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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**
**URBANA DIVISION**

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| **MARTIN J. WALSH, Secretary of Labor, United States Department of Labor,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Case No. 21-CV-2225** |
| **LEE A. McDEVITT d/b/a MIDWEST HOME CARE,** | ) | |
| **Defendant.** | ) | |

# ORDER

Plaintiff, Martin J. Walsh, Secretary of Labor, United States Department of Labor, filed a Complaint alleging that Defendant, Lee A. McDevitt, d/b/a Midwest Home Care, committed multiple violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Specifically, Plaintiff alleged that Defendant and Midwest Home Care ("Midwest") violated Sections 206 (minimum wage), 207 (maximum hours/overtime), and 211 (record-keeping) of the FLSA. Plaintiff seeks back wages from a period spanning between October 8, 2018, and January 3, 2021 ("the investigation period"), liquidated damages in the same amount, and injunctive relief.

Presently before the court are Motions for Summary Judgment filed by each party. Defendant filed his Motion for Summary Judgment (#17) on September 29, 2022; Plaintiff filed his Response (#20) on October 20, 2022; and Defendant filed a Reply (#22)

on November 3, 2022. Plaintiff filed his Motion for Summary Judgment (#18) on September 30, 2022; Defendant filed his Response (#21) on October 21, 2022; and Plaintiff filed a Reply (#23) on November 4, 2022. For the reasons set forth below, Defendant's Motion for Summary Judgment (#17) is DENIED, and Plaintiff's Motion for Summary Judgment (#18) is GRANTED.

## BACKGROUND

The following background facts are taken from the parties' Undisputed Statements of Material Facts in their Motions for Summary Judgment, the parties' Additional Facts in their respective Responses, and the materials attached by the parties to their filings.

### Threshold Admissibility Issues

Before proceeding to the background facts, the court must address certain admissibility arguments raised by Defendant. Namely, Defendant contends that three affidavits relied upon by Plaintiff in his Undisputed Statement of Material Facts may not be relied upon at summary judgment.

*Heffner and Walton Declarations*

Plaintiff attached to his Motion for Summary Judgment declarations from two of Defendant's employees, Lori Heffner and Kala Walton.

Defendant objects to the use of the declarations on the grounds that Plaintiff failed to disclose either affiant in his disclosures under Federal Rule of Civil Procedure 26(a)(1). Moreover, Defendant argues, Plaintiff failed to produce the declarations in response to Defendant's request for production of witness statements. Defendant

asserts that Plaintiff's failure to disclose the witnesses and their statements until after the discovery deadline was prejudicial in that it prevented him from adequately preparing for them, and was not harmless.

Under Federal Rule of Civil Procedure 26(a)(1)(A)(i), a party is obligated to include in its initial disclosures to the opposing party "the name and, if known, the address and telephone number of each individual likely to have discoverable information[.]" "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Plaintiff asserts that he was entitled to withhold the names of Heffner and Walton in order to protect their identities pursuant to the informer's privilege.

In Plaintiff's initial disclosures, served on Defendant on December 6, 2021, Plaintiff averred that

> Defendant's present and former employees . . . are likely to possess general knowledge of their employment relationship with defendant, including but not limited to, their job duties and responsibilities, the clients they were assigned to, their schedules and hours worked (including but not limited to any interrupted sleep time), and the goods and/or materials they handled to carry out their jobs, as well as defendant's pay and timekeeping practices.

Plaintiff did not disclose any specific names of employees. Plaintiff noted multiple times in his disclosure that he was not waiving the informer's privilege.

The underlying concern of the informer's privilege "is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation." *Dole v. Loc. 1942, Int'l Bhd. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 372 (7th Cir. 1989). "The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance." *Id*. "In civil cases the privilege, which limits the right of disclosure usually called for by the Federal Rules of Civil Procedure, is arguably greater, since not all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants." *Id*. (cleaned up). A government party need not make any threshold showing of potential retaliation in order to invoke the privilege; rather, "the government is granted the privilege as of right." *Id*.

The informer's privilege is applicable to Heffner and Walton. By providing statements to the Department of Labor, they were unquestionably assisting the government in its investigation of Defendant. Plaintiff was therefore entitled to invoke the privilege as of right. *Id*. While the informer's privilege must yield in certain circumstances, the court notes that Defendant has made no such argument (nor, for that matter, *any* argument relating to the informer's privilege), despite that privilege having been raised by Plaintiff at least as early as December 6, 2021.

The court also finds that the nondisclosure of Heffner and Walton's names in discovery was harmless, such that a sanction of nonadmissibility under Rule 37(c)(1) would be inappropriate. See *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1363 (7th Cir. 1996) ("The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court.").

First, Plaintiff *did* disclose that Defendant's employees would have discoverable information, and Defendant must surely be aware of the identities of his past and present employees, such that he had ample opportunity to depose them.

More specifically, both Heffner and Walton were listed in an exhibit attached to the Complaint as among the 56 former and current employees to whom back pay was owed, further directing Defendant's attention to them.

Finally, and most importantly, the substance of the two declarations in question concerns the affiants' job responsibilities as well as Defendant's payroll and scheduling practices. While Defendant broadly asserts that he was unable "to adequately prepare" for the declarations, he fails to elaborate. The declarations contain only information of which Defendant would have been well aware, and precisely the type of information described in Plaintiff's initial disclosures, leaving the court unable to conclude that he suffered any particular prejudice.

Accordingly, the court finds that the declarations of Heffner and Walton will be considered at summary judgment.

*Svacina Affidavit*

Plaintiff also attached to his Motion for Summary Judgment an affidavit sworn by Todd Svacina, an investigator with the Wage and Hour Division of the Department of Labor. In the affidavit, signed on September 30, 2022, Svacina detailed the steps taken in the course of his investigation, including summaries of interviews with Defendant and certain employees of Midwest. The affidavit also sets out Svacina's method for calculating back wages.

Defendant contends that the Svacina affidavit "is inadmissible because it is not based on personal knowledge." He argues that the affidavit "is based on Svacina's review of documents and interviews with individuals" and therefore amounts to "inadmissible hearsay that cannot form the basis for a summary judgment affidavit."

Defendant has not specified which portions of Svacina's wide-ranging affidavit constitute hearsay. His reference to Svacina's "review of documents" suggests that Svacina's back wage calculations are somehow hearsay, or perhaps based on hearsay. But those calculations were based only on payroll records disclosed by Defendant and basic math. Defendant's argument on this point—if he is, in fact, intending to make such an argument—is not sufficiently developed for this court to address it. See *M.G. Skinner & Assocs. Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority.").

