No. 22-1862

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TORRI HOUSTON, INDIVIDUALLY, AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

ST. LUKE'S HEALTH SYSTEM, INC.;
ST. LUKE'S NORTHLAND HOSPITAL CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri (Case No. 4:17-CV-00266-BCW)
The Honorable Brian C. Wimes

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellee Saint Luke's Health System rounds off time worked by employees. This time adds up—overwhelmingly in Saint Luke's favor. Saint Luke's consistently underpays two-thirds of employees because of rounding. Over a six-year period, Saint Luke's rounded away—and therefore failed to pay for—more than 75,000 hours of work that employees performed and more than $2 million in wages that they earned. In granting summary judgment to Saint Luke's on Appellant Torri Houston's claims under the Fair Labor Standards Act ("FLSA") and Missouri law, the district court principally relied on the FLSA's rounding and de-minimis regulations. The district court's decision was wrong on the law. The FLSA entitles employees to pay for all hours worked. The rounding regulation does not excuse non-payment when, as here, rounding consistently shortchanges employees. And the de-minimis doctrine does not apply when, again as here, an employer precisely records all time worked, but then refuses to pay employees for part of that time. Moreover, these *federal* rules do not apply to Houston