolution of this case.

Fourth, Plaintiffs have provided a clear and manageable two-phase trial plan. Defendant's misplaced effort to portray the remedial phase of this case as complex misinterprets governing Supreme Court and Seventh Circuit precedent and ignores substantial guidance from other courts on how the remedial proceedings contemplated here can be managed well.

For these reasons, and as set forth fully below, Plaintiffs' Motion for Class Certification and Final Certification of the Collective should be granted.

II. ARGUMENT

In opposing Plaintiffs' certification efforts, Defendant mischaracterizes the applicable legal standards under Rule 23 and the FLSA, as well as the claims that Plaintiffs advance in this action.[2] Properly construed, the pertinent legal authority and evidence readily demonstrate that Plaintiffs

[2] Defendant does not dispute that Plaintiffs satisfy the numerosity requirement or the requirement class counsel be adequate. For the reasons set forth in Plaintiffs' opening brief, Plaintiffs have satisfied these elements. Dkt. 247, Mem. in Supp. of Pls.' Mot. for Class Cert. ("Mot.") at 29-30, 32-33.

have satisfied the requirements of Rule 23 and the elements of final certification under the FLSA.

A. Defendant's Challenges to Ascertainability Fail

Defendant frames much of its opposition as a challenge to the ascertainability of Plaintiffs' proposed class definitions. Ascertainability—the implied requirement for class, but not collective, certification—asks whether "the membership of the class [is] sufficiently definite." *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 245 (N.D. Ill. 2014). As articulated by the Seventh Circuit's seminal case on the issue, *Mullins v. Direct Digital, LLC*, class definitions must be defined: (1) clearly; (2) through objective criteria; and (3) irrespective of the merits. 795 F.3d 654, 659-60 (7th Cir. 2015). Defendant does not claim Plaintiffs' proposed definitions are imprecise or present failsafe classes. Rather, Defendant complains that it is too complicated to determine which ARC participants are class members for two reasons: (1) some participants, who are excluded from the class and collective definitions, attend an ARC as a court-ordered diversion from incarceration ("justice referred"); and (2) the class definitions do not explicitly exclude individuals who failed to perform work for The Salvation Army. Neither of these issues creates a hurdle to definitively ascertaining class membership.

1. The Existence of Justice Referred Individuals Does Not Create an Ascertainability Issue

First, Defendant argues that Plaintiffs' class definitions are not ascertainable because "justice referred" participants—those who enroll in the program to comply with a court order or as a condition of probation, parole, or community supervision—can only be identified through subjective criteria and individualized assessments. Opp. at 15-19. Not so.

Although Defendant now attempts to introduce uncertainty surrounding the boundaries of the "justice referred" definition, it affirmatively negotiated and stipulated to the precise language used. *See* Dkt. 108, Order Conditionally Certifying Collective Action, at 1-2. That definition boils

down to one question: did the person enroll in the ARC in lieu of a direct threat of incarceration? While Defendant now claims the parties have disagreed about the meaning of "justice referred" status throughout this litigation, Opp. at 19 (citing Dkt. 269, Decl. of Toni Michelle Jackson ¶ 18), it provides no examples of such disagreement. That is because none exist. Ex. 1, Declaration of Michael Freedman ("Freedman Decl.") ¶¶ 17-18. Defendant's citations, Opp. at 9, 28, to Opt-In Plaintiffs DeAris Barber, who was placed on probation eight months *after* graduating the program, and Brandon Fuselier, who entered the ARC *before* he was ever sentenced for a criminal conviction, do nothing to demonstrate that either of them enrolled in the ARC as a court-ordered alternative to incarceration. *Compare* Ex. 2, Deposition of DeAris Barber 157:13-18 (date of probation), *to* Ex. 3, DeAris Barber Amended Interrog. Resps., Interrog. 2 (date of ARC enrollment); *see also* Ex. 4, Deposition of Brandon Fuselier 23:20-24:16. It is only now, in opposing class certification, that Defendant, for the first time, has intimated that "justice referred" could also include individuals who held speculative beliefs about whether enrollment might "show positive personal improvement to a court or parole or probation officer in the future." *Contra* Opp. at 10, 18-19; Dkt. 269, Ex. 3, ¶ 14. That is not, and never has been, the meaning of the parties' use of "justice referred." Ex. 1, Freedman Decl. ¶ 18.

Nor could it be. Defendant itself tracks in its electronic records system categories of those who are "justice referred." Mot. at 20 n.10. When asked at deposition if Defendant maintained "a mechanism for tracking the individuals who are judicially referred to the ARC," Defendant's corporate representative Neisha McNeal answered affirmatively that "[t]here is." Mot. Ex. 5 ("30(b)(6) McNeal Day 1 Dep.") at 88:10-15; *see also id.* at 96:12-20 (answering "Yes" when asked if Defendant "track[s] the number of ARC participants that enroll in the program because they are judicially referred or diverted from the court system"). She testified with specificity:

"When individuals are referred, for instance, on parole, probation or any sort of tether to the justice system, our intake staff add a particular service tagging that file." *Id.* at 88:15-19. Ms. McNeal did not correct or qualify this testimony at any point during her deposition—including at the second session days later, or in her corrections to her transcript. She also testified that the need for Defendant to engage in this recordkeeping is not discretionary. The Salvation Army is "required to maintain that [it] know[s] how many individuals are justice involved." *Id.* at 88:20-22; *see also id.* at 96:20-23 ("[I]t's a requirement for our national statistics that we reconcile that count of individuals that are paroled, probation or justice referred."). Defendant requires such tracking by policy. Mot. Ex. 20 at 0315472-73 (May 2024 Program Instruction Manual: "The intake staff is responsible for tracking and recording all referring agencies and retrieving (if applicable) all documents that are attached to each referral. Such as . . . legal documents, etc."); *id.* at 0315474 ("Applicants who are required to meet the legal requirement(s) of furlough or court supervision during a program term must provide documentation confirming requirements. This documentation is required to be uploaded[.]"). The Salvation Army's sworn testimony during discovery established that the identity of justice referred participants is "something that can be found and figured out." 30(b)(6) McNeal Day 1 Dep. 97:1-6.[3]

Nearly a year later, Ms. McNeal has submitted a sham declaration proffering contradictory testimony. Dkt. 269-1. She now attempts to walk back her unequivocal testimony on behalf of her employer by suggesting that justice referred status is not knowable because participants often do not report their referral source. *Id.* ¶ 12. Yet Defendant's own files for ARC participants, as well as the evidence amassed above and publicly accessible arrest and conviction records that

[3] Defendant also represented confidence in its intake data when insisting that the parties use the categories on justice referral to limit which ARC participants could receive notice of this lawsuit. *See* Dkt. 174-4.

Defendant has produced in discovery, all contradict this unsupported statement. *See, e.g.*, Ex. 5, CENT_TSA_0000888 (Named Plaintiff's criminal records); Ex. 6, CENT_TSA_0000955 (same for another); Ex. 7, CENT_TSA_0064040 (same for another); Ex. 8, CENT_TSA_0064101 (same for another); Ex. 9, CENT_TSA_0002585 (Opt-In Plaintiff's ARC file: authorizing The Salvation Army's release of participant information to probation officer); *id.* at 0002618 (indicating that the same individual was on probation and including the contact information for his probation officer); *see also* Dkt. 174-1, Decl. of Rebecca A. Ojserkis ¶ 16. Ms. McNeal still acknowledges that The Salvation Army retains the referral records and notates referrals in participants' files. Dkt. 269-1, ¶¶ 14-15. But despite these facts, she speculates for the first time that "in a significant number of instances, this information *may* never have been provided to the ARC[.]" *Id.* ¶ 14 (emphasis added). She provides no justification for this hypothesis, or why it differs from her earlier testimony.