The portions of Svacina's affidavit in which he summarizes or excerpts his interviews with some Midwest employees would appear to be a more obvious basis for a hearsay objection. Indeed, the affidavit contains summaries of statements from nine current (at the time of the interview) employees of Defendant, detailing each employee's job responsibilities, work schedule, timekeeping, breaks, and sleep. Though Defendant's argument is undeveloped and unsupported by any *specific* legal citation on this point as well, the court will consider whether those excerpted statements are admissible for the truth of the matters asserted.

Under the Federal Rules of Evidence, a statement is not hearsay where it is offered against the opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). The statements to which Defendant appears to object were made by Defendant's employees, while they were employees, and related exclusively to their employment. Accordingly, the court finds that the statements of Defendant's employees relayed in the Svacina affidavit are not hearsay, under Federal Rule of Evidence 801(d)(2)(D). The affidavit is fully admissible at summary judgment.

**Midwest Home Care**

Defendant is the sole owner, proprietor, and president of Midwest. Defendant has owned and operated Midwest since 1991. Defendant manages the day-to-day operations of Midwest, including hiring and firing employees, setting pay rates, and supervising employees. John Bollinger is Midwest's office manager, and assists with

timekeeping and payroll. Midwest's annual dollar volume of sales exceeded $500,000 in each year from 2018 through 2021.

*Caregivers' Duties*

Midwest is a home services agency. Midwest's employees, also known as caregivers, provide assisted living services to a number of clients. Approximately 75% of clients receive services 24 hours per day, 7 days per week. Midwest is licensed to operate as a home services agency by the Illinois Department of Health. The Illinois Home Health, Home Services, and Nursing Home Code states that "Home Services" or "Home Care Services" are "based upon assisting the client in meeting the demands of living independently and maintaining a personal residence, such as companionship, cleaning, laundry, shopping, meal preparation, dressing, and bathing." Ill. Admin. Code tit. 77, § 245.20

When asked at his deposition what the home services license allowed Midwest to do, Defendant responded:

> It is considered non-medical. We can assist the clients with activities of daily living, meal preparation, housekeeping, assistance with hygiene.
>
> We can do -- we can remind them to take -- our clients to take their medicine. You know, we can even -- we can remind them. We can show them where it is at. We can't touch the medicine in any way. But then we can chart when they take their medicine. Our caregivers can write that down so it is charted.
>
> Oh gosh. It involves -- it varies from client to client. Dressing with some of them. We have a -- we have a lady now who is bedfast, and it requires some -- we have to give her a sponge bath. It is different from a person that can get in a shower. They have to use bed checks and Depends to keep her clean and dry. It is hygiene.

A two-page document entitled "Midwest Home Care Caregiver Competency Evaluation" lists the potential job responsibilities of a caregiver. Included in the list are cleaning (defined as "light housekeeping to ensure a clean, safe, and healthy environment"), laundry, shopping, and meal preparation. A number of hygienic items are included on the list, including haircare, mouthcare, and shaving. The top item on the list is "Companionship," followed by the description: "services that provide fellowship, care and protection for a client who . . . cannot care for his/her own needs."

Defendant agreed that the document could be characterized as a job description for caregivers, but pointed out that not every client requires each service included in the list. He testified that the document is "part of the application package so the person that is applying to work knows what the job responsibilities are."

Defendant agreed that caregivers would use soap, mops, vacuums, and the like in performing their duties. He noted however, that all such items would be provided by the client, rather than by Midwest. Caregivers tracked and reported the various tasks they would complete in a shift.

Heffner stated in her declaration that in her role as caregiver she assists clients "with their daily life functions and/or personal needs," including "preparing meals, light housekeeping, [and] placing grocery orders." Heffner further stated: "For example, I often ordered Starkist tuna fish and prepared tuna fish sandwiches for one of my clients."

Walton stated in her declaration that she assists clients with "anything they needed done, including grocery shopping, cooking meal, housekeeping/cleaning, [and] driving them to appointments," among other tasks. Walton added: "For example, I went to Sam's Club to buy food products such as Gatorade, Powerade, and Ensure for one of my clients."

In the interviews excerpted in Svacina's affidavit, caregivers reported cooking, cleaning, doing laundry, running errands, and helping with personal hygiene. One caregiver estimated that they spent 60% of their time "doing things like meal prep, mopping, laundry, etc."

Defendant testified that around 2007 Midwest changed from a placement agency to a home services agency. "The big difference," he explained, "is as a home services agency the caregivers are employees of the company." When Midwest was a placement agency, "the client employed the caregivers and paid [Midwest] a fee."

*Shifts, Scheduling, and Sleep*

Caregivers are obligated to stay with the client through the entirety of their shift. They may not, for instance, leave the client's home to take a lunch break. Defendant testified that the amount of sleep a caregiver could get would vary from client to client and shift to shift. A caregiver for one client may get nine hours of uninterrupted sleep, while another may only get four hours. There was no designated sleep period for Midwest caregivers, as the timing and duration of sleep would vary depending on the client's needs. Midwest did not keep track of caregivers' sleep hours or sleep interruptions.

Caregiver shifts usually run from 9:00 am to 9:00 am the next day. Most caregivers work two or three such shifts per week. Caregivers did not fill out time cards or time sheets. Rather, they would "text in their time" to Defendant or Bollinger after they worked. As Defendant explained it: "Sometimes they'll just say 'I worked Monday and Tuesday this week.' It is usually about that simple." Caregivers would not relay the precises times at which they started or stopped work, or the periods of time in which they slept.

Defendant did not believe it was necessary to require caregivers to report their precise start and stop times. He believed that if a caregiver was late to their shift, he would "hear about it" from the caregiver who was being relieved.

Prior to January 4, 2021, Midwest paid caregivers a "set rate per day," with rates generally ranging from $190 to $210 per shift/day. Defendant explained that the rates could vary with the "difficulty" of the client. Midwest did not pay an overtime premium during that time.

Defendant further testified that "there have been many of our jobs that caregivers do, in fact, get eight hours sleep." The following exchange ensued at Defendant's deposition:

> [Counsel]: was Midwest Home Care paying caregivers for 16 hours of work in that 24-hour shift? Is that how you viewed it?
>
> [Defendant]: No, not really. It didn't really matter too much how we viewed it. What it came down to is, you know, you are there for 24 hours. You sleep part of that time. Here is the daily rate.
>
> [Counsel]: So you weren't – sorry. You weren't deducting sleep time --

[Defendant]: No

[Counsel]: In order to come up with the daily rate?

[Defendant]: No.

