No. 15-1074

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS E. PEREZ, SECRETARY OF LABOR,
Plaintiff-Appellee,

v.

CONTINGENT CARE, LLC; ENDLESS POSSIBILITIES, LLC;
and WOLFGANG J. SHIELDS
Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Missouri

BRIEF OF PLAINTIFF-APPELLEE

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SUMMARY OF THE CASE

Contingent Care, LLC, Endless Possibilities, LLC, and Wolfgang Shields (collectively "Contingent Care") employ workers to care for and teach young children at a Kansas City, Missouri facility. In 2010, Investigator Deann Alvarado of the Wage and Hour Division, U.S. Department of Labor, began investigating whether Contingent Care paid its employees in compliance with the requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA" or "Act").

Investigator Alvarado discovered that Contingent Care, which qualifies as a preschool covered by the Act, had violated the FLSA in several ways. Using records provided by Contingent Care—which were neither complete nor entirely accurate, in violation of the FLSA's recordkeeping provisions—Investigator Alvarado painstakingly reconstructed employees' hours worked and wages owed, concluding that Contingent Care had violated the Act's minimum wage and overtime provisions. She determined the amounts of backwages Contingent Care owed its employees with detailed workweek-by-workweek calculations made necessary by Contingent Care's obfuscatory payment system.

On the basis of these findings, the Secretary of Labor filed suit against Contingent Care. After a two-day trial, the District Court for the Western District of Missouri agreed that Contingent Care had violated the FLSA and awarded Contingent Care's employees $92,402.35 in backwages. Because Contingent

Care's challenges to the district court's conclusions are legally incorrect and mischaracterize the careful calculations on which the backwage award is based, the district court's order should be affirmed.

Oral argument is not necessary in this case because the district court's opinion contains no legal error and is fully supported by the evidence and testimony presented at trial.

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STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that a facility that provides care to children younger than school age is properly classified as a "preschool" for purposes of FLSA coverage under 29 U.S.C. 203(s)(1)(B). *Reich v. Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191 (6th Cir. 1994); *United States v. Elledge*, 614 F.2d 247 (10th Cir. 1980).

2. Whether, if the issue is not deemed waived because it was conceded before the district court and argued for the first time on appeal, the professional exemption from FLSA requirements for "teacher[s] in elementary or secondary schools" created by 29 U.S.C. 213(a)(1) applies to employees of a preschool if the facility is not an "educational institution" because it is not licensed under the state's educational system. 29 C.F.R. 541.303(a); 29 C.F.R. 541.204(b).

3. Whether the district court correctly awarded backwages for violations of the FLSA's minimum wage and overtime compensation provisions in amounts the Wage and Hour Division calculated based on the employer's records, including careful reconstruction of hours worked made necessary by the employer's obfuscatory payment practices, or based on reasonable inferences where the employer did not provide records. 29 U.S.C. 206(a), 207(a); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Holaway v. Stratasys, Inc.*, 771 F.3d 1057 (8th Cir. 2014); *Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

STATEMENT OF THE CASE

A. Facts

Contingent Care provides custodial care and educational services to young children at its facility in Kansas City, Missouri. District Court Order ("Order") at 1, 6. Between December 2008 and March 2014, Contingent Care employed over 100 workers to provide child care, plan lessons, and teach reading and math. *Id.*; Appellee's Appendix ("DOL App'x") at 1-12 (list of Contingent Care employees to whom the Wage and Hour Division calculated backwages were due). Contingent Care used a clock-in, clock-out system that created weekly timecards showing its employees' hours of work; the timecards indicate that many employees often worked more than 40 hours each workweek. *See* DOL App'x at 148-59 (sample timecards provided to the Wage and Hour Division by Contingent Care); Order at 8.

Contingent Care was the subject of investigations of possible FLSA violations by the Wage and Hour Division in 2005 and 2008. Order at 2-3. In the course of each investigation, a Wage and Hour Division Investigator found FLSA coverage, assessed backwages, and explained these conclusions and the relevant FLSA requirements to Contingent Care's owner, Wolfgang Shields, who agreed to come into FLSA compliance. *Id.* Contingent Care was therefore aware that it was required to pay its employees at least the minimum wage for all hours worked and

one and a half times each employee's regular rate for all hours worked over 40 in each seven-day workweek.

Despite this prior experience with and guidance from the Wage and Hour Division, Contingent Care maintained atypical pay practices. Contingent Care paid its employees once a month. *See* Appellant's Appendix ("CC App'x") at 504 (Defs.' Proposed Findings of Fact); *see also* DOL App'x at 160-65 (Contingent Care's lists of payment dates). Although it had designated Monday through Sunday as its seven-day workweek for purposes of calculating overtime hours worked and wages owed under the FLSA, *see* CC App'x at 504, the periods of time that its monthly payments covered did not correspond to workweeks (or even to calendar months), *see, e.g.*, DOL App'x at 162 (pay schedule showing, for example, that Contingent Care's November 2010 paychecks were compensation for work performed from Tuesday, August 17 through Tuesday, September 14).

Furthermore, Contingent Care's wage payments often did not accurately correspond to the number of hours, including the hours of overtime, employees worked, and often were not made based on the correct overtime compensation rate. Order at 8-9. Contingent Care also did not comply with the FLSA requirement that it preserve all timecards showing the hours its employees worked—in particular, it does not have such records from December 2008 through April 2009, *id.* at 7—and did not pay all workers in every pay period, *id.* at 11.