The Court should strike Ms. McNeal's declaration, or otherwise refuse to give any credence to her belated and novel assertions. The Seventh Circuit's sham affidavit doctrine "prohibits a party from submitting an affidavit that contradicts the party's prior deposition or other sworn testimony." *Perez v. Staples Cont. & Com. LLC*, 31 F.4th 560, 569 (7th Cir. 2022) (citation omitted). "[E]ven affidavits that are not directly contradictory may be excluded under this rule" if the affidavit provides specific pertinent information despite having an opportunity to offer it at deposition. *Hickey v. Protective Life Corp.*, 988 F.3d 380, 389 (7th Cir. 2021). "The concern in litigation, of course, is that a party will first admit no knowledge of a fact but will later come up with a specific recollection that would override the earlier admission." *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 293 (7th Cir. 1996). When a party violates this rule by submitting a sham declaration, district courts are directed to strike the declaration or otherwise disregard it. *Dunn v.*

Menard, Inc., 880 F.3d 899, 910-11 (7th Cir. 2018). This doctrine applies here. Defendant, through its corporate representative, admitted under oath that it consistently records information about whether participants are justice referred. Nearly a year later, Defendant attempts to walk back that unequivocal testimony with general statements clearly designed as a litigation strategy to escape class certification. The Court should reject such gamesmanship by striking the May 22, 2025 McNeal Declaration. Dkt. 269-1.

Even assuming *arguendo* Defendant's data are imperfect, this is not a bar to establishing ascertainability.[4] For example, in *Smith v. Family Video Movie Club, Inc.*, the court found ascertainable two classes of individuals who were denied overtime payments, even though the Defendant's records did not reflect all unpaid work performed, since a defendant "should not benefit any more than is necessary from its own allegedly poor record keeping." 311 F.R.D. 469, 474 (N.D. Ill. 2015). The Seventh Circuit has warned of the "significant harm" that can result if defendants are "immunize[d] . . . from liability because they chose not to maintain records of the relevant transactions." *Mullins*, 795 F.3d at 668-69 (discussing the appropriate standard for ascertainability). Such an approach might "create an incentive for a person to violate [a law] . . . and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Birchmeier*, 302 F.R.D. at 250 (discussing the issue of class definitions and ascertainability). Given Defendant has conceded that it is required to maintain and

[4] Defendant's fears about filtering out huge numbers of justice referred participants, *see* Opp. at 17-18, are also overblown. All signs indicate that the process the parties undertook together to exclude justice referred participants from the notice process following conditional certification was successful. Only thirteen participants—not thirty—have since been identified and withdrawn from the case for being justice referred. Ex. 1, Freedman Decl. ¶ 16. Such a low figure does not raise alarm bells. *See Mullins*, 795 F.3d at 667-68 (rejecting concerns about fraudulent or mistaken claims as a basis to impose heightened ascertainability standard); *cf.* Dkt. 177, Tr. of Proc. - Tel. Mot. Hearing (Jan. 23, 2024) at 14:18 (in which the Court asked why six justice referred Opt-In Plaintiffs "isn't . . . an awfully low error rate"); Dkt. 175 ("The court is not persuaded that the number of opt-ins that should not have been included has revealed a problem in the process that justifies the expenditure of plaintiffs' resources now.").

report out data on justice referred individuals in the programs, and that it fulfills this requirement with its procedures, it cannot now try to poke holes in its own data to evade liability. And in general, "the ascertainability requirement is not about evidence; it is about whether the proposed class definitions are based on objective criteria." *Smith*, 311 F.R.D. at 475.

Thus, even if Defendant's records are "insufficient to ascertain" who is "justice referred," Opp. at 14-15, there is no problem with class members submitting affidavits to establish class membership. In the Seventh Circuit, class members' "own self-serving testimony can be sufficient to establish [their] claim[s]." *Dunn v. Wells Fargo Bank, N.A.*, 2020 WL 1066008, at *1 (7th Cir. Feb. 25, 2020); *see also Mullins*, 795 F.3d at 669 ("Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed."). Courts in the Seventh Circuit consistently endorse the use of affidavits "to identify class members after liability is established class-wide." *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1009 (7th Cir. 2019) (citing *Mullins*, 795 F.3d at 672); *see, e.g.*, *Benson v. Newell Brands, Inc.*, 2021 WL 5321510, at *8 (N.D. Ill. Nov. 16, 2021) (finding class ascertainable where "[i]dentification of class members in this case can take place at the claims-administration stage through self-identification in sworn affidavits or claim forms"); *Smith*, 311 F.R.D. at 475 (same). The case law on this point is so robust that it has become a well-established principle within this Court that individuals may identify themselves as class members through affidavits. *See, e.g.*, *Salam v. Lifewatch, Inc.*, 2016 WL 8905321, at *2 (N.D. Ill. Sept. 6, 2016); *W. Loop Chiropractic & Sports Inj. Ctr., Ltd. v. N. Am. Bancard, LLC*, 2018 WL 4762333, at *10 (N.D. Ill. May 16, 2018), *report and recommendation adopted*, 2018 WL 3738281 (N.D. Ill. Aug. 7, 2018); *Bakov v. Consol. World Travel, Inc.*, 2019 WL 1294659, at *19 (N.D. Ill. Mar. 21, 2019); *see also Beaton*

v. SpeedyPC Software, 907 F.3d 1018, 1030 (7th Cir. 2018) (affirming district court's ruling that "individualized inquiries could be handled through 'streamlined mechanisms' such as affidavits and proper auditing procedures" for individual merits questions as well as questions of class membership).

Consistent with this established practice, Plaintiffs have proposed a trial plan in which employment status would be established during a phase one trial, with a streamlined phase two claims administration process. During that phase two process, to the extent necessary, class members could submit affidavits attesting that their enrollment in an ARC during the class period was not in lieu of incarceration.[5] Such a claims administration process involving those sworn affidavits, Defendant's data, and/or any publicly available records—all of which Defendant could challenge—presents a clear, manageable path forward. *See, e.g.*, *Birchmeier*, 302 F.R.D. at 249-50 (approving a claim identification process involving a "combination of documentary evidence and a sworn statement," and rejecting that "the contours of the class should be defined by defendants' own recordkeeping," which defendants also contended was insufficient for identifying class members). "When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good." *Mullins*, 795 F.3d at 666. Plaintiffs seek to certify a collective and classes of voluntary, not "justice referred," ARC participants. That there exist other ARC participants who fall *outside* those definitions has no bearing on whether the standards for class and collective certification have been met for those who fall *inside* the definitions.

The cases Defendant cites are inapposite for this very reason. Opp. at 19-20. *Oshana v.*

[5] Defendant's own prior representations affirm that such self-reporting makes sense. Repeatedly, Defendant has maintained that "plaintiffs are the most accurate reporters of their reasons for being in . . . the ARCs." Dkt. 170 at 9; *accord id.* at 8 (whether participants are justice referred is information "only the plaintiffs will know"); Dkt. 177, Tr. of Proc. - Tel. Mot. Hearing (Jan. 23, 2024) at 14:1-3 (defense counsel stating that "plaintiffs are in the best position to know whether they were sent to the ARC as a condition of probation/parole or community release.").