Beginning on January 4, 2021, Midwest began paying caregivers on an hourly basis. A 24-hour shift would be counted as 20 hours, to account for caregivers' sleep. The four-hour sleep credit was based off a Department of Labor audit that concluded caregivers were getting 4.5 hours of sleep per 24-hour shift, on average. Also beginning on January 4, 2021, caregivers were paid at a time-and-a-half rate for any hours worked above 40 in a week. Midwest also began tracking hours based on a Monday-through-Sunday workweek; previously, it had not tracked hours based on a workweek. Midwest still does not track the precise start, stop, or sleep times of its caregivers.

Heffner began working for Midwest in August 2020. She noted in her declaration that she was paid for 20 hours of work after a 24-hour shift (presumably referring to shifts after January 4, 2021), regardless of whether she slept or not. Walton stated that she "typically only got two hours of sleep at a time," because clients would wake up in the middle of the night and needed to be tended to. She further stated that she had never "had any discussion with Midwest Home Care about sleep time during a shift," and had never been asked to track sleep time or sleep interruptions.

Walton noted that she was not completely relieved of duty while she ate meals during her shift; rather, she would eat with the client and would sometimes have to feed them. Walton also stated that there were occasions when the next caregiver would arrive to a client's home late, or not at all, such that she did not get off work at her

scheduled time. Walton, who worked as a caregiver exclusively in 2020, also stated that "Midwest Home Care did not address sleep time with me when I was hired." She slept when the client slept, and "typically only got two hours of sleep at a time."

Caregivers whose interviews were excerpted in Svacina's affidavit reported varying amounts of uninterrupted sleep. Some got eight hours, or five to six hours, while others estimated that they got four hours of uninterrupted sleep, while still others reported that they only got one or two total hours of sleep in a 24-hour shift. The interviewed caregivers reported that there were no breaks for meals, because of the need to remain with the client.

Defendant testified that at some point in 2007 or 2008 he learned that it was legal to pay his employees a daily rate, rather than an hourly rate, and that he did not have to pay overtime. Specifically, he testified: "the person that was doing my accounting at that time looked up some of the laws concerning that and advised me it was -- that was fine. That that was a legal way to do it." From that time through 2018, Defendant did not seek out any professional advice from an accountant or attorney as to how he should pay the caregivers. He did not review any materials published by the Department of Labor or otherwise take any steps to keep abreast of developments in the law or to ascertain his obligations to the caregivers.

**ANALYSIS**

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling

on a motion for summary judgment, a district court is tasked with deciding, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Summary judgment is appropriate only where the evidence is such that no reasonable jury could return a verdict in the nonmovant's favor. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

In making this determination, the court must construe the evidence in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). In other words, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the court's favor toward the nonmoving party does not extend to drawing inferences that are only supported by speculation or conjecture. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 401 (7th Cir. 2008).

I. Applicability of the FLSA to Defendant

Plaintiff asserts that the FLSA's minimum wage, overtime, and recordkeeping provisions apply to Defendant through two separate avenues. First, Plaintiff argues that FLSA coverage is extended to Defendant's employees by Section 202(a) of the FLSA, which explicitly states that "Congress further finds that the employment of persons in domestic service in households affects commerce." 29 U.S.C. § 202(a). Second, Plaintiff contends that Defendant is an "enterprise engaged in commerce," as defined in Section 203(s), and is thus subject to the mandates of the FLSA.

Defendant disputes that he is subject to the various requirements of the FLSA. First, he takes exception to Plaintiff's reading of Section 202(a) as broadly extending FLSA coverage to all domestic workers. Defendant maintains that Plaintiff's interpretation of that subsection would run afoul of the Commerce Clause. Second, Defendant argues that Midwest does not meet the definition of an "enterprise engaged in commerce."

It is well settled that where an issue can be resolved without reaching federal constitutional issues, a court should do so. *E.g.*, *Triple G Landfills, Inc. v. Board of Commissioners of Fountain County*, 774 F.Supp. 528, 531 (S.D. Ind. 1991) ("[T]he federal courts pursue a policy of not reaching federal constitutional issues when a case can be decided on other grounds[.]"); *Indiana Port Commision v. Bethlehem Steel Corp*., 835 F.2d 1207, 1210 (7th Cir. 1987) ("We avoid deciding constitutional questions if the case may be disposed of on other grounds presented."). Accordingly, the court will begin by addressing the parties' dispute over whether Midwest is an enterprise engaged in commerce, as it does not require resolution of any constitutional question.

**Enterprise Engaged in Commerce**

Section 203(s)(1) of the FLSA reads, in relevant part, as follows:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—
>
> (A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

> (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000[.]

The minimum wage (29 U.S.C. § 206(b)) and maximum hour (*id*. § 207(a)) provisions of the FLSA are expressly made applicable to enterprises engaged in commerce. The recordkeeping (*id*. § 211(c)) requirement is applicable to "[e]very employer subject to any provision of this chapter."

Most of the constituent elements of an "enterprise engaged in commerce" are not in dispute here. Defendant does not dispute that Midwest is an "enterprise" (as defined in 29 U.S.C. § 203(r)), or that Midwest's annual gross volume of business done exceeds $500,000. Plaintiff, meanwhile, does not argue that Midwest's employees are themselves engaged in commerce or the production of goods for commerce.

The entire dispute boils down to the so-called "handling clause" of Section 203(s)(1)(A)(i). In other words, Midwest is an enterprise engaged in commerce if, and only if, its employees handle "goods or materials that have been moved in or produced for commerce by any person."

*Interstate Commerce and the Items in Question*

The FLSA defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). Accordingly, it is settled that "[t]he plain meaning of the handling clause is that it only applies to 'goods' or 'materials' that have been subject to *interstate* commerce." *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1221 (11th Cir. 2010) (emphasis in original).

The record at summary judgment establishes that Midwest caregivers engage in such activities as laundry, housework, bathing, meal preparation, and shopping on behalf of their clients. These facts are not in dispute. Nor is there any disagreement between the parties that these activities necessarily entail handling of a variety of items, with "laundry soap, bleach, and dishwashing soap" and food items, such as Starkist tuna, being frequently cited as examples in the parties' briefs.[1] See 29 C.F.R. § 552.99 ("[E]mployees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce[.]").

It is somewhat less clear whether Defendant concedes that these items (or at least some of them) moved in interstate commerce before being handled by Midwest caregivers. Importantly, Defendant never raises an argument that these items were not products of interstate commerce, or that Plaintiff has failed to prove as much. Rather, Defendant's sole argument is that that they do not meet the definition of goods or materials.