Deann Alvarado, an Investigator from the Wage and Hour Division, U.S. Department of Labor, began a third investigation of Contingent Care's possible FLSA violations in 2010. Order at 3. She determined, as had two previous investigators, that Contingent Care was a covered employer under the FLSA and that Contingent Care had violated the FLSA's minimum wage, overtime, and recordkeeping provisions. *Id.* Calculating the backwages due to each worker as a result of these violations was a lengthy, painstaking process. Contingent Care's timecards were stored in a pile of zip lock bags kept in a box, which were not clearly labeled and were not in any order; after sorting them, Investigator Alvarado used the timecards as the most accurate record of how many hours each employee worked in each seven-day workweek. *See* DOL App'x at 216-17 (Investigator Alvarado's testimony). She compared those numbers to the hours for which Contingent Care's payroll records showed that each employee had been paid. *Id.* at 216. That process required analysis of the irregular dates included in each pay period and the day-by-day breakdown of hours in workweeks that fell across two of Contingent Care's pay periods. *See id.* at 213, 219. Where Investigator Alvarado found discrepancies between the number of hours worked shown on the timecards and those accounted for in the payroll, she calculated the difference between the wages employees received and the amounts they were due under the FLSA. *See id.* at 213-19.

For example, Contingent Care's 2010 pay schedule shows that its April 2010 paychecks were for work performed from January 22 through February 19, and its May 2010 paychecks were for work performed from February 20 through March 22. *See* DOL App'x at 162. The pages of Investigator Alvarado's spreadsheet showing the relevant backwage calculations for employee Kim Johnson therefore reflect that hours worked at the beginning of the workweek ending on Sunday, February 21, 2010 were included in the April 2010 payroll and the hours worked on the last two days in that workweek were included in the May 2010 payroll. *See id.* at 73. (Investigator Alvarado determined that Johnson's paychecks for both pay periods did not compensate for the correct number of overtime hours. *See id.* at 73-74.)

As to time periods for which Contingent Care failed to maintain timecards, Investigator Alvarado used a different method to calculate unpaid overtime compensation. She made the necessary, reasonable inference that there were 168 non-overtime hours in each of Contingent Care's 29-day pay periods (40 non-overtime hours in each of four seven-day workweeks plus eight non-overtime hours for the extra day) and that all hours above 168 were overtime hours (because they were hours worked over 40 in one of the workweeks). *See* DOL App'x at 231 (Investigator Alvarado's testimony). She used the hours worked shown on Contingent Care's payroll records—which, because she did not have timecards,

contained the best information available—to determine how many hours over 168 an employee had worked in the relevant pay periods. *Id.*

Investigator Alvarado's backwage calculations, which total $92,402.35 for 100 employees, are set out in a 135-page spreadsheet. *See* DOL App'x at 13-147 (spreadsheet); *id.* at 217-21 (Investigator Alvarado's testimony describing the contents of the spreadsheet); *id.* at 1-12 (summary of backwages).

B. Procedural History

The Secretary of Labor ("Secretary") filed this lawsuit in September 2011. *See* CC App'x at 1-10 (Complaint). The District Court for the Western District of Missouri held a two-day bench trial in May 2014. Order at 4; DOL App'x at 174-305 (transcript of Day 1 of trial), 306-384 (transcript of Day 2 of trial). The Wage and Hour Investigators who conducted the two previous investigations of Contingent Care, Investigator Alvarado, Contingent Care owner Wolfgang Shields, and three former Contingent Care employees testified. *Id.*

On December 15, 2014, the district court issued an opinion and order in favor of the Secretary. Order at 1. The court concluded that Contingent Care is a "preschool" covered by the FLSA because, for the reasons explained in *Reich v. Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191 (6th Cir. 1994), an entity that provides custodial and educational services to children, even if licensed as a day care center, is a preschool under the Act. *Id.* at 6-7 (citing 29 U.S.C. 203(s)(1)(B)).

The court then held that Contingent Care had violated the FLSA's recordkeeping, minimum wage, and overtime compensation provisions. *Id.* at 1-16.

As to recordkeeping, the court found two types of violations. First, Contingent Care had failed to preserve some timecards, which are its records of employees' hours worked. Order at 7. The court rejected Contingent Care's argument that a former employee destroyed the timecards based on testimony of the former employee that contradicted Contingent Care's account and that the court found credible. *Id*. Second, Contingent Care had created some records that "contained inaccurate and conflicting information about the pay periods and, in some cases, the pay dates." *Id.* at 7-8.

Contingent Care had violated the FLSA's minimum wage requirements, the court concluded, by not providing paychecks to some employees in some weeks and by paying for fewer than some employees' actual hours worked in certain weeks. Order at 11-12. The court cited specific examples from Investigator Alvarado's spreadsheet in support of these findings. *Id.*

The court further determined that Contingent Care committed three types of overtime violations. Order at 8-11. First, Contingent Care paid some employees their regular, non-overtime rate for some of their hours worked over 40 in certain workweeks. *Id.* at 8. Second, Contingent Care paid nothing at all for some employees' hours worked over 40 in certain workweeks. *Id.* Third, Contingent

Care calculated some employees' overtime rates based on a regular rate lower than the employees' actual hourly rate of pay. *Id.* at 8-11. The court provided examples from Investigator Alvarado's spreadsheet for each type of violation, *id.* at 8-9, and as to the third type, found the Secretary's evidence more credible than Contingent Care's, *id.* at 10.

The court reached two additional conclusions before awarding relief. First, the district court concluded that Contingent Care's payments for some pay periods were made so long after the work was performed as to constitute minimum wage violations. Order at 12-13 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 709 n.20 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993)). Second, the district court determined that because Contingent Care had been the subject of two prior FLSA investigations in which the Wage and Hour Division found violations and explained the FLSA's requirements, the violations at issue in this case were "willful," meaning the statute of limitations was extended to three, rather than two, years. *Id.* at 13-14 (citing 29 U.S.C. 255(a); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

As a result of these violations, the court ordered Contingent Care to pay $92,402.35, the full amount of backwages calculated by Investigator Alvarado. *Id.* at 16. It also ordered Contingent Care to pay pre-judgment and post-judgment interest, enjoined Contingent Care from violating the FLSA in the future, denied

Contingent Care's motion for costs and fees, and denied as moot the Secretary's motion to file a response to Contingent Care's proposed findings of fact and conclusions of law. *Id.*

SUMMARY OF ARGUMENT

As a threshold matter, the FLSA applies in this case. Based on the statutory text, the Wage and Hour Division's longstanding position, the majority of case law from other Circuit Courts, and the purposes of the statute, Contingent Care is a "preschool" covered by the FLSA because a day care center that provides custodial services to young children qualifies as a preschool for purposes of the Act regardless of whether it also provides educational services. Furthermore, under the relevant regulations and the Wage and Hour Division's longstanding interpretation of those regulations, Contingent Care's employees do not qualify for the professional exemption from FLSA obligations for teachers because Contingent Care is not licensed by the state department of education and therefore is not an "educational institution."