Coca-Cola Co. upheld a denial of class certification because the class definition *itself* was written such that the class would contain "millions" of individuals who might have no claims whatsoever. 472 F.3d 506, 513-14 (7th Cir. 2006). Here, by contrast, the class definitions are specifically designed to *exclude* justice referred individuals, and any justice referred individuals who submit a claim (which will be far fewer than "millions," if any) can easily be screened out. The same is true of *Panwar v. Access Therapies, Inc.*, in which the class definition *as written* included a "significant number" of uninjured individuals. 2015 WL 329013, at *4 (S.D. Ind. Jan. 22, 2015). *McGlenn v. Driveline Retail Merchandising, Inc.* is also irrelevant, because the plaintiffs in that case presented essentially no evidence that *any* class members had been harmed. 2021 WL 165121, at *9 (C.D. Ill. Jan. 19, 2021) (in data breach case, plaintiffs did not show class-wide evidence of bank charges, fees, negative credit ratings, loan denials, or identity theft, instead only presenting evidence that some putative class members may have had "suspicious credit activity"). And *Espenscheid v. DirectSat USA, LLC* is simply misportrayed by Defendant. Opp. at 20. That case did not concern uninjured class members at all, and the language that Defendant quotes as the "holding" of that case is not a holding but rather a single sentence of dictum. *Id.* That a case which has "*millions* of class members" with no injury "*may*" cause a trial to be unwieldy is an irrelevant proposition to the Motion at hand. *Espenscheid*, 705 F.3d 770, 776 (7th Cir. 2013) (emphases added; never expressing that certification of such a class would be inappropriate).

2. The Class Definitions Can Be Easily Modified to Exclude Participants Who Have Not Performed Work

According to Defendant, Plaintiffs' class definitions are not ascertainable because it does not specify that only participants who have *worked* —*i.e.*, performed "work therapy"—for The Salvation Army are class members. Opp. at 14. This argument is easily dispatched.

Plaintiffs have no objection to limiting class membership to those who have performed

work for Defendant. *See* Opp. at 14 n.8. As Defendant notes, Plaintiffs pled such definitions. *Id.* at 14. Their Motion does not contain that language, Mot. at 1-2, simply because it was omitted from the collective definition negotiated *with Defendant* in the parties' conditional certification stipulation, *see* Dkt. 108 at 1-2. Class definitions "can change over the life of a case," such that modifying them is no impediment to class certification; nor does it require amending the complaint. *See Bieniek v. Cent. States, Se. & Sw. Areas Health & Welfare & Pension Funds*, 2023 WL 4473018, at *5 n.3 (N.D. Ill. July 11, 2023) (Shah, J.); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (holding that courts have the discretion to and "should . . . solve[]" problems with a class definition by "refining the class definition rather than . . . flatly denying class certification").

Defendant throws its hands up at determining who performed work and how much, noting it "does not maintain timecards" for participants. Opp. at 19. It does not need to; its own corporate representative made clear that all participants begin working after their orientation period, which lasts one to seven days. Dkt. 269-7, McNeal Dep. 124:15-127:4. Therefore, common evidence establishes that all participants start working at the *latest* by their eighth day of enrollment, such that excluding participants enrolled for seven or fewer days eliminates anyone who did not work while enrolled at an ARC. This can be determined using Defendant's well-maintained enrollment data,[6] which provides each participant's days of enrollment for each stay at an ARC. Therefore, Plaintiffs propose excluding from the FLSA collective and class definitions anyone who was not

[6] Moreover, Defendant overstates the percentage of enrollments in Michigan, Illinois, and Wisconsin that lasted one day and fewer than seven days, due to faulty math. Opp. at 24. When calculating the percentage of enrollments that fall into those two categories, Defendant divided the number of enrollments in those states by the total number of unique participants who attended the ARCs, not by total number of enrollments. *Id.*; *see also* Dkt. 269-4, ¶ 11 (listing the number of unique participants for the three states). Because the total number of unique participants is less than the total number of enrollments (as some people enrolled multiple times), the percentages reported by Defendant are inflated. *Id.* (explaining the process for removing people who attended more than once during class period).

enrolled in the ARC for at least seven days.

With revisions, the FLSA collective definition reads:

> All persons enrolled in any Salvation Army Adult Rehabilitation Center from September 20, 2019 to September 11, 2023, for more than seven days, who did not enroll in the program to comply with a court order or as a condition of probation, parole, or community supervision.

With revisions, the Illinois, Wisconsin, and Michigan class definitions read:

> All persons enrolled in any Salvation Army Adult Rehabilitation Center in [Illinois, Wisconsin, Michigan], respectively between [March 9, 2019 (Illinois, Michigan) or March 9, 2020 (Wisconsin)] and the date of final judgment for more than seven days, 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.

With these adjustments, Defendant's concerns regarding ascertainability are moot.[7]

B. The Commonality Requirement of Rule 23(a) and the Predominance Requirement of Rule 23(b) Are Both Fully Satisfied

In the face of overwhelming common questions, Defendant presents a weak challenge to determining whether Defendant employs the putative class: that participants have had varied takeaways from their ARC experiences. Opp. at 36-37. Defendant ignores, however, that participants' experiences have *not* varied with respect to the core "deal" that forms the basis of their claims, as is reflected in Defendant's common policies and practices across the ARCs. *See* Mot. at 9. Notwithstanding indisputably common questions regarding employment status,

[7] In addition, Defendant makes a passing challenge on standing grounds. Opp. at 14. But the possibility of some class members lacking injury has no bearing on standing. Opp. at 14. In the Seventh Circuit, standing exists "as long as one member of a certified class has a plausible claim to have suffered damages." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *see also Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-85 (7th Cir. 2014) (rejecting argument that a judge must determine if all class members are injured as a basis for standing). This requirement is satisfied when a single named plaintiff has standing. *Kohen*, 571 F.3d at 677; *see also Montoya v. Jeffreys*, 99 F.4th 394, 399 (7th Cir. 2024) ("At least one named plaintiff must have standing for a class action to proceed."); *Fox v. Riverview Realty Partners*, 2014 WL 1613022, at *3 (N.D. Ill. Apr. 22, 2014) (refusing to deny class certification based on standing because "it is necessary in the Seventh Circuit only for one named class plaintiff to have standing for the class to be certified.").

Defendant lodges a litany of factually and legally erroneous arguments about individual class members' entitlement to remedies, dressed up as concerns regarding liability. While Defendant is correct that determining each class member's damages will require determining any food and lodging offset[8] and deduction for gratuity against the minimum wage owed, Plaintiffs' experts have already used Defendant's records to: (1) calculate the weekly offset for food and lodging and deduction for gratuity for each ARC for each year of the class period, which does not exceed weekly minimum wages owed; and (2) demonstrate that each class member's minimum wages owed can be calculated easily using a consistent formula.

1. The Salvation Army Carries Out its Policies and Practices with Respect to Participants on a Uniform Basis

Plaintiffs contend that Defendant employs ARC participants and violates the FLSA and Michigan, Illinois, and Wisconsin state wage laws by failing to pay participants the minimum wage for all hours that participants work in support of The Salvation Army's massive thrift store business. For purposes of the commonality element, Plaintiffs need only *one* key common question. *E.g.*, *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 381 (7th Cir. 2015) ("[C]ommonality as to every issue is not required for class certification.").

Defendant admits, both in its Motion for Summary Judgment *and* its instant Opposition, the bedrock fact that it imposes "common policies applicable to all ARCs and Beneficiaries." Opp. at 30; *id.* at 27 (arguing its "common policies" provide it a win on the common legal question of employment status); Dkt. 260, Mem. of Law in Supp. of Def.'s Mot. for Summ. J. at 31 ("An objective evaluation of . . . facts, which include *basic policies and practices applicable to all* and undisputed by Plaintiffs, reflects a rehabilitation program, not employment." (emphasis added));

[8] The food and housing offset does not apply in Michigan, as there is no food and housing credit under Michigan law. *See generally* Mich. Compiled Laws Ch. 408.