Yet, Defendant at least seems to *allude* to a greater dispute is his response to Plaintiff's undisputed statement of material fact no. 10. That fact states: "These food and household products were manufactured outside of Illinois and traveled in interstate commerce. For example, StarKist tuna is manufactured primarily in American Samoa

[1] Other items, such as employees' vehicles and cellular phones are cited at times by Plaintiff, but are subject to particularized disputes by Defendant. For now, the court need not resolve those disputes.

and then distributed throughout the United States." Following the fact is a citation to the FAQ page of the Starkist website, which shows that its tuna is primarily produced in American Samoa, Ecuador, and Senegal, with some also produced in Thailand. See https://starkist.com/faq#:%7E:text=All%20our%20tuna%20is%20wild,products%20are%20manufactured%20in%20Thailand (last accessed February 2, 2023).

Defendant's response to Plaintiff's fact no. 10 is: "This paragraph is not supported by admissible evidence." No further discussion follows, nor does any argument stemming from the denial.

The court presumes that Defendant's dispute is with the first sentence of Plaintiff's fact no. 10, which broadly states, without specific support, that any number of household and home products were manufactured outside of Illinois and shipped in interstate commerce. Plaintiff's narrower statement—that Starkist tuna is manufactured outside of the United States and thus, by implication, necessarily traveled in interstate commerce—is plainly supported by the Starkist website. If Defendant does take exception to Plaintiff's use of a website, he has not made that clear, let alone the actual legal basis for his dispute.

In *Martinez v. Manolos Tamales, Inc.*, 2015 WL 5144024, at *2 (N.D. Ill. Aug. 31, 2015), the court stated: "[I]t is a plausible inference that in the course of cooking and cleaning at tamale restaurants in Chicago, plaintiff handled goods that had moved in interstate commerce. (In fact, it seems *implausible* that she would *not* have handled any such goods.)" (Emphases in original). While that observation arose in the context of a motion to dismiss, the reasoning is no less applicable here. It is an undisputed fact that

Midwest caregivers regularly engage in activities such as laundry, housework, bathing, meal preparation, and shopping on behalf of their clients. On the face of this fact alone, it seems not just implausible, but quite nearly *impossible* that caregivers could conduct those tasks without ever handling any items that passed in interstate commerce. See, e.g., *Diaz v. Jaguar Rest. Grp., LLC*, 649 F. Supp. 2d 1343, 1347 (S.D. Fla. 2009) ("The most essential 'materials' required to operate a typical restaurant like this one have undoubtedly traveled in interstate or foreign commerce.").

Whether that inference—that Midwest caregivers handled items that passed in interstate commerce—is so compelling that it must be drawn against Defendant even at summary judgment need not be decided here. This is because Plaintiff has produced undisputed evidence that Starkist tuna, which Walton regularly purchased and used to make sandwiches for one of her clients, did travel in interstate commerce. Given the apparent abundance of items that Midwest caregivers must have used to carry out their numerous duties, the general unlikelihood that none of those items originated outside of Illinois, and the specific proof presented with respect to one often-used food item, no reasonable juror could conclude that Midwest caregivers did not regularly handle items that had moved in interstate commerce.

It remains to be determined if those "items" actually qualify as "goods or materials."

*Goods*

Under the FLSA,

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

29 U.S.C.A. § 203(i). Defendant argues that the items used by its employees—be they cleaning products or food items—are purchased, owned, and in the physical possession of the clients. Accordingly, he contends that they are in the actual physical possession of the ultimate consumer, and therefore not considered "goods" under the FLSA.[2]

In his Motion for Summary Judgment, Plaintiff asserts that the items in question qualify as both goods and materials. However, in his Response to Defendant's Motion for Summary Judgment, Plaintiff states: "Because [Plaintiff] has established Midwest caregivers handled 'materials,' it is unnecessary for him to show they also handled 'goods' or address Defendant's ultimate consumer argument." Thus, Plaintiff, at least at summary judgment, has elected to put all of his eggs in the "materials" basket.

[2] Defendant does not explain how items such as Gatorade, Powerade, or Ensure were in the "actual physical possession" of the client when Walton was purchasing them at Sam's Club, or how that would have been the case as to any of the cargeivers who shopped for their clients. But, since Plaintiff has elected not to pursue any dispute on the point, the court will not concern itself with the apparent gap in Defendant's argument.

*Materials*

Materials Defined

"Materials" is not defined in the FLSA. The Seventh Circuit has not had occasion to define the term or otherwise differentiate it from "goods." Accordingly, both parties turn to the Eleventh Circuit decision in *Polycarpe v. E & S Landscaping Service, Inc*., 616 F.3d 1217 (11th Cir. 2010) for the operative definition. See also *Gunn v. Stevens Sec. & Training Servs., Inc.*, 2018 WL 572512, at *2 (N.D. Ill. Jan. 26, 2018) ("Both parties rely on *Polycarpe v. E & S Landscaping Service, Inc*., which appears to be the only authority to analyze enterprise coverage under the 'handling clause' and discuss the difference between 'goods' and 'materials.'").

Following a discussion of potential plain meanings of the term, the *Polycarpe* court concluded: "the most accurate view of Congress's intent for the interplay between "goods" and 'materials' in the FLSA . . . is to read 'materials' in the FLSA this way: 'materials' in the FLSA *means tools or other articles necessary for doing or making something*." *Polycarpe*, 616 F.3d at 1223-24 (emphasis added). Notably, the *Polycarpe* court observed that its proposed definition was supported by legislative history reports, which cited "the soap used by a laundry" as an example of a material, and an example that fit squarely within the court's "tools or other articles necessary for doing . . . something" definition. *Id*. at 1224-25 (citing S. Rep. No. 93-690, at 17 (1974)).

Settling on a plain meaning for "materials," however, was only the first step for the *Polycarpe* court. The court observed that the phrase "or materials" was added to the handling clause in a 1974 amendment to the FLSA. *Id.* at 1220-21 (citing Fair Labor

Standards Amendments of 1974, Pub.L. 93-259, 88 Stat. 55). Citing the use of the disjunctive—"*or* materials"—the *Polycarpe* court opined that Congress necessarily intended for goods and materials to have separate definitions, and that the ultimate consumer exception does not apply to materials. *Id*. at 1222. Thus, the court wrote:

> [A]s we determine the correct understanding of the word "materials" within the handling clause, we disfavor any construction that would cause an overlap with the definition of "goods"; we do not presume that Congress has by implication overruled a portion of the preexisting "goods" definition or the important ultimate-consumer exception that is part of that definition.

*Id*. at 1223.