Additionally, although Contingent Care was obligated to pay its employees in compliance with the FLSA, it failed to do so, and the district court properly awarded unpaid wages to Contingent Care's employees. First, Contingent Care failed to maintain complete and accurate records of the hours its employees worked. Second, many of Contingent Care's wage payments violated the FLSA's

minimum wage and overtime provisions, in part because some employees did not receive payment for certain hours of work at all and because some employees did not receive overtime compensation for certain hours worked over 40 in a workweek. Contingent Care issued paychecks for 29-day pay periods, so although its timecards showed the number of hours worked in each Monday to Sunday workweek, its payroll records did not cover periods corresponding to those weeks; for that reason, to properly calculate wages owed, the Wage and Hour Investigator painstakingly reconstructed each employee's hours worked and wages due during the period of investigation using Contingent Care's timecards, pay schedules, and payroll records, and relying on reasonable inferences where Contingent Care was missing timecards. The district court properly awarded backwages based on these calculations.

STANDARD OF REVIEW

This Court reviews a district court's legal conclusions after a bench trial de novo and its factual findings for clear error. *See, e.g.*, *Meecorp Capital Markets, LLC v. PSC of Two Harbors, LLC*, 776 F.3d 557, 562-63 (8th Cir. 2015) (citing *Darst–Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 710-11 (8th Cir. 2003)). "The ultimate question of whether an employee falls within the FLSA's protection is a question of law to be reviewed de novo." *Reich v. Stewart*, 121 F.3d 400, 404 (8th Cir. 1997) (citing *Spinden v. GS Roofing Prods. Co.*,

94 F.3d 421, 426 (8th Cir. 1996)). Factual findings that form the basis for backwage calculations are to be upheld unless they are clearly erroneous. *See id.* at 404, 406.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT CONTINGENT CARE IS A PRESCHOOL COVERED BY THE FLSA BECAUSE IT PROVIDES CUSTODIAL SERVICES TO CHILDREN YOUNGER THAN SCHOOL AGE

Section 203(s)(1)(B) of the FLSA, which lists certain entities (referred to as "named enterprises") that are covered by the Act's requirements, includes in that list "a preschool." 29 U.S.C. 203(s)(1)(B).[1] Contingent Care argued below, CC App'x at 515, and now implies, Br. at 21-22, that it operates a day care center rather than a preschool. But in this context, day care centers are not meaningfully distinct from preschools.

Congress added preschools to the named enterprise provision of the FLSA, which had previously included "elementary or secondary school[s]" but not preschools, in 1972. Education Amendments of 1972, Pub. L. 92-318, § 906(b)(2),

[1] Specifically, the Act requires employers with employees "employed in an enterprise engaged in commerce or in the production of goods for commerce" to pay wages in compliance with the Act's minimum wage and overtime provisions, 29 U.S.C. 206(a), 207(a), and it defines "'[e]nterprise engaged in commerce or in the production of goods for commerce'" to include "an enterprise that … is engaged in the operation of … a preschool, elementary or secondary school, or an institution of higher education," 29 U.S.C. 203(s)(1), (s)(1)(B).

(3), 86 Stat. 235, 375 (June 23, 1972). The amendment did not add a definition of "preschool" to the Act, *see id.*, and there was no legislative history relevant to the meaning of the term, *see* Wage and Hour Division Opinion Letter WH-294, 1974 WL 38733, at *1 (Oct. 24, 1974) (noting the absence of legislative history relevant to what type of entity constitutes a preschool); *Miss Paula's Day Care Center*, 37 F.3d at 1193 (same); *United States v. Elledge*, 614 F.2d 247, 249 (10th Cir. 1980) (same). Shortly after Congress passed the amendment, the Wage and Hour Division issued guidance explaining that:

> A preschool … provides for the care and protection of infants or preschool children outside their own homes during any portion of a 24-hour day. The term "preschool" includes any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or developmental services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children.

DOL App'x at 385-92 (WH Publication 1364, *Preschools Under the Fair Labor Standards Act*, at 1-2 (July 1972)). Wage and Hour Division opinion letters spanning decades contain essentially identical language. *See* Wage & Hour Division Opinion Letter, 1999 WL 1002394, at *1 (Apr. 24, 1999); Wage & Hour Division Opinion Letter WH-294, 1974 WL 38733, at *1 (Oct. 24, 1974); Wage & Hour Division Opinion Letter WH-176, 1972 WL 34919, at *1 (Sept. 21, 1972); *see also* Wage & Hour Division Field Operations Handbook ("FOH") § 12g03,

available at http://www.dol.gov/whd/FOH/ (internal guidance for all Wage and Hour Investigators also containing nearly identical language).

Moreover, two Circuit Courts of Appeals have reached the conclusion that a day care center qualifies as a preschool for purposes of the FLSA. In *United States v. Elledge*, 614 F.2d 247 (10th Cir. 1980), the Tenth Circuit held that the custodial nature of a day care center did not distinguish it from a preschool covered by the FLSA. *Id.* at 249-50. The court explained that state law regarding the licensing of day cares and preschools was not useful to the analysis; although the FLSA's definitions of "elementary school" and "secondary school" call for reliance on state law designations, "Congress treated preschools differently by not referring to state law as determinative." *Id.* at 249, 250 (referring to 29 U.S.C. 203(v) and (w), which define elementary and secondary schools, respectively, as providing elementary or secondary education "as determined under State law").[2] It also noted that the entities listed in the FLSA's named enterprise provision include not just other types of schools but also "hospitals" and "institutions for the care of the sick, the aged, the mentally ill or defective"—i.e., entities that provide custodial services, showing that Congress was not exclusively focused on providing FLSA protections to employees of educational institutions. *Id.* Furthermore, the court in

[2] In this case, the district court properly rejected Contingent Care's contention that state licensing is relevant to the determination of whether an entity is a preschool. *See* Order at 6-7. Contingent Care has not renewed that argument to this Court.