Dkt. 261, Def.'s SOMF 19 ("The ARC Command ensures that all ARCs in the Central Territory operate consistent with [The Salvation Army] policies and procedures for the ARC program, including those set forth in the Greenbook[.]"). One such policy is requiring putative class members to work without receiving minimum wage. Dkt. 278, SOAMF 5, 8; *see also* Dkt. 278, RSOMF 14, 45; *see* Opp. at 29 (discussing Defendant's "stated national policy requiring . . . work therapy"). That "uniform employment practice" alone "provide[s] the commonality needed for a class action." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011).

Plaintiffs likewise satisfy Rule 23(b)'s predominance requirement. "To gauge whether a class action would be more efficient than individual suits, [t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 607 (7th Cir. 2021) (with marks omitted, quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49 at 195-96 (5th ed. 2012))).

Here, Plaintiffs have identified numerous common factual questions, all of which are *critical* to the resolution of this litigation. *See id.* at 33-43; *see also* Dkt. 274, Pls.' Mem. in Opp. to Mot. for Summ. J. at 20-22 (discussing the relevant legal standard). These common issues include, but are not limited to: (1) whether Defendant requires, as a condition for enrolling in an ARC, that an individual be able to work full-time for The Salvation Army; (2) whether Defendant provides by policy a set of benefits—including lodging, food, rehabilitation services, and gratuity—to all ARC participants while enrolled in the program; (3) whether The Salvation Army requires ARC participants to work full-time in its work therapy program for access to those benefits; (4) whether The Salvation Army gains a financial advantage over any competitors from

the labor that ARC participants provide; (5) whether The Salvation Army pays ARC participants the applicable minimum wage for all hours worked; and (6) whether The Salvation Army benefits from the labor ARC participants provide. *See* Mot. at 30-31. These questions can be answered with a common body of evidence, such as:

- The deal—40 hours weekly of menial work in support of The Salvation Army's thrift store business in exchange for housing, food, in-kind benefits, and gratuity—is established by Territory-wide policy and is the same for all class members (Mot. at 36-37);
- Defendant requires all ARC participants to sign the same documents upon admission to an ARC (*id*. at 37);
- Defendant's policy empowers it to discharge ARC participants who refuse or become unable (due to injury or sickness) to work or who do not meet its performance standards (*id*.);
- Defendant prescribes the same menial duties across the ARCs for each "work therapy" position (*id*. at 39);
- For the first 30 days of the program, Defendant prohibits ARC participants from leaving the ARC for any reason (*id*. at 42);
- For the duration of the participants' enrollment, Defendant prohibits them from working for any entity other than The Salvation Army (*id*.); and
- Defendant forbids all ARC participants from even applying for post-ARC employment until they have nearly completed the ARC program (*id.*).

Predominance is not determined "simply by counting noses," *i.e.*, are there more common questions than individualized ones, but is a "qualitative rather than a quantitative concept." *Parko*, 739 F.3d at 1085. Here, the common evidence, and the class- and collective-wide resolution it would allow, will "substantially advance the case." *Riffey v. Rauner*, 873 F.3d 558, 565 (7th Cir. 2017) (citation omitted), *cert. granted, judgment vacated on other grounds*, 138 S. Ct. 2708 (2018).

Rather than dispute the existence of the common questions, or evidence common to the class that will drive their resolution, Defendant claims that this robust shared proof is hampered

by the fact that ARC participants have different "subjective" experiences of value from the ARC. Opp. at 9, 33. The cursory treatment Defendant gives to this argument is perhaps unsurprising, given that in moving for summary judgment, Defendant conceded—indeed, repeatedly asserted—that the relevant legal analysis was one of objective reasonableness, not tied to ARC participants' personalized experiences. Dkt. 260 at 2 (urging "[a]n *objective* analysis of the undisputed facts" to conclude participants are not employees, and stating that participants' "*subjective* experiences" do not give rise to disputed facts (emphases added)); *id.* at 31 (advocating "[a]n [*o*]*bjective* [e]valuation" of employment status under the FLSA (emphasis added)); *id.* at 32 (also seeking "[a]n *objective* evaluation" of Defendant's admitted "control" over participants (emphasis added)); *id.* at 43 (discussing whether continued expectation of compensation was "*objectively* unreasonable" (emphasis added)); *id.* at 51 (again discouraging a finding that "[*s*]*ubjective* [e]xperiences" create a disputed fact on the primary beneficiary question (emphasis added)). Defendant's articulation at summary judgment of the legal standard is correct as a matter of law. *See* Mot. at 34-36, 38 (citing case law); Dkt. 274 at 22, 28, 34, 42 (same). Regardless, Defendant cannot have it both ways, discounting negative experiences but crediting positive ones.

Relatedly, Defendant argues that the Court should deny class certification because Plaintiffs rely on anecdotal evidence. Opp. at 35-36. But these references to plaintiff testimony simply confirms how Defendant's class- and collective-wide policies and procedures play out in practice. *See, e.g.*, *Zollicoffer v. Gold Std. Baking, Inc.*, 335 F.R.D. 126, 156-57 (N.D. Ill. Mar. 31, 2020) (holding that plaintiffs' "persuasive anecdotal evidence establishing a discriminatory policy" was, with other evidence, sufficient to establish commonality); *Eagle v. Vee Pak, Inc.*, 343 F.R.D. 552, 573 (N.D. Ill. 2023) ("[F]irst-hand accounts about [a] policy's contents and implementation would, if true, allow a jury to find a policy existed[.]"); *cf. Int'l Bhd. of Teamsters*

v. United States, 431 U.S. 324, 339 (1977) (discussing how individual plaintiffs' testimony can bring other evidence "convincingly to life"). Defendant quibbles with how many examples Plaintiffs cite for various propositions.[9] Opp. at 28-29. But this bean-counting is meaningless; plaintiffs are allowed to rely on representative discovery. Anecdotal examples, of which there are plenty, meaningfully confirm, without conflicting with, Defendant's common policies. *Cf. E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988) ("We do not agree that examples of individual instances of discrimination must be numerous to be meaningful.").

Defendant's support for its argument against anecdotal evidence is limited to two irrelevant out-of-circuit district court cases. Opp. at 29. The plaintiffs in *Pichardo v. Boston Post Food Corp.* rested their entire commonality argument on nothing more than three declarations, two of which were essentially identical. 2025 WL 1122531, at *3 (S.D.N.Y. Apr. 16, 2025). Plaintiffs here have amassed a record consisting of clear, common policies *and* testimony from high-level officials at The Salvation Army and dozens of participants, all of which is consistent with Defendant's policies and show that participants' experiences at the ARCs were similar in all meaningful respects. Mot. at 2-27. *Darling v. Dignity Health, Dignity Community Care* is likewise inapposite. 2022 WL 1601408, at *8 (N.D. Cal. Apr. 26, 2022). The plaintiffs in that case failed to produce "any evidence regarding the number and location of the class members," such that the court had no way

[9] Defendant also cursorily points out that Plaintiffs did not present representative testimony from participants who attended Michigan ARCs about their expectations of work and being able to stay in the program. Opp. at 28 n.21. While there is no requirement to present anecdotal evidence for each state where there is abundant common evidence, Plaintiffs also have testimony from Michigan participants in spades. *See, e.g.*, Mot. Ex. 148, Deposition of James Peters 56:16-23 (Michigan Named Plaintiff testifying that "if you was unable to work, . . . you wasn't able to stay there"); *id.* at 79:3-5 (people in Michigan ARC who did not work well "got to go"); Mot. Ex. 149, Deposition of Thomas Bryant 176:14-21 (Michigan Named Plaintiff testifying that "everybody knew and understood that if you didn't work, you weren't allowed to be there"); *id.* at 110:7-17 (a Salvation Army employee told him "if you can't work, you can't be here"); Mot. Ex. 63, Deposition of Richard Peer 62:17-20 (Michigan participant testifying about how people who "couldn't work consistently . . . were shown the door").

to know whether the anecdotal evidence was confirmation that common questions existed because it had no way to know the bounds of the class itself. 2022 WL 1601408, at *8. No such concerns exist here.