Because of the necessary statutory difference between "goods" and "materials," the court found that "actually applying the FLSA requires a further step of determining . . . whether a given item actually counts as 'goods' or 'materials' (it could also count as neither)." *Id*. The court found that the distinction was largely context-dependent, concluding: "Whether an item counts as 'materials' will depend on two things: 1) whether, in the context of its use, the item fits within the ordinary definition of 'materials' under the FLSA and 2) whether the item is being used commercially in the employer's business." *Id*. at 1225-26.

The *Polycarpe* court illustrated the first of those requirements with a hypothetical:

> Depending on how they are used, china dinner plates that are produced out of state, for instance, could count as either "goods" or "materials." Where a catering business uses the china plates at a client's banquet, the plates count as part of the "materials" necessary for serving a catered meal. But, where a department store sells the same china plates as stand-alone items, the plates count as "goods" for that retailer.

*Id*. at 1226.

As to the second requirement, the court opined that "for an item to count as 'materials' it must have a significant connection with the employer's commercial activity; the business may not just somehow internally and incidentally consume the item." *Id*. In support of this requirement, the court cited to Department of Labor regulations, which establish that the "handling" under the handling clause must occur "regularly and recurrently." 29 C.F.R. § 779.238. Added the court: "[W]e believe Congress is addressing the routine of a business, not isolated or exceptional moments." *Id*. at 1226 n.7. The court returned to its hypothetical to further illustrate the "significant connection" requirement:

> Returning to our example of china dinner plates that are produced out of state, for a caterer that uses the china plates while providing catering services, the plates count as "materials" because they have a significant connection to the business's commercial activity of catering. But for an accounting firm that uses the same china plates as objects of decoration mounted on its lobby wall, the china plates cannot count as "materials" because the plates have no significant connection to the business's accounting work.

*Id*. at 1226. The court thus concluded:

> For the purposes of the FLSA's handling clause, an item will count as "materials" if it accords with the definition of "materials"—tools or other articles necessary for doing or making something—in the context of its use and if the employer has employees "handling, selling, or otherwise working on" the item for the employer's commercial (not just any) purposes.

*Id*. at 1227.

To be sure, the Eleventh Circuit's decision in *Polycarpe* is not binding on this court. However, the reasoning in *Polycarpe* has been endorsed in whole by the Sixth Circuit (*Secretary of Labor v. Timberline S., LLC*, 925 F.3d 838, 848 (6th Cir. 2019)), and has been applied in this circuit as well (see *Gunn*, 2018 WL 572512, at *2). Those courts

found as this court does: that the exhaustive analysis in *Polycarpe* is well-reasoned and persuasive. No less important is the fact that the parties here agree that *Polycarpe* should be applied. The court therefore adopts the reasoning and construction of the FLSA set forth in *Polycarpe*.[3]

*Application to the Instant Case*

While the parties agree on the legal standard (i.e., the requirements of the FLSA with respect to the "materials" question), a factual dispute arises as to whether Midwest caregivers actually handled materials.

Plaintiff asserts that certain items handled by Midwest employees qualify as materials because they are articles necessary for doing or making something: tuna is used to make tuna sandwiches, laundry soap is used to do laundry, etc.
For his part, Defendant does not actually dispute that Midwest caregivers used items that meet that plain definition of "materials." Instead, he contends that the use of those items does not satisfy the contextual inquiry set forth in *Polycarpe*. Specifically, Defendant asserts that the caregivers' handling of these items has no significant connection to Midwest's commercial activity. To wit, Defendant argues: "In the context of Defendant's business, which is to provide protective oversight to those who need it

[3] With one minor note: the court agrees that the FLSA requires that any materials handled (or goods, for that matter), must "have a significant connection with the employer's commercial purpose," rather than merely being handled incidentally. *Polycarpe*, 616 F.3d at 1226. However, it seems clear, even from *Polycarpe*'s own analysis, that this particular requirement arises under the definition of "handling, selling, or otherwise working on," (29 U.S.C. § 203(s)(1)(A)(i)), rather than the definition of "materials" itself. See *Timberline*, 925 F.3d at 848 (suggesting the same). With that said, the precise origin of the requirement makes no tangible difference in this case.

because of age or infirmity, the employees' using soap, food, medicine, or vehicles, is an incidental part of their protective oversight functions." Elsewhere, Defendant insists that "Defendant's employees primarily provide companionship and incidentally handle the client's own goods, such as cleaning materials and food."

Plaintiff characterizes Defendant's argument as "disingenuous." He points out that Midwest's own job description lists cleaning, laundry, shopping, and meal preparation among the listed responsibilities, and that Midwest required its employees to track their completion of such tasks.

Thus, at long last, the court turns to the factual dispute between the parties: whether Midwest's caregivers' handling of items such as laundry detergent, soap, and food had "significant connection" with Midwest's commercial activity, or, on the other hand, the use of those items was merely "incidental." When cross motions for summary judgment have been filed, this court must review the record construing all inferences in favor of the party against whom the motion under consideration is made. See *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 818 (7th Cir. 2008). So, when the court evaluates Defendant's summary judgment motion, Plaintiff gets the benefit of reasonable inferences; conversely, when evaluating Plaintiff's filing, the court gives Defendant the benefit of the doubt. See *Indiana Rail Road Company v. Illinois Commerce Commission*, 576 F.Supp.3d 571, 572-73 (N.D. Ill. 2021).

Even when the evidence of record is construed in the light most favorable to Defendant, it is clear that no reasonable trier of fact could conclude that the handling of items such as laundry detergent, soap, and food had anything less than a significant connection to Midwest's commercial activity.

Defendant's insistence that the primary role of Midwest's caregivers is that of "protective oversight" or "companionship" is simply not supported by the record. Even when Defendant himself was asked to describe the work of the caregivers, he stated: "We can assist the clients with activities of daily living, meal preparation, housekeeping, assistance with hygiene." Furthermore, the list of job responsibilities in the "Midwest Home Care Caregiver Competency Evaluation" included cleaning (defined as "light housekeeping to ensure a clean, safe, and healthy environment"), laundry, shopping, meal preparation, and myriad hygienic tasks, such as haircare, mouthcare, and shaving. Indeed, many of the caregivers who provided declarations or whose interviews were excerpted in the Svacina affidavit listed such tasks as among their regular duties. Even the Illinois Administrative Code states that tasks such as cleaning, laundry, shopping, and meal preparation are central to the work of a home services agency. Ill. Admin. Code tit. 77, § 245.20. And all of these tasks require the regular use of materials: food preparation requires food and ingredients, bathing requires soap and shampoo, housekeeping requires any number of products, including laundry soap.