Elledge noted that the dictionary definition of "preschool" as well as expert testimony supported the notion that facilities providing care to young children are places of learning, i.e., schools. *Id.* Finally, the court quoted the Wage and Hour Division's guidance defining "preschool," noting that the Wage and Hour Division's "interpretation … complies with [the] dictionary definition of the term," "follows expert opinion," and "is sufficiently reasonable to require acceptance by a reviewing court." *Id.* at 251 (citing *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975)).

In *Reich v. Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191 (6th Cir. 1994), the Sixth Circuit also held, based on similar reasoning to that in the Tenth Circuit's opinion, that "preschool" as used in the FLSA includes facilities that provide only custodial services as well as those that also provide educational services. *Id.* at 1195-96. The court noted the Wage and Hour Division's position and explained that its interpretations "do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance." *Id.* at 1194 (citing *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 182 (1946)). It then explained that distinguishing day care centers from preschools constituted "a strained reading of the text" because day care centers "provide services to children who are not yet required to attend school, i.e., children who are still '*pre* school.'" *Id.* at 1195. It also agreed with a magistrate

judge's statement that "[t]he common sense definition of a preschool includes day care centers. The words are interchangeable in the common parlance." *Id.* It next rejected, based on the lack of a statutory definition grounded in state law, the notion that state licensing was relevant to a determination of whether a facility was a preschool under the FLSA. *Id.* And the court further noted that the named enterprise provision should be understood to include custodial, rather than just educational, facilities, such that even day care centers with no educational services would constitute preschools. *See id.* at 1196 ("Even if … 'child day care centers' were able to show that they offer no education or learning whatsoever, that they provide nothing more than custodial child care that is comparable to professional babysitting, they would still be obligated to comply with the FLSA. Preschools are not merely educational facilities, they also perform a custodial service. Indeed, the statute includes a number of other custodial-care institutions, including 'institution[s] primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution.'").[3]

[3] The Ninth Circuit, the only other U.S. Court of Appeals to have addressed this issue, held in *Marshall v. Rosemont, Inc.*, 584 F.2d 319 (9th Cir. 1978), that in the absence of a statutory definition, the best reading of "preschool" was as an institution that is part of the educational system. *Id* at 321. The Secretary respectfully disagrees with this conclusion and notes that neither the Sixth Circuit nor the Tenth Circuit was persuaded by the Ninth Circuit's reasoning. *See Miss Paula's Day Care Center*, 37 F.3d at 1195 (describing the Ninth Circuit's opinion while reaching a different conclusion); *Elledge*, 614 F.2d at 249-50 (same, and

An inclusive interpretation of the term "preschool" is consistent not only with the Department's interpretation and the view of the majority of Circuit Courts to have considered the issue, but also with the expansive manner in which this Court directs that the FLSA be read. *See, e.g.*, *Specht v. City of Sioux Falls*, 639 F.3d 814, 819 (8th Cir. 2011) ("The purpose of the FLSA 'is to protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.' … Courts should broadly interpret and apply the FLSA to effectuate its goals because it is 'remedial and humanitarian in purpose.'" (quoting *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir.1999))); *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 846 (8th Cir. 1975) ("The Fair Labor Standards Act was enacted to provide a minimal standard of living necessary for the health, efficiency, and general well-being of workers and to prescribe certain minimum standards for working conditions. In applying the Act to the facts at hand, we must liberally construe it 'to apply to the furthest reaches consistent with congressional direction' in fulfillment of its humanitarian and remedial purposes." (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959))).

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noting that "[w]e are not impressed by the reference in the Ninth Circuit decision … to state law").

Even if this Court adopts an interpretation of "a preschool" limiting the term to facilities that provide educational services, Contingent Care falls within that definition. The district court found (and Contingent Care does not dispute, *see* Br. at 21) that Contingent Care "establishes curriculums, employs lesson plan coordinators, gives employees the title of 'teachers,' advertises on its website that it is a 'key supplier of … Web-Based Reading/Math Services in the Kansas City Metropolitan Area,' and admits that the average age of the children served is three." Order at 6.[4]

II. CONTINGENT CARE'S ARGUMENT THAT THE PROFESSIONAL EXEMPTION FOR TEACHERS APPLIES TO ITS EMPLOYEES IS NEITHER PROPERLY BEFORE THIS COURT NOR CORRECT

Contingent Care asserts that if its facility is a preschool, its employees are exempt from the FLSA's protections under 29 U.S.C. 213(a)(1), which provides that "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of … teacher in elementary or secondary schools)" is not entitled to the Act's minimum wage and overtime protections. Br. at 20-22. This argument is not properly before the Court and, in any event, does not have merit.

[4] Even if Contingent Care is not a preschool, it is nevertheless a type of employer that must comply with the FLSA if its annual dollar volume of business is $500,000 or more. *See* 29 U.S.C. 203(s)(1)(A). Contingent Care conceded below that it had the requisite volume of business from at least December 13, 2008 through April 3, 2013. Order at 6 n.2.

A. The issue is waived because Contingent Care conceded it below.

Contingent Care admitted before the district court that its employees were *not* teachers for purposes of the FLSA exemption: its Proposed Findings of Fact and Conclusions of Law asserted that "one must conclude that the employees do *not* qualify for the teacher exemption under section 13(a)(1) of the FLSA." CC App'x at 515-18 (emphasis added). It cannot now reverse its position. *See, e.g.*, *Davidson & Schaaff, Inc. v. Liberty Nat'l Fire Ins. Co.*, 69 F.3d 868, 869 (8th Cir. 1995) ("The rule that we will not address arguments raised for the first time on appeal, *see Andes v. Knox*, 905 F.2d 188, 189 (8th Cir. [1990]) …, applies even more forcefully when the appellant took the opposite position in the district court.").[5]

B. The exemption does not apply because Contingent Care is not licensed by the state department of education.

In any event, Contingent Care's position before the district court was correct: its employees do not qualify for the FLSA exemption for teachers. The FLSA exempts teachers "in elementary … schools," 29 U.S.C. 213(a)(1), a term that includes preschools only if the preschool is licensed by the state department of education, which Contingent Care was not.