On the flip side, Defendant attempts its *own* use of anecdotal evidence by invoking a small handful of examples where, on very few occasions during their enrollment, participants worked fewer than 40 hours per week. *See* Opp. at 36-37. However, these few exceptions mostly from the COVID-19 pandemic are too slender a reed to defeat commonality. Defendant misleadingly cites to the delay in starting work, or quarantine after contracting COVID-19, as purported examples of the variability of the 40-hour policy. But this situational exception was not the rule. In short, Defendant's anecdotal citations do nothing to undermine its clear 40-hour work policy. *See* Mot. at 5-6 (aggregating citations that participants must work 40 hours per week); Dkt. 278, SOAMF 5, 47.

2. Calculations of Work Time and Offsets Are Easily Determined from Defendant's Records

Defendant argues that "complex" individualized calculations regarding whether class members worked while at an ARC, how much they worked, and whether the offset—the value of food and housing—to class members' owed wages exceeds the amount of those wages, will predominate over common issues. Opp. at 15, 19-24. Defendant is wrong. The calculation of when and how much class members worked is straightforward math from Defendant's own records, done with a consistent formula for everyone. The food and housing offset contemplated under the FLSA 3(m) regulation, and its Wisconsin and Illinois analogues, and deductions for gratuity are similarly straightforward; indeed, both Plaintiffs' and Defendant's experts have already done these calculations. These are the only set of credits to which Defendant is entitled. It may *not* receive, as it contends, any so-called "equitable offset," Opp. at 20-21, a concept that would turn the

employer-employee relationship on its head if applied in this, or any, minimum wage case. Overall, the need for the type of simple individualized calculations anticipated here does not defeat class certification.

a. Questions Regarding Whether and How Much Participants Worked Are Easily Answered Using Defendant's Records

Plaintiffs' modified proposed class definitions already exclude individuals who did not work, based on Defendant's representation that participants start their work assignments by their eighth day of enrollment. *See supra* at II.A.2. Therefore, every participant who remains in the class—*i.e.,* has enrolled in the program for more than 7 days—performed at least some work for The Salvation Army.

The calculation of how *many* hours each participant worked is straightforward. *See* Mot. at 45. Defendant maintains computerized enrollment records for each participant across all ARCs in the Central Territory; these records show each participant's dates of entry into and exit out of the program and the number of days the participant was enrolled in the ARC ("enrollment data"). *See* Mot. Ex. 142, Suppl. George Rebuttal Report at 21; Dkt. 269-4, Exs. A-F (showing enrollment data for participants in Michigan, Illinois, and Wisconsin). Defendant itself relies upon this data, effectively conceding its reliability. Opp. at 24; Dkt. 269-4, Greisman Decl. ¶¶ 3, 5, 10, 12, 14. Once participants begin working, the record is overwhelming that they will work 40 hours per week for The Salvation Army. *See* Mot. at 5-6; Dkt. 278, SOAMF 5, 47; Mot. Ex. 142, Suppl. George Rebuttal Report at 27 n.27. These data allow for the easy determination of full and partial weeks of work, which then only need to be multiplied by hours worked within the week.[10]

[10] Although not necessary given the veracity of the enrollment data, Plaintiffs' expert also offers an alternative method to calculate hours worked, through Defendant's Gratuity Tracking Reports, which show the number of hours that each participant worked in a given workweek. *See* Dkt. 278-1, Woo Decl. in Opp. to Mot. Summ. J., Ex. D (attaching single, combined Gratuity Tracking Report for the 55 Named and Opt-In

The need for simple individualized calculations such as these cannot defeat class certification. *See, e.g.*, *Beaton*, 907 F.3d at 1029-30 (even with respect to liability, "not every issue must be amenable to common resolution; individual inquiries may be required after the class phase"); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) ("Neither Rule 23 nor any gloss that decided cases have added to it requires that every question be common. It is routine in class actions to have a final phase in which individualized proof must be submitted."). That conclusion is especially so here, where the exclusion of participants who were enrolled for seven or fewer days from the class will reduce the proportion of unharmed class members to nearly zero—a far cry from Defendant's projection of 24-38%, Opp. at 20 n.15, 24. *See Kohen*, 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct . . . . Such a possibility or indeed inevitability does not preclude class certification."). While having "a great many" uninjured class members may give courts pause, *see id.*, Plaintiffs' modified class

Plaintiffs who completed discovery). Defendant is incorrect that the potential presence of errors in the Gratuity Tracking Report means it cannot be used. Opp. at 22-23. There is no "authority demanding perfection before data may be relied upon for class certification." *Espinal v. Bob's Disc. Furniture, LLC*, 2023 WL 869394, at *7 (D.N.J. Jan. 26, 2023). When a defendant has failed to maintain accurate records—even if "the lack of accurate records grows out of a bona fide mistake"—the entity does not get the benefit of not paying due compensation because of it. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *Barragan v. Evanger's Dog & Cat Food Co.*, 259 F.R.D. 330, 334 n.3 (N.D. Ill. 2009) ("The possibility that some of the payroll records may be inaccurate does not preclude certification."); *Espinal*, 2023 WL 869394, at *7 (allowing plaintiffs to rely on data from defendant regarding truck drivers even though the data showed instances where a "'delivery team traveled 190.2 miles in 1.5 hours,' . . . '[a] delivery team completed 15 deliveries in 19 seconds,' or . . . the total recorded duration of a route was zero minutes"); *see also supra* at II.A.1.

With respect to the above cited declaration, the March 28, 2025 Declaration of Linda Woo appended to Plaintiffs' Motion was unsigned in error due to the software used to prepare the document for filing. *See* Opp. at 8 n.4 (citing Ex. 151 to Mot.). The signed declaration, which is identical in content, was submitted with Plaintiffs' Opposition to Defendant's Motion for Summary Judgment. Dkt. 279-2. With respect to Ex. D, the publicly filed version of this document cuts off data, including that individuals worked "40" (not "0") hours per week. Plaintiffs request that the Court refer to the complete version of Ex. D filed under seal at Dkt. 278-1.

definitions eliminate the need to even question what the precise tipping point might be.[11] *See Lacy v. Cook Cnty.*, 897 F.3d 847, 864 (7th Cir. 2018).

Accordingly, the individualized inquiries necessary to determine class members' hours worked will not overwhelm the substantial common issues in the case.

b. Defendant Is Only Entitled to a 3(m) Credit, Not a Concocted "Equitable Offset" Inapplicable to Minimum Wage Claims

As Defendant acknowledges, the FLSA recognizes a credit in certain circumstances for the reasonable cost or fair value, whichever is lower, of "board, lodging, or other facilities." Opp. at 31, 40 (citing 29 U.S.C. § 203(m)); 29 C.F.R. § 531.3(c). While Defendant unsurprisingly argues for a broad construction of the encompassed credits, the regulation cuts off such interpretation. "Other facilities," as defined in the Code of Federal Regulations, "must be something like board or lodging." 29 C.F.R. § 531.32 (providing examples, such as meals furnished in a cafeteria and dormitory rooms); *see also Shultz v. Hinojosa*, 432 F.2d 259, 267 (5th Cir. 1970) ("[A]s used in the statute, the words 'other facilities' are to be considered as being in pari materia with the preceding words 'board and lodging.'"). Likewise, Wisconsin and Illinois law provide allowances only for meals and lodging. *See* Ill. Admin. Code tit. 56, § 210.200 (referring to "meals and lodging")[12]; Wis. Stat. Ann. § 104.035 (same). And the Wisconsin statute narrows the scope of the offset even further by capping the lodging credit to $58 per week (or $8.30 per day) and the meal

[11] Even without amendments to the definitions, Defendant's authority in this discussion, Opp. at 19-20, bear little resemblance to instant case. *See supra* at 9-10.