It is true that the first item on the "Midwest Home Care Caregiver Competency Evaluation" is "Companionship," which is described as "services that provide fellowship, care and protection for a client who . . . cannot care for his/her own needs." But there is no particular indication that the Competency Evaluation has listed the duties in descending order of importance. Even if companionship and protection could be characterized as the "primary" duties of a caregiver—again, a conclusion not supported by the record—it does not follow that each of the other numerous duties carried out by a caregiver are merely "incidental." On the contrary, the tasks in question were fundamentally central to the role of the caregiver, in a way that decorative china plates in an accounting firm are not. See *Polycarpe*, 616 F.3d at 1226.

The undisputed evidence shows that Midwest caregivers "regularly and recurrently" conducted tasks for their clients that would require the handling of materials that traveled in interstate commerce. 29 C.F.R. § 779.238. These were not "isolated or sporadic" instances of handling such materials. *Id*.

Finally, Defendant repeatedly references the fact that Midwest did not purchase or provide any of the materials in question, ostensibly in support of his argument that the handling of those materials by the caregivers was incidental. However, the FLSA makes no indication that only materials provided by the employer will qualify under the handling clause, and Defendant has otherwise provided no explanation (let alone supportive caselaw) as to why this fact is relevant.

In sum, Midwest caregivers simply could not complete their core job responsibilities or fulfill their integral obligations to their clients without regularly and frequently handling materials that have passed through interstate commerce. No reasonable juror could find that the handling of those materials had anything less than a significant connection to Midwest's commercial activity. See *Polycarpe*, 616 F.3d at 1226. The court therefore finds that no genuine dispute of material fact exists as to whether Defendant is an "enterprise engaged in commerce." The court finds that the requirements of that Act, including those alleged to have been violated in this case, *do* apply to Defendant. Because the sole basis of Defendant's Motion for Summary Judgment was his argument that the FLSA did not apply to Midwest, that Motion (#17) is DENIED.

II. Violations

**Recordkeeping**

Section 211(c) of the FLSA requires that "[e]very employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him[.]" 29 U.S.C. § 211(c). The records must include each employee's total daily and weekly hours worked, regular rates of pay, total daily or weekly straight time earnings, and total overtime earnings per workweek. 29 C.F.R. § 516.2(a)(1)-(12); see also *Solis v. El Matador, Inc.*, 2011 WL 1671561, at *5 (C.D. Ill. May 3, 2011) (finding FLSA recordkeeping violation where employer "failed to maintain accurate records of hours worked for all employees").

Defendant conceded that Midwest did not comport with these recordkeeping requirements. During the investigation period, Midwest did not track or record an employee's regular rate of pay, nor did it even distinguish between weekly straight time and overtime earnings. Midwest's scheduling practices did not contemplate any kind of workweek, and precise start and stop times have never been recorded. While Midwest's records beginning on January 4, 2021, contemplate a workweek and overtime pay, they do not track employee's precise hours worked. Nor does Midwest track the hours of sleep a caregiver received on any given shift.

Defendant does not directly address this failure of recordkeeping in his Response. While he argues that he could not have violated § 211(c) because it, and the FLSA in general, do not apply to Midwest, he otherwise makes no contention that Midwest's recordkeeping was compliant. Defendant has therefore conceded the point. "The general rule in the Seventh Circuit is that a party's failure to respond to an opposing party's argument implies concession." *Cintora v. Downey*, 2010 WL 786014, at *4 (C.D. Ill. Mar. 4, 2010) (cleaned up); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument ... results in waiver," and "silence leaves us to conclude" a concession). The court therefore finds that Midwest's recordkeeping practices were in violation of the FLSA's requirements during the investigation period under § 211(c) and remain so.

**Overtime**

Section 207(a)(1) of the FLSA mandates that no employer subject to the Act "shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Employers who do not pay on an hourly basis are still required to pay overtime and must compute overtime on the basis of the hourly rate derived therefrom. See 29 C.F.R. § 778.109 ("The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek.")

Defendant admitted in his deposition that, prior to January 4, 2021, Midwest did not pay overtime. The court therefore finds that Midwest was in violation of Section 207 during the investigation period.[4]

A separate dispute arises regarding Midwest's ability to claim a sleep credit against the caregivers' hours, that is, reduce compensated hours based on time spent sleeping. This issue is relevant in determining the amount of back wages owed for overtime and minimum wage violations during the investigation period. It is also

[4] Defendant argues that he did not violate Section 207 because the FLSA does not apply to Midwest. This argument has already been rejected.

relevant in the present, as Midwest currently reduces caregivers' pay by a four-hour sleep credit. While Plaintiff does not seek any back wages after January 4, 2021, Defendant's present compliance with the FLSA is relevant to Plaintiff's request for injunctive relief.

"Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period . . . from hours worked[.]" 29 C.F.R. § 785.22(a). However, unless there is an "expressed or implied agreement to the contrary," any periods of time spent sleeping or eating must be counted as time worked. *Id*.

Aside from the requirement for an agreement between employer and employee, a number of other exacting standards must be met in order for a sleep time credit to apply. First, "adequate sleeping facilities" must be "furnished by the employer." *Id*. Further, it must be the case that "the employee can usually enjoy an uninterrupted night's sleep." *Id*. Specifically, the Code of Federal Regulations states:

> If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

29 C.F.R. § 785.22(b).

In his deposition, Defendant admitted to a number of facts demonstrating that Midwest was ineligible to claim a sleep credit against the caregivers' time. First, Defendant conceded that the setting of the daily rate (prior to January 4, 2021) did not contemplate an actual deduction for sleep time, thus eliminating the possibility of there having been any sort of express or implied agreement for such a deduction. This was further reflected by the statements of Walton and Heffner, who indicated that they never had any discussions with Midwest about sleep time.

Defendant also made clear in his deposition that Midwest, not the client, was the caregiver's employer, such that it could not be said that when caregivers did sleep, they did so in facilities furnished by their employer. It was also made clear that Midwest caregivers did not have a "regularly scheduled sleeping period." Rather, any sleeping periods would have been contingent on the needs (and sleeping patterns) of the client.

Finally, Defendant conceded that—both during the investigation period and after—Midwest did not track caregivers' sleep time or interruptions. This would make it impossible for Midwest to properly apply the sleep credit based on the stringent requirements set forth above. See *Walsh v. Saline Cnty. Ambulance Serv., Inc.*, 2022 WL 2305681, at *3 (S.D. Ill. June 27, 2022) (discussing employer's failure to track sleep time and sleep interruptions).