[5] Unsurprisingly, the district court did not address this question. *See* Order at 5-7 (addressing the application of the FLSA in this case without mentioning the exemption for teachers).

Specifically, the Secretary's regulations explain that the professional exemption applies to teachers employed "in an educational establishment." 29 C.F.R. 541.303(a). An "'educational establishment' means an elementary or secondary school system, an institution of higher education or other educational institution." 29 C.F.R. 541.204(b). As noted above, an elementary school—the only type of "educational establishment" a preschool could plausibly be[6]—is defined in the Act as "a day or residential school that provides elementary education, as determined by State law." 29 U.S.C. 203(v).[7] Therefore, preschools that are not licensed by a state's department of education do not qualify as elementary schools and so are not "educational establishment[s]." *See* Wage and Hour Opinion Letter FLSA2008-13NA, 2008 WL 4906283, at *1 (Sept. 29, 2008) (explaining that a state's decision to license facilities through an agency other than its department of education "indicates that the state does not consider the day care centers to be providing educational services"). Accordingly, the employees of

[6] Under the regulations, "[t]he term 'other educational establishment' includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher," 29 C.F.R. 541.204(b)—not a preschool.

[7] The Secretary's regulations explain that under state law, elementary schools typically "include[] the curriculums in grades 1 through 12" as well as "the introductory programs in kindergarten," and they "may also include nursery school programs in elementary education." 29 C.F.R. 541.204(b).

such preschools do not qualify for the professional exemption for teachers. *Id.*; 29 C.F.R. 541.303(a).[8]

Here, Contingent Care is not an educational institution because it did not have a license from the Missouri Department of Elementary and Secondary Education. Contingent Care acknowledged to the district court that Missouri day care centers are not licensed by that agency, *see* CC App'x at 515; instead, Contingent Care was licensed by the Missouri Department of Health and Senior Services, DOL App'x at 166 (Contingent Care's license); *see* Mo. Rev. Stat. 210.211 (requiring that "a child-care facility for children" have a written license from the Department of Health and Senior Services in most circumstances); Mo. Rev. Stat. 210.201 (defining "child-care facility" as "a house or other place conducted or maintained by any person who advertises or holds himself out as providing care for more than four children during the daytime, for compensation or otherwise, except those operated by a school system").

An employer "bears the burden to demonstrate its affirmative defense that [its employees] were exempt from the FLSA's overtime requirements." *Beauford*

[8] That Contingent Care calls its employees "teachers" is irrelevant to the analysis of whether those employees qualify for this exemption. *See* 29 C.F.R. 541.2 ("A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.").

v. ActionLink, LLC, 781 F.3d 396, 401 (8th Cir. 2015) (citing *Fife v. Harmon*, 171 F.3d 1173, 1174 (8th Cir. 1999)); *see Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 783 (8th Cir. 2009) ("[T]he 'general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.'" (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974))); *see also Beauford*, 781 F.3d at 401 ("We protect workers by narrowly construing exemptions to the FLSA's overtime requirements." (citing *Spinden*, 94 F.3d at 426)); *McDonnell v. City of Omaha, Neb.*, 999 F.2d 293, 295-96 (8th Cir. 1993) ("Exemptions to the FLSA must be narrowly construed in order to further Congress' goal of providing broad federal employment protection." (citing *Lublin, McGaughy & Assoc.*, 358 U.S. at 211; *Abshire v. County of Kern*, 908 F.2d 483, 485 (9th Cir. 1990))). Contingent Care has failed to meet its burden here.

III. IN AWARDING BACKWAGES, THE DISTRICT COURT APPROPRIATELY RELIED ON THE WAGE AND HOUR INVESTIGATOR'S CALCULATIONS, WHICH WERE BASED ON AVAILABLE RECORDS AND REASONABLE INFERENCES WHERE CONTINGENT CARE FAILED TO PROVIDE RECORDS

The FLSA requires covered employers to pay their non-exempt employees at least the federal minimum wage for each hour worked and overtime compensation of at least one and a half times the employees' regular hourly rate of pay for each hour worked over 40 in a workweek. *See* 29 U.S.C. 206(a), 207(a).

The Act also requires that employers maintain records of, among other things, hours worked by and wages paid to their employees. *See* 29 U.S.C. 211(c).

Because the FLSA applies to Contingent Care and its employees, Contingent Care was obligated to comply with these requirements. Despite the many pages of Contingent Care's brief devoted to assailing Investigator Alvarado's backwage calculations, Contingent Care has provided no legitimate critique of the logic behind or technical aspects of those calculations, let alone pointed to any evidence or performed any calculations of its own to support its contentions. Investigator Alvarado's findings, and the district court's conclusions in reliance on them, are properly based on the evidence in the record, reasonable estimations where the employer did not provide records, and careful, detailed calculations. *See, e.g.*, *Reich v. Stewart*, 121 F.3d 400, 406 (8th Cir. 1997) (affirming "meticulous" backwage calculations by a district court based on "just and reasonable inference[s]" and explaining that an employer who has failed to keep records cannot benefit from a complaint that "the damages lack the exactness and precision" that better recordkeeping would have allowed (citing *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992); *Mumbower v. Callicott*,

526 F.2d 1183, 1186 (8th Cir. 1975); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946))).[9]

A. The district court correctly found FLSA recordkeeping violations based on Contingent Care's failure to maintain timecards for all workweeks.