[12] As to the Illinois law, Defendant asserts that its inclusion of the "reasonable cost" of meals and lodging is an example of how "offsets require[] consideration of different criteria" than food and housing. Opp. at 32 (citing Ill. Admin. Code tit. 56, § 210.200). This is a broad overreach. As "neither the [Illinois] statute nor . . . case law" provide explicit guidance on calculating this offset, courts interpreting Illinois's meal and lodging credit turn to the FLSA standard for guidance. *Monson v. Marie's Best Pizza, Inc.*, 2014 WL 2855860, at *6 (Ill. Ct. App. June 20, 2014); *see also Morgan v. SpeakEasy, LLC*, 625 F. Supp. 2d 632, 655 (N.D. Ill. 2007) (interpreting offsets under Illinois Minimum Wage Law and offsets under FLSA in tandem).

credit to a maximum of $87 per week (or $4.15 per meal). Wis. Stat. Ann. § 104.035. There is no food and housing credit under Michigan law. *See generally* Mich. Compiled Laws § 408.931-45*; see also* Opp. at 31 (conceding, by omission, that there is no offset under Michigan law). Gratuity also "offsets" wages owed by The Salvation Army, as it constitutes cash payment for hours worked. *See* Mot. at 22-24 (describing Defendant's gratuity policy and practice across the class period).

Defendant tries to fabricate individualized inquiries by claiming an entitlement to the irrelevant concept of an "equitable offset," in *addition* to the legally authorized board and lodging offset, to the present case. Opp. at 19-24, 31-34. Without citation to a single authority to support its position, Defendant claims for its "equitable offset" a vast variety of purported benefits that participants may have obtained while at an ARC, such as "skills developed," future gains in health and employment, and improved connections with family. Opp. at 21-22, 31-33. Unsurprisingly, Defendant does not—and cannot—demonstrate how this defense has been applied in a minimum wage lawsuit or situations in which a Court has offset an employee's wages because their employer provided "improved physical and mental safety" or improved "connections . . . with family, friends and community," as Defendant claims. Opp. at 33. Necessarily, Defendant argues, to value some of those benefits would require fact-intensive individualized inquiries into participants' pre- and post-ARC circumstances. *Id*. at 34. The Court should reject this nonsensical conjecture, which is entirely inconsistent with the language and purpose of the minimum wage laws. And as discussed below, there is common evidence for the only credits and deductions available to Defendant: those for food, housing, and gratuity. *See infra* at II.B.2(c)).

While Plaintiffs may only guess as to what "equitable offset" is, given Defendant's brief is silent on how this term is applied in the minimum wage context, in general, the "equitable offset"

defense (sometimes known as the "equitable setoff" defense) "allows entities that owe each other money to apply their mutual debts against each other[.]" *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995). The defense is a "device that facilitates the efficient reconciliation of competing claims between the same parties." 80 C.J.S. Set-off and Counterclaim § 7. On its face, the defense has no application to the instant case. Defendant has not presented any evidence that ARC participants do, or could, owe it money for the items for which it now claims an offset. To the contrary, The Salvation Army touts the ARC as a "no cost" program. Mot. Ex. 20 at 0315496 (May 2024 Program Instruction Manual). Nor did Defendant deduct any of its purported offsets from its acknowledged employees' minimum wage, even though Defendant admitted any minimum wage job was likely to confer the same benefits as "work therapy." Mot. Ex. 4, Polsley Dep. 124:18-23 (acknowledged employees receive minimum wage); *id.* at 126:24-127:8 (participants are likely to receive the same benefits of "work therapy" from any minimum wage job); *see also* Ex. 11, CENT_TSA_0008909 at 8916 (SEMI ARC policy requiring former ARC participants who are hired by the thrift stores and remain living at the ARC to attend classes); Ex. 12, CENTPLTFS000259 (Opt-In Plaintiff's SEMI ARC thrift store paystubs from time as an acknowledged employee, showing no deductions); *see also* Mot. at 19 (paid employees and ARC participants were often doing the same work).

When asked about the definition of "equitable offset," Defendant's expert Dr. Valentin Estevez—whom Defendant charged with determining which individual pre- and post-ARC circumstances should be part of its proposed offset—stated that it referred vaguely to various "benefits" received by ARC participants such as "improvement in . . . socioeconomic outcome[s]" and "the cost of acquiring [rehabilitative] services." Ex. 10, Deposition of Valentin Estevez, Ph.D. ("Estevez Dep.") 215:15-24, 218:7-18, 222:7-22. Dr. Estevez admitted that his understanding of

the concept came entirely from conversations with Defendant's counsel and "what the words sound like." *Id.* at 216:1-3. None of the benefits that Dr. Estevez includes in his purported calculations of equitable offset fall under the legal definition of the defense. *See* Mot. Ex. 144, Suppl. Estevez Report at 9. As such, Dr. Estevez's conclusions on this topic are inadmissible, and Plaintiffs will seek permission from the Court to move to exclude his testimony and opinions.

The void of authority supporting Defendant's proposed "equitable offset" exists for good reason. Defendant's grounds for an offset would lead to absurd results, rocking the foundation of the minimum wage statutes. All jobs provide workers with some of the intangible, nonmonetary benefits for which Defendant claims it is entitled to an offset. Opp. at 34 (citing Mot. Ex. 144, Suppl. Estevez Report) (acknowledged by Defendant's own expert); Mot. Ex. 4, Polsley Dep. 126:24-127:8 (stating same). Following Defendant's reasoning, courts would have to give all employers a credit for the value of those benefits against the minimum wage owed to their employees. Permitting such an offset would be inconsistent with the statutes. The FLSA and state analogues provide only narrow grounds on which an employer can take a credit against the minimum wage, clearly to the exclusion of others. *See Me. Cmty. Health Options v. United States*, 590 U.S. 296, 314 (2020) (reiterating the statutory interpretation principle that "when Congress includes particular language in one section of a statute but omits it in another," courts presume that Congress "intended a difference in meaning" (quotation omitted)); *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health.").