Defendant's counterargument actually appears in a separate section of his Response, where he asserts: "The Secretary has not established that [Defendant] is not entitled to a sleep credit." In support, Defendant insists that "The Secretary relied

exclusively on the Heffner and Walton Declarations . . . to establish that the sleep credit is not applicable." Defendant concludes: "[I]n the absence of admissible evidence otherwise, Defendant should be credited with" five hours of sleep credit in back wage calculations.

Initially, Plaintiff's argument that Midwest did not qualify for a sleep credit with respect to its caregivers is not "exclusively" based on the Heffner and Walton declarations. Rather, as discussed, it is largely based on Defendant's own admissions in his deposition. Furthermore, the court has found that the Heffner and Walton declarations, including their statements regarding sleep, *are* admissible. Accordingly, the court finds that Midwest is not entitled to claim a sleep credit during the investigation period because there was no agreement on that topic, express or implied between employer and employee. The court further finds that Midwest's present practice of not tracking sleep time or sleep interruptions similarly renders it unable to claim a sleep credit.

**Minimum Wage**

Section 206 of the FLSA requires employers to pay their employees wages at least equal to the federal minimum wage ($7.25 per hour). 29 U.S.C. § 206(a)(C). Plaintiff asserts that as a result of Defendant's pay practices, he failed to pay 18 employees the minimum wage because the lump sum they received, divided by hours worked, did not cover the federal minimum wage. Plaintiff concludes that, in total, Defendant's pay practices resulted in $3973.08 in minimum wage back wages owed.

In Response, Defendant again only argues that the FLSA does not apply to Midwest, an argument already rejected by the court. Defendant's silence as to the substance of Plaintiff's argument amounts to a concession. *Cintora*, 2010 WL 786014, at *4. The court also notes that Plaintiff's calculation of $3973.08 in minimum wage back wages owed is supported by his Exhibit 15 (#25-2), calculating back wages owed, and Svacina's affidavit explaining his methodology, both of which will be discussed in more detail in the section below. Accordingly, the court finds that Defendant violated the minimum wage provisions of the FLSA.

III. Back Wage Calculations

In Exhibit 15,[5] Svacina calculated that Defendant owes $562,388.93 in back wages, primarily from overtime violations, but also, as discussed immediately above, from minimum wage violations.

*Svacina's Methodology*

Svacina explained that he calculated back wages from a period beginning on October 8, 2018, and ending with the work week beginning on December 28, 2020—the last work week before Midwest changed its payroll practices. Svacina's calculations were based on schedule and payment records provided by Midwest.

[5] Plaintiff's original Exhibit 15 contained a transcription error that resulted in a back wages calculation approximately $20,000 greater. Defendant raised no objection to Plaintiff's Motion to Correct the Exhibit (#25), which the court granted.

Svacina's methodology was straightforward. He began by calculating the numbers of hours worked by each employee in a Monday-to-Sunday workweek. For 24-hour shifts, this meant multiplying the number of shifts in the week by 24. Svacina did not deduct time for sleep, because Defendant did not even purport to do so when setting the shift rate during that period.

Svacina then divided the hours worked by the gross pay for the week to determine an employee's regular rate of pay.[6] Svacina multiplied that rate by the hours worked in the work week. Svacina then multiplied the number of hours over 40 worked in that week by half the regular rate, adding that total to the first total. The result was the statutory amount owed to the employee. Where that amount was higher than the amount actually paid to the employee, the discrepancy represented the back wages owed.[7]

Svacina provided as an example one employee's work week in October 2020. The employee worked three 24-hours shifts that week and was paid $520. Because that rate of pay ($7.22) was less than required, the then state minimum wage of $10/hour was

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[6] Svacina noted that where the resulting regular rate was below Illinois minimum wage, that minimum wage was substituted as the proper regular rate. See 29 C.F.R. § 778.5 ("Where a higher minimum wage than that set in the [FLSA] is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the [FLSA], cannot be lower than such applicable minimum, for the words 'regular rate at which he is employed' as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.").

[7] Where a certain employee's regular rate (prior to the Illinois minimum wage adjustment) fell below the federal minimum wage of $7.25 per hour, Svacina was able to calculate what portion of back wages stemmed from minimum wage violations and what portion stemmed from overtime violations.

used as the regular rate. Seventy-two hours times $10 was $720, to which was added half-rate pay ($5) for the 32 hours of overtime ($160), resulting in a statutory amount owed of $880. As the employee was paid only $520, the back wages owed for that week was $360. Svacina noted that he could not base his calculations on precise start and stop times, because—as discussed above—Midwest did not keep records of that information.

Svacina conducted those calculations for 69 Midwest employees who worked between October 8, 2018, through January 3, 2021. Each set of calculations appears in Exhibit 15, which is subdivided by employee, and includes the hours or shifts worked by each employee and the amount they were paid. The total back wages owed by Defendant, as calculated by Svacina, is $562,388.93.

*Defendant's Objection*

Defendant argues that the unpaid compensation was improperly calculated. He points out that in Svacina's original report, tendered as part of Plaintiff's Rule 26 disclosures, Svacina credited Defendant with five hours of sleep time per 24-hour shift. The resulting calculations, in that original report, showed back wages owed in the amount of $291,095.60. Defendant argues that Plaintiff failed to update its disclosed back wage calculations, and that he may not now rely upon the new calculations, pursuant to Rule 37(c).

Federal Rule of Civil Procedure 26 requires a party to disclose, inter alia, "a computation of each category of damages claimed by the disclosing party[.]" Fed. R. Civ. P. 26(a)(1)(A)(iii). Further, Rule 26(e)(1)(A) requires that a party supplement its 26(a) disclosures in a timely manner "if the party learns that in some material respect

the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Plaintiff asserts that the removal of the sleep credit from the back wages calculation was necessitated by evidence that came to light in the course of discovery. Specifically, Plaintiff points to Defendant's deposition testimony, in which he admitted that his shift rates prior to January 4, 2021, did not contemplate sleep time credit. Because one of the requirements for the sleep credit is an agreement between the employer and the employee, and Defendant effectively conceded that there was no such agreement, it followed that application of five hours of sleep credit during the investigation period was inappropriate.

The court observes that Defendant's deposition was held on August 17, 2022. The updated back wages calculations, no longer applying a five-hour sleep credit, were first provided to Defendant on September 30, 2022, upon the filing of Plaintiff's Motion for Summary Judgment. Thus, 44 days elapsed between the deposition and Plaintiff's corrected disclosure. Accounting for the time necessary to review and analyze the deposition itself and for Svacina to recalculate back wages without sleep credit, the court cannot find that Plaintiff failed to update his disclosures "in a timely manner." Fed. R. Civ. P. 26(e)(1)(A).