Contingent Care contests the district court's determination that it violated the FLSA's recordkeeping requirement because it could not produce timecards for any employees for several months in the period covered by Investigator Alvarado's investigation, asserting that the records were destroyed or stolen and that it had produced many other timecards. Br. at 3-4. But the district court found Contingent Care's explanation for its failure to produce the timecards not credible, Order at 7, a determination that is entitled to significant weight, *see, e.g.*, *Wright v.*

[9] The district court concluded that Contingent Care willfully violated the FLSA, and therefore that the statute of limitations for FLSA violations was three, rather than two, years. Order at 13-14 (citing 29 U.S.C. 255(a)). Contingent Care has not addressed the district court's willfulness determination in its brief to this Court and has therefore waived any challenge to the award of backwages for the entire time period accounted for in Investigator Alvarado's spreadsheet. *See, e.g.*, *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) (explaining that issues not raised in an opening brief are deemed waived (citing *Fair v. Norris*, 480 F.3d 865, 869 (8th Cir. 2007))). Furthermore, the district court was correct. A willful violation is one as to which "'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'" *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1082 (8th Cir. 2000) (quoting *Richland Shoe Co.*, 486 U.S. at 133). Here, the Wage and Hour Division had investigated Contingent Care, and explained the requirements for FLSA compliance, twice before Investigator Alvarado began her investigation, Order at 2-3, and therefore Contingent Care certainly knew of its FLSA obligations.

St. Vincent Health Sys., 730 F.3d 732, 739 (8th Cir. 2013) ("[A] district court's credibility determinations in a bench trial, like a jury's credibility determinations in a jury trial, are 'virtually unassailable' on appeal." (quoting *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 806 (8th Cir. 2013)) (internal quotation marks omitted)). Moreover, Contingent Care's argument that it produced *most* timecards for the period of Investigator Alvarado's investigation, Br. at 19, is of no avail. The FLSA requires that records regarding *all* employees and *all* workweeks be maintained. *See* 29 U.S.C. 211(c); 29 C.F.R. 516.2(a)(7) (requiring that employers keep records of "[h]ours worked each workday and total hours worked each workweek"); *see also* 29 C.F.R. 516.7 (requiring that "[a]ll records … be available for inspection and transcription by the [Wage and Hour] Administrator or a duly authorized and designated representative").[10]

B. The district court correctly found FLSA minimum wage violations based on Contingent Care's failure to provide some employees paychecks for certain pay periods.

Contingent Care contests the district court's award of backwages for missed paychecks—i.e., pay periods for which employees received no wages at all—based solely on the assertion that none of the three former employees who testified at

[10] Contingent Care has not challenged the district court's finding that some of its records listed inaccurate pay periods or pay dates, which, as the court concluded, also constitutes a violation of the FLSA's recordkeeping requirements. Order at 7-8.

trial said that there was a pay period for which she had not received a paycheck. Br. at 2-3, 9. But the district court did not rely on testimony from those witnesses in making the factual finding that Contingent Care had failed to pay employees for all pay periods. Rather, the district court found that testimony from Investigator Alvarado about her examination of Contingent Care's records constituted credible evidence showing that some employees had not been paid for some of their work. Order at 11 (citing portions of the trial transcript available at DOL App'x at 247-50). And the district court specifically noted an example of Investigator Alvarado's findings that is further supported by documentary evidence in the record: employee Mayah Burton was not paid for a day she worked in November 2011. *Id*. Contingent Care provided to Investigator Alvarado a timecard showing the hours Burton worked on November 14, 2011. *See* DOL App'x at 153 (timecard). According to Contingent Care's pay schedule, Contingent Care paid for hours worked on November 14, 2011 in its February 2012 payroll. *See id.* at 163 (pay schedule).[11] But Contingent Care's payroll record for February

[11] It is the Secretary's position that payment of wages more than a month after work is performed itself constitutes an FLSA violation, because prompt payment is inherently required by the statute. *See, e.g.*, Wage and Hour Division Opinion Letter, 1998 WL 1147716, at *1 (July 20, 1998) ("It has been our longstanding position that an employer is required to pay employees the full minimum wages and overtime due on the regular payday for the workweek in question."); *see also Brooklyn Sav. Bank*, 324 U.S. at 709 & n.20 (discussing the harm to workers of not being paid on time and noting that "[t]he necessity of prompt payment to workers of wages has long been recognized by Congress"); *Biggs*, 1 F.3d at 1540-41

2012 does not list any payment to Burton. *See id.* at 168-72 (payroll record). Investigator Alvarado therefore calculated backwages for Burton. *See id.* at 27 (relevant page of spreadsheet). Contingent Care has not offered any reason it was clear error for the district court to rely on this evidence in awarding backwages consistent with Investigator Alvarado's calculations.

C. The district court correctly found FLSA minimum wage violations based on Contingent Care's failure to pay some employees for all of their hours worked in certain pay periods.

Contingent Care challenges the district court's award of backwages to compensate for minimum wage violations resulting from Contingent Care's paying employees for fewer hours than they worked, based in part on conduct by Investigator Alvarado it refers to as "spreading." Br. at 15-16, 18-19. This Court should not be persuaded; evidence in the record shows that the district court's determination was not in error. For example, Contingent Care paid Maia Shante Harrell $7.25 per hour for 124.7 hours of non-overtime work in her July 2011 paycheck. *See* DOL App'x at 167 (payroll page showing that in July 2011, Harrell was paid $904.08 for 124.7 hours of "Regular" work, which is equal to $7.25 per hour). That paycheck was to compensate for work performed from April 8 through May 6. *See id.* at 163 (pay schedule for 2011). But Harrell worked 160 non-

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(holding that failure to pay employees on their regular pay day constitutes a violation of the FLSA). The district court agreed. Order at 11-12. Contingent Care has not raised this issue on appeal.

overtime hours (40 hours in each of four workweeks) within that range of dates. *See id.* at 148-52 (timecards showing no hours on April 8, 9, or 10; 42 hours, 59 minutes for the workweek from Monday, April 11 to Sunday, April 17; 49 hours, 9 minutes for the workweek from Monday, April 18 to Sunday, April 24; 54 hours, 11 minutes for the workweek from Monday, April 25 to Sunday, May 1; and 44 hours, 50 minutes for Monday, May 2 through Friday, May 6, the last day in the pay period). Investigator Alvarado's backwage calculations therefore include the wages owed, based on the federal minimum wage of $7.25 per hour, to Harrell for 35.3 (160 minus 124.7) uncompensated non-overtime hours. *See id.* at 63 (spreadsheet page for Harrell with entries for the July 2011 pay period for "Diff[erence in] Reg[ular hours]" on the relevant payroll record and timecards and the resulting "Unpaid S[traight]T[ime]" dollar amount).[12] Nothing in Contingent Care's brief calls into question the evidence or calculations underlying the district court's conclusion with regard to this type of violation.