Defendant's smattering of cases it cites in support of this argument, Opp. at 34, are uniformly distinguishable or are otherwise portrayed inaccurately. In both *Hawkins v. Securitas*

Sec. Servs. USA, Inc. and *Laverenz v. Pioneer Metal Finishing, LLC*, employees alleged that their employers failed to compensate them for all hours worked. 280 F.R.D. 388, 400 (N.D. Ill. 2011); 746 F. Supp. 3d 602, 619 (E.D. Wis. 2024). The "offsets" analyzed in those cases were not the sort of boundless, amorphous "equitable offset" that Defendant asserts is relevant here; rather, the "offsets" in those cases were simply instances in which the employers "paid . . . individual[s] for uninterrupted meal breaks that do not qualify as worktime," such that those paid hours could be credited against unpaid hours. *Hawkins*, 280 F.R.D. at 400; *see also Laverenz*, 746 F. Supp. 3d at 618-19. And in any case, the "offsets" in those cases were relevant for class certification only because assessing which workers used meal breaks, and which did not, required individualized evidence that the plaintiffs had failed to provide, which is not the case here. Defendant's nod to *Aboin v. IZ Cash Inc.* is no more helpful. 2021 WL 3616098, at *6 (S.D. Tex. June 29, 2021). That case contains no analysis whatsoever on the issue of offsets, aside from a single sentence of dictum that pertains only to wage deductions based on "loss or theft." *Id*. So too with *Marquis v. Sadeghian*, which does not even mention offsets or deductions and instead denied class certification because some putative plaintiffs were compensated via housing and some were compensated via a salary. 2021 WL 6621686, at *6 (E.D. Tex. Dec. 30, 2021). Such variations do not exist here. Finally, *Klick v. Cenikor Foundation* did nothing more than instruct the district court to consider whether an offset defense was relevant for the FLSA certification inquiry under the facts of that case (which is, of course, what this Court is doing right now). 94 F.4th 362, 373-74 (5th Cir. 2024). The Fifth Circuit made no statements of law with respect to offset defenses and FLSA certification. *Id.*

The Court should reject Defendant's wholly unsupported attempt to use an inapplicable doctrine of equitable offset to avail itself of credits for a variety of additional items.

c. Calculating Both Wages Owed and Any Applicable Offset Is Simple

All participants who worked for The Salvation Army could have been injured so long as any offset to which Defendant is entitled is of a lesser value than the wages The Salvation Army owed the person.[13] *See* Opp. at 20 n.15 (citing *Kohen* and conceding this point). According to Plaintiffs' experts' calculations, this is exactly the situation here for each workweek that a participant attended any ARC. The weekly offset for housing, food, and gratuity was less than the FLSA weekly minimum wage ($290 per week) at all ARCs for all fiscal years. Ex. 1, Freedman Decl. ¶ 2; Mot. Ex. 142, Suppl. George Rebuttal Report at 25, Table 7 (calculating housing and food credits and gratuity deductions). Given the federal minimum wage exceeds the offset, the higher Illinois minimum wage certainly does too.[14] Even Defendant's expert agrees (with the exception of one ARC in one fiscal year) that the weekly value of housing, food, and gratuity was less than the applicable weekly minimum wage for all fiscal years and ARCs in the class period. *See* Ex. 1, Freedman Decl. ¶¶ 9-10 (referencing Supplemental Estevez Report).

Calculation of wages owed after deducting gratuity and, for all but the Michigan class, any housing and food credit are straightforward and capable of being performed using Defendant's class-wide, streamlined data and expert testimony. The formula applied to determine the wages owed across an entire enrollment in the ARC for each participant would be as follows:

*(hours worked * minimum wage) – (enrollment days – 7 days) * (daily housing/food/gratuity credit)*

See Mot. Ex. 142, Suppl. George Rebuttal Report at 26-27.

[13] This applies to the collective, as well as the Illinois and Wisconsin classes. However, there is no food and housing credit under Michigan law. *See supra* at 22. The credit for gratuity should never exceed the minimum wages owed. Ex. 1, Freedman Decl. ¶ 4.

[14] According to Plaintiffs' expert's calculations, the daily and weekly costs for food and housing are below the statutorily set caps at all relevant time periods for the Wisconsin class. Mot. Ex. 142, Suppl. George Rebuttal Report at 25, Table 7.

Each component of this calculation is readily determinable. As discussed above, the enrollment data that both parties rely upon and, if needed, Defendant's Gratuity Tracking Reports, provide the data necessary to determine how much class members worked while enrolled. *See supra* at 19. And common evidence shows Defendant requires by policy and in reality that participants work 40 hours per week when enrolled in an ARC. *See supra* at 15, 18-19.[15]

The remaining elements of the formula are just as straightforward. The applicable minimum wage is set by law. And the value of any housing and food credit and gratuity paid can be, and has already been, easily calculated, as Plaintiffs' experts have credibly set forth.[16]

[15] While Defendant points to a handful of ARC participants who did not start working for The Salvation Army immediately upon enrolling in the ARC, Opp. at 23 n.17, 24, any concerns about when participants start working after they enroll are addressed by Plaintiffs' proposal to exclude the first seven days of each participant's enrollment from the calculation of hours worked, *see supra* at II.A.2. For all remaining class members whose enrollment exceeds seven days, even if the number of hours they worked in their first workweek is "dwarfed" by Defendant's offset, as Defendant claims, that only implicates their damages for one week.

[16] The calculations by Dr. Estevez are unreliable for a number of reasons. As one example, he attempts to calculate the value of the housing provided to ARC participants by using data from the U.S. Department of Housing and Urban Development for the average rental for an efficiency/studio unit in the markets in which the ARCs are located. Mot. Ex. 144, Suppl. Estevez Report at 8-9, 23-24; *id.*, Table 4. But in so doing, he assumes that each ARC participant is the sole occupant of an efficiency unit and therefore receives the full value of the unit. *See* Mot. Ex. 143, Dunec Rebuttal Report at 7-8. As explained by Plaintiffs' expert on rental valuation, that assumption makes no sense, as it is undisputed that all participants live in shared, dormitory-style housing, including some dormitories with as many as 32 beds in a single room. *Id.*; Dkt. 278, SOAMF 4. Moreover, whereas an efficiency unit has a private bathroom and kitchen, the ARCs have only shared bathrooms and do not provide participants with access to a kitchen. *See* Mot. Ex. 143, Dunec Rebuttal Report at 8.

As another example, Dr. Estevez presents calculations for the purported costs that The Salvation Army incurred to provide housing and food to participants. Mot. Ex. 144, Suppl. Estevez Report, Table 4. As Dr. Estevez admitted at his deposition, he simply regurgitated information from spreadsheets of costs created by Defendant, without verifying the information was accurate, confirming that the claimed costs were actually for housing or food, or conducting any analysis of his own. Ex. 10, Estevez Dep. 32:18-44:5. As Plaintiff's other expert explains, however, the spreadsheets upon which Estevez relied are filled with improper assumptions and errors not noted by Estevez. Mot. Ex. 142, Suppl. George Rebuttal Report at 6-8.

In light of these and other problems, Plaintiffs intend to move to exclude Estevez's credit calculations and other opinions. That said, because Estevez agrees that the food, housing, and gratuity credit can be calculated on a per-person-per-day-of-enrollment basis, it is not necessary for resolution of Plaintiffs' Motion for the Court to determine whether his credit calculations are admissible.

Regardless, although the parties present competing expert opinions regarding the amount of these credits, they agree that the credits can be calculated on a per-person-per-diem basis for each ARC for each fiscal year (October 1 to September 30). Mot. Ex. 144, Suppl. Estevez Report at 21-24, App. D, Tables 4-5; Mot. Ex. 145, Deposition of H. Bryan Callahan 79:6-16.

Once the factfinder establishes the value of the credit for each class year and particular ARC, all that will be necessary is to multiply that credit by the number of days each participant was enrolled minus seven. Overall, these simple calculations, which rest on data from Defendant and expert opinions, and which would have to occur in any case in which a housing and food credit were at issue, do not present any obstacle to class certification. *See* Mot. Ex. 142, Suppl. George Rebuttal Report at 26-27 (explaining simplicity of calculations).