Even if Plaintiff's supplementation was deemed untimely, the timing of the supplementation was "substantially justified"—for the reasons just stated—such that the inadmissibility of the new calculations would be an inappropriate sanction under

Federal Rule of Civil Procedure 37(c)(1). Likewise, the "late" supplementation would have been harmless. See *id*. Defendant does not dispute the actual math of Svacina's calculations. The "new" portion of those calculations is simply the removal of the sleep credit, which presents a legal point that Defendant attacks in his Response. It is not clear what Defendant would have, or could have, done differently if Svacina's new calculations had been disclosed slightly sooner. See *Malik v. Falcon Holdings, LLC*, 2011 WL 6841532, at *4 (N.D. Ill. Dec. 29, 2011).

"When an employee offers evidence sufficient to establish . . . that he was improperly compensated under the FLSA and the amount of work performed, the burden shifts to the employer to come forward . . . with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." *Reich v. Scherer Buick Co*., 887 F. Supp. 1142, 1146 (C.D. Ill. 1995) (citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687-88 (1946)). Svacina's calculations of back wages owed by Defendant are reasonably based on Defendant's own records, FLSA requirements, and simple math. Defendant has not produced, or even suggested, evidence that would tend to negate those computations. Accordingly, the court finds that Defendant is liable for $562,388.93 in back wages.

IV. Liquidated Damages

"Any employer who violates the provisions of section 206 or section 207 of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The

FLSA "makes liquidated damages mandatory unless the district court finds that the defendant-employer was acting in good faith and reasonably believed that its conduct was consistent with the law." *Shea v. Galaxie Lumber & Const. Co.*, 152 F.3d 729, 733 (7th Cir. 1998) (citing 29 U.S.C. § 260)).

The employer seeking to avoid liquidated damages bears the burden of proving both good faith and reasonable belief. *Id*. While a decision as to liquidated damages is a matter of the district court's discretion, the Seventh Circuit has cautioned that "that discretion must be exercised consistently with the strong presumption under the statute in favor of doubling." *Id*. To establish good faith, an employer must show that he took affirmative steps to determine his FLSA obligations. *Williams v. Merle Pharmacy, Inc*., 2017 WL 3705802, at *8 (C.D. Ill. Aug. 28, 2017).

Defendant makes no argument that his actions were objectively reasonable or that he acted in good faith. He only argues that he cannot be liable for liquidated damages because the FLSA does not apply to Midwest. At risk of being repetitive, the court has already rejected that argument.

Given the strong presumption in favor of liquidated damages in an amount equal to back wages owed, and the fact that the burden is on Defendant to prove that he should be excepted, Defendant's failure to raise any actual argument is sufficient for the court to find that amount of liquidated damages appropriate here. The court nevertheless notes that it can discern nothing particularly reasonable in Defendant's failure to accurately record his employees' hours worked, or to pay a shift rate that comported with state or federal minimum wages, among other things. Nor does the

record reflect that Defendant took the appropriate steps to determine his obligations under FLSA, such that he could be said to have acted in good faith. On the contrary, the record shows that Defendant made one such effort in 2007 or 2008, then never apparently inquired again.

Accordingly, the court finds that Defendant is liable for liquidated damages in the amount of $562,388.93, equal to the amount of back wages owed to his employees. See 29 U.S.C. § 216(b).

V. Injunction

Under Section 217 of the FLSA, a district court has jurisdiction to enjoin future violations of the FLSA in suits brought by the Secretary of Labor. 29 U.S.C. §§ 211, 217; see also *Heitmann v. City of Chicago, Ill.*, 560 F.3d 642, 644 (7th Cir. 2009). In this case, Plaintiff seeks an injunction to ensure Defendant's future compliance with the FLSA.

Where violations of the FLSA have been established "and there are insufficient assurances that [d]efendants will comply with the FLSA in the future, an injunction is appropriate." *Solis v. Int'l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 754 (N.D. Ill. 2011). While current compliance with the FLSA is a relevant factor, compliance alone is not a sufficient basis for denying injunctive relief. *Id.* (citing *Herman v. Brewah Cab, Inc.*, 992 F.Supp. 1054, 1060 (E.D. Wis. 1998) (granting injunction to restrain future FLSA violations even though defendant was currently in compliance with FLSA).

Of course, Defendant is *not* currently in compliance with the FLSA. Even after commencement of a Department of Labor investigation and this suit, Midwest still does not track its caregivers' hours worked with precision. Furthermore, Midwest continues

to reduce caregivers' hours worked by four hours per shift, despite not taking any steps to track sleep time or interruptions. This does little to assure that court that Defendant will comply with the FLSA in the future. See *Perez v. Super Maid*, LLC, 55 F. Supp. 3d 1065, 1080 (N.D. Ill. 2014) ("In view of the defendants' recalcitrance even after the Department of Labor investigated the defendants and advised them that their maids were employees, their failure to maintain and produce reliable records, and their generally inadequate and reluctant compliance with their obligations in litigating this case, the Court has no basis to believe that the defendants will comply with their future obligations under FLSA without an injunction.").

It is also notable that Defendant makes no argument as to why he is likely to comply with the FLSA in the future, let alone offer evidence of as much; nor does he otherwise argue that an injunction would be inappropriate.[8] A defendant's failure to make such assurances is regularly cited as a basis for issuing an injunction. See *Int'l Detective*, 819 F. Supp. 2d at 755 ("Defendants offer no mitigating facts demonstrating their commitment to following the FLSA. That is, Defendants present no Rule 56.1 facts or legal argument showing any indication that there is a reasonable likelihood that they will comply with the FLSA. This is the type of scenario where an injunction is appropriate[.]"); *Super Maid, LLC*, 55 F. Supp. 3d at 1080-81 ("[Defendants] offer no mitigating factors or assurances, therefore the Court grants the Secretary's request for an injunction.").

[8] That is, other than his argument that this court cannot issue such an injunction, because the FLSA does not apply to Midwest.

Accordingly, the court finds an injunction appropriate in this case. Defendant is hereby enjoined from violating the Fair Labor Standards Act.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion for Summary Judgment (#17) is DENIED.

(2) Plaintiff's Motion for Summary Judgment (#18) is GRANTED.

(3) Judgment is entered in favor of Plaintiff and against Defendant for $1,124,777.86, comprised of $562,388.93 for back wages and $562,388.93 in liquidated damages.

(4) Defendant is enjoined from violating the Fair Labor Standards Act.

(5) This case is terminated.

ENTERED this 7th day of February, 2023.

s/Colin Stirling Bruce
COLIN S. BRUCE
U.S. DISTRICT JUDGE