[12] As with all employees and all pay periods, Investigator Alvarado calculated the overtime compensation due to Harrell for the July 2011 pay period separately from backwages for the minimum wage violation. *See* DOL App'x at 63 (spreadsheet page, with separate columns for "Diff[erence in] Reg[ular hours" and "Difference [in] Overtime [hours]" on payroll records as compared to timecards, as well as resulting "Unpaid S[traight]T[ime]" and "Unpaid T1/2," or unpaid time-and-a-half, i.e., overtime, in dollar amounts).

D. The district court correctly found overtime violations for pay periods as to which Contingent Care provided timecards, relying on a careful reconstruction of hours worked each workweek.

Contingent Care repeatedly argues in its brief that Investigator Alvarado improperly changed Contingent Care's wage payment "methodology" in a manner that did not account for time by workweek as required by the FLSA, Br. at 2, 4-5, 8-10, and even suggests that Investigator Alvarado did not make use of its timecards, *id.* at 8. But Investigator Alvarado used the timecards Contingent Care provided and the seven-day workweek Contingent Care designated to calculate overtime as required by the FLSA. *See* DOL App'x at 215-18 (Investigator Alvarado's testimony regarding her use of the timecards); *see also id.* at 13-147 (Investigator Alvarado's backwage spreadsheet, each page of which includes columns for daily hours shown on Contingent Care's timecards and calculations of the total number of hours worked in each workweek). Because Contingent Care's pay periods did not begin on Mondays or end on Sundays even though Contingent Care had designated Monday to Sunday as its workweek for purposes of FLSA compliance, *see* CC App'x at 504, Investigator Alvarado painstakingly input numbers from individual timecards into her spreadsheet to compare actual hours worked over 40 in each workweek with overtime hours paid. *Id.*

An example demonstrates the steps involved in accurately calculating the difference between the wages Contingent Care's employees were due and the

amounts they received. The paychecks Contingent Care issued in August 2012 were meant to compensate employees for hours worked between Sunday, July 1, 2012 and Tuesday, July 31, 2012. *See* DOL App'x at 164 (2012 pay schedule). Contingent Care provided timecards showing employee Crystal Charles's hours worked on those dates:

- On July 1, which was the first day of the pay period but the last day of a workweek, Charles worked for 8 hours and 22 minutes. DOL App'x at 154 (Charles's timecard for the workweek from Monday, June 25 to Sunday, July 1).[13] Because Charles had already worked more than 40 hours in the workweek before beginning work on July 1, all 8 hours and 22 minutes were overtime. *Id.* (timecard showing that Charles had worked 42 hours, 24 minutes before Sunday, July 1).
- During the workweek from Monday, July 2 to Sunday, July 8, all of which was included in the August 2012 pay period, Charles worked 8 hours and 32 minutes of overtime. *Id.* at 155 (timecard showing 48 hours, 32 minutes worked in the workweek).

[13] Contingent Care's timecards—unlike its pay periods—correspond to its designated Monday to Sunday workweeks. *See* DOL App'x at 148-59 (sample timecards showing the times employees clocked in and out each day, as well as the daily and cumulative total hours and minutes); *see also* CC App'x at 504 (Contingent Care's statement that its FLSA workweeks began on Mondays).

- During the workweek from Monday, July 9 to Sunday, July 15, Charles did not work any overtime hours. *Id.* at 156 (timecard showing that Charles worked 34 hours, 10 minutes total).
- During the workweek from Monday, July 16 to Sunday, July 22, Charles worked 10 hours and 26 minutes of overtime. *Id.* at 157 (timecard showing 50 hours, 26 minutes worked in the workweek).
- During the workweek from Monday, July 23 to Sunday, July 29, Charles did not work overtime. *Id.* at 158 (timecard showing 29 hours, 33 minutes total worked in the workweek).
- On July 30 and 31 (the only days in the workweek ending August 5 covered by the August 2012 paycheck), Charles worked 14 hours and 21 minutes, adding no overtime to her total for the August 2012 paycheck. *Id.* at 159.

After converting the overtime hours to figures with decimals rather than minutes, Investigator Alvarado calculated that Charles's total overtime in the relevant span of dates was 27.34 hours (8.37 plus 8.53 plus 10.43). *See id.* at 34 (spreadsheet page for Charles with column for "T[ime]C[ard] Overtime Hours"). But according to Contingent Care's payroll record, Contingent Care paid Charles for only 10.43 overtime hours in August 2012. *See id.* at 172 (payroll record). Therefore, Investigator Alvarado calculated overtime compensation for 16.91 hours (27.34

minus 10.43) that Charles worked between July 1 and July 31. *Id*. at 34 (spreadsheet page).[14]

Contingent Care's brief does not raise any legitimate reason why it was clear error for the district court to rely on Investigator Alvarado's thorough, careful calculations of overtime compensation due based on the documents Contingent Care itself provided.[15]

[14] Because Crystal Charles's rate of pay was $7.25 per hour, *see* DOL App'x at 172 (payroll page showing Charles was paid $1,015.58 for 140.08 non-overtime hours, which is $7.25 per hour), Investigator Alvarado calculated that Charles was owed $183.86 (one half of 16.91 overtime hours times $7.25) in backwages for the unpaid overtime compensation in her August 2012 paycheck, *id.* at 34 (spreadsheet page, including column for "Unpaid … T1/2," or time and a half, i.e., overtime).