Nevertheless, Defendant maintains that the Court cannot determine liability or damages without adjudicating individual claims. Opp. at 34-38. This argument unjustifiably portrays as unmanageable the inquiries into each class member's entitlement to damages that are routine to collective adjudication. *See Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 801 (7th Cir. 2013) ("It would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages.").[17] The formula for calculating each class member's remedies may show that a handful of participants are not entitled to any recovery because they did not work enough days at the ARC to exceed the offset to their wages. This small possibility, and one that

[17] The cases Defendant cites to the contrary are unavailing. Opp. at 38. This case does not present issues involving highly complex prevailing wages, like in *Murphy v. Professional Transportation, Inc.*, 2017 WL 5665901, at *8 (S.D. Ill. Nov. 27, 2017). And this Court need not delve into individualized determinations about Defendant's motivations, like in the hiring discrimination case *Little v. Washington Metropolitan Area Transit Authority*, where defendant's reason for not hiring each class member would need to be determined for liability. 249 F. Supp. 3d 394, 425 (D.D.C. 2017). Certainly, Plaintiffs have done more than the plaintiffs in *Langendorf v. Skinnygirl Cocktails, LLC*, who produced "no evidence" that the defendant had caused the complained-of harm on a class-wide basis. 306 F.R.D. 574, 583 (N.D. Ill. 2014) (Shah, J.). Defendant identifies no case that undercuts Plaintiffs' evidence that administering damages and offsets on a class- and collective-wide basis is feasible and manageable here.

will be readily discovered in these calculations, poses no impediment to class certification. *See Bell*, 800 F.3d at 380 (upholding certification of class that was likely to include class members who were not harmed by the defendant's overtime policy because they never worked beyond their 40-hour week).

As for damages, so long as the method of proving damages is tied directly to the alleged violations, *see Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), some individualized inquiries at the damages phase will not defeat class certification. The analysis is especially clean here where all damages inquiries about the duration of work, magnitude of the offset, and minimum wage can be resolved in a formulaic fashion using computerized data.

C. Class Treatment is Superior to Any Other Method of Adjudication

Contrary to Defendant's assertions, litigation of the common liability questions in this matter will not degenerate into "separate mini-trials."[18] Opp. at 38. As the primary liability determination for all class members will all rise or fall upon the question of whether, under the FLSA and state minimum wage laws, Defendant employed ARC participants, *see* Dkt. 274 at 21, a class action is the most efficient approach for adjudicating these claims.

Plaintiffs' two-phase trial plan is straightforward. Phase one determines the employment status question for all class and collective members. Should Plaintiffs prevail as to employment status, a streamlined phase two trial would follow, focusing on confirmation of class and collective membership and the allocation of monetary relief to class members (including any potential credits owed to Defendant). This type of bifurcated trial is used regularly in wage and hour class actions.

[18] Although Defendant conflates the inquiries of whether a class action is superior and whether class membership is ascertainable in its Opposition, Opp. at 38-39, Plaintiffs have presented ample authority showing their satisfaction of these two separate components of Rule 23 in the Motion and above. *See* Mot. at 29-30, 40; *see supra* at II.A.

See, e.g., *McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 876 (7th Cir. 2015) ("It is well established that, if a case requires determinations of individual issues of causation and damages, a court may 'bifurcate the case into a liability phase and a damages phase.'" (internal quotation omitted)); *Suchanek*, 764 F.3d at 756 ("It is routine in class actions to have a final phase in which individualized proof must be submitted."); *accord Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir. 2017).

Phase one of the trial will turn largely on Defendant's common policies and practices—which Plaintiffs can be prove through evidence applicable to the classes and collective as a whole, including: (1) Defendant's policies, procedures, and other documents; (2) testimony from Defendant's 30(b)(6) designees concerning its policies and practices; (3) expert testimony; and (4) anecdotal testimony of Named and Opt-In Plaintiffs.

A number of potential case management techniques are available to the Court that could be used in the stage two proceedings to compute the monetary relief owed to individual class and collective members—including the formulaic calculation of damages, *Teamsters* hearings, specials masters, and a claims process. During this phase two trial, class members have the initial burden to present evidence to establish their claims. *E.g.*, *Brandon v. 3PD, Inc.*, 2014 WL 11348985, at *2 (N.D. Ill. Oct. 20, 2014) (an "individual is entitled to be included in the class" "[t]o the extent that [he or she] can demonstrate that he or she" has class claims); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417-18 (N.D. Ill. 2012) (at claims administration process, plaintiffs would be required to show class membership through either documentary or testamentary evidence). The combined use of formulas (based on Defendant's own data) and a claims process presents a manageable approach that easily satisfies this standard. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458-59 (2016) (confirming that formulas

can be used in the class context). Indeed, Plaintiffs have already proposed a specific, straightforward formula using Defendant's data to establish the number of unpaid hours for each class member, including any potential offset. *See supra* at II.B.2(c). And as described above, any potential data issues with respect to Defendant's records regarding which participants are justice referred can be solved by individuals submitting simple affidavits.

To the extent Defendant views gaps in the evidence for any class members, it may then raise objections. *Mullins*, 795 F.3d at 671 ("As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected."); *Beaton*, 907 F.3d at 1030 ("[I]ndividualized inquiries could be handled through 'streamlined mechanisms' such as affidavits and proper auditing procedures . . . . Defendants' due process rights are not harmed by such case-management tools."); *G.M. Sign Inc. v. Stealth Sec. Sys., Inc.*, 2017 WL 3581160, at *3 (N.D. Ill. Aug. 18, 2017) ("[Defendant] will still have the opportunity at the damages phase to remove class members."). Such a procedure is easily manageable and commonly used in this Circuit.

D. Defendant's Arguments Against Typicality and Adequacy Fail

Defendant recycles its argument about some ARC participants lacking damages to assert that the Named Plaintiffs' claims are not typical, and ergo, that they are not adequate representatives. Opp. at 30. As explained, the existence of some ARC participants who may not be entitled to damages does not defeat certification. *See supra* at 28-29. Neither the typicality nor the adequacy prong requires identicality of damages. *See, e.g.*, *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996) ("Typical does not mean identical[.]"). And as already detailed, Defendant's reliance on *Oshana* to challenge the Named Plaintiffs' typicality and adequacy is unpersuasive. *See supra* at 9-10. Plaintiffs have established typicality and adequacy. *See* Mot. at 31-33.

E. Defendant Cannot Overcome Plaintiffs' Demonstration that Collective Certification Is Warranted

With respect to final certification of the FLSA collective claims, The Salvation Army merely refers back to its prior protestations that individualized issues exist with respect to liability and damages. Opp. at 39. For reasons stated above, those arguments fail under the more rigorous Rule 23 standard. *See supra* at II.B. Defendant's conclusory analysis is especially weak given that, as Defendant concedes, the FLSA standard is more lenient than Rule 23. *See* Opp. at 13, 22, 39. For the reasons articulated in Plaintiffs' Motion and above, the Court should certify the FLSA collective. *See* Mot. at 46-50.

The only cases Defendant cites in support of its argument against collective certification lack relevance here. Opp. at 39-40. As already discussed, *Klick* and *Laverenz* are distinguishable. *See supra* at 24-25. Further, *Laverenz* never stated that the existence of individualized offset defenses would, standing alone, warrant against certification. 746 F. Supp. 3d at 618-19. And *Solsol v. Scrub, Inc.* is wholly inapposite. 2017 WL 2285822, at *3 (N.D. Ill. May 23, 2017). That case resulted in decertification of the incorrect timekeeping claims, subject to *de minimis* affirmative defenses, of employees who worked in "a multitude of areas" in "several different capacities" with "disparit[ies] in [] job duties" and "varying practices relating to start times, meal breaks, and rounding." *Id.* at *3-7. These circumstances bear no resemblance. The FLSA collective should be finally certified.

III. CONCLUSION

For the reasons above, Plaintiffs' Motion for Class Certification and Final Certification of the Collective should be granted.

DATED: July 11, 2025

Respectfully submitted,

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