[15] Contingent Care argued before the district court that it was not required to include payments to some employees it designated as "Other Pay"—as supposedly distinct from hourly wages—in calculating an employee's regular hourly rate of pay, which is her total non-overtime compensation in a workweek divided by her number of hours worked in that workweek. Order at 9; *see* 29 C.F.R. Part 778. (The regular rate is significant because overtime compensation must be at least one and a half times an employee's regular rate for each hour worked over 40 in a workweek. *See* 29 U.S.C. 207(a); 29 C.F.R. 778.100.) The district court correctly rejected this position, based in part on a credibility determination. Order at 9-10. Contingent Care has not renewed its arguments here and has therefore waived any challenge to the conclusion that Investigator Alvarado calculated backwages for unpaid overtime based on the appropriate hourly rates. *See, e.g.*, *Jenkins*, 540 F.3d at 751 (citing *Fair*, 480 F.3d at 869)).

E. The district court correctly found overtime violations in pay periods for which Contingent Care did not provide timecards based on reasonable inferences made by the Wage and Hour Investigator.

Contingent Care's brief repeatedly refers to Investigator Alvarado's use of 168 as the default number of non-overtime hours when calculating backwages on a month-by-month basis. *See* Br. at 5, 9, 11-12, 16-18. But Contingent Care's statements are based on at least two faulty premises. First, as explained above, most of Investigator Alvarado's backwage calculations were based on actual hours worked as shown on Contingent Care's timecards. Although Investigator Alvarado did make an inference as to certain pay periods that the first 168 hours an employee worked were not overtime and all additional hours were overtime, she did so only as to the subset of pay periods for which Contingent Care did not provide timecards. Second, as to the entire relevant time period, none of Investigator Alvarado's calculations was based on the number of days (or business days) in any calendar month; instead, they were based on the workweeks contained in Contingent Care's 29-day pay periods.

Investigator Alvarado's use of an inference in the absence of timecards was appropriate. The Supreme Court and this Court have explained that district courts should draw inferences about employees' hours worked or wages owed if an employer does not provide the records necessary to make more precise calculations. *See Mt. Clemens Pottery Co.*, 328 U.S. at 688; *Holaway v. Stratasys,*

Inc., 771 F.3d 1057, 1059 (8th Cir. 2014) ("If an employer has failed to keep records, employees are not denied recovery under the FLSA simply because they cannot prove the precise extent of their uncompensated work. … Rather, 'employees are to be awarded compensation based on the most accurate basis possible.'" (quoting *Dole v. Tony & Susan Alamo Found.*, 915 F.2d 349, 351 (8th Cir. 1990))). Therefore, Investigator Alvarado's inference of 168 non-overtime hours to make calculations as to the pay periods for which Contingent Care produced payroll records (such that she knew which employees were paid in the pay period, and for how many hours of work each) but not timecards (such that she did not know for how many hours each employee actually worked, and thus was owed wages, during the workweeks in that pay period) was entirely appropriate, and it was not error for the district court to adopt it.

Not only was Investigator Alvarado's inference appropriate, it was reasonable. Contingent Care's pay periods were four weeks and one day, or 29 days, long. *See, e.g.*, DOL App'x at 160 (pay schedule showing that, for example, payment in January 2009 was for November 10, 2008 through December 8, 2008, or 29 days; payment in February 2009 was for December 9, 2008 through January 6, 2009, or 29 days). Without timecards showing the hours worked each workweek, even assuming (as Investigator Alvarado did) that the payroll record reflected an accurate total number of hours worked in the pay period, Investigator

Alvarado could not determine how many hours of overtime each employee worked in those 29 days.[16] So Investigator Alvarado made the reasonable assumption that 28 days of the pay period were four seven-day workweeks in which the employee worked 160 hours, or the maximum number of non-overtime hours possible (40 hours each week), and that the 29th day included eight non-overtime hours, as though it was one day of a 40-hour workweek comprised of five eight-hour days. *Id.* at 231 (Investigator Alvarado's testimony describing the basis of the 168-hour inference). Accordingly, as to the pay periods for which Contingent Care did not provide timecards, Investigator Alvarado first determined how many hours over 168 were shown on the payroll records as paid as non-overtime, and then calculated as backwages due one-half of the resulting number multiplied by the employee's non-overtime hourly rate of pay. *Id.*

For example, Investigator Alvarado used this method to calculate overtime compensation due to Iyabo Owoyemi for the April 2009 pay date, for which Contingent Care provided no timecards. Contingent Care's payroll record shows that Owoyemi received $9.00 per hour for 184.5 non-overtime hours in this pay

[16] As an illustration of the problem, if an employee worked 160 hours total over the course of four seven-day workweeks, those hours could have been configured in numerous ways that would generate different overtime compensation obligations. For example, the employee could have worked 40 hours in each of the four workweeks (for no overtime), 50, 10, 80, and 20 hours in each respective workweek (for 50 hours of overtime), or 80 hours in both the first and second workweeks and none in the third and fourth (for 80 hours of overtime).

period. *See* DOL App'x at 166 (payroll record showing Owoyemi was paid $1,660.50 for 184.5 non-overtime hours, which is $9.00 per hour). Contingent Care's pay schedule shows that the April 2009 payment was meant to cover work for the 29 days from February 5 to March 5. *Id.* at 160 (2009 pay schedule). Investigator Alvarado therefore reasonably determined that Owoyemi was due an additional one-half her regular rate of pay for each of the 16.5 hours over 168 for which she had not received overtime compensation. *Id.* at 108 (spreadsheet page showing $74.25, which is one-half of 16.5 times $9.00, in overtime compensation due to Owoyemi for the April 2009 pay period). Contingent Care has offered no critique of this reasoning or these calculations that could justify a finding of clear error by the district court.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's conclusion that Contingent Care committed FLSA violations and its award of $92,402.35 in backwages.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 8,862 words long (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This brief also complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(4), (5) and (6). This brief uses Times New Roman, 14-point font, and all page margins are one-inch.

Additionally, I have scanned this brief for viruses and confirm that the brief is virus-free.

__/s/_Sarah Marcus_____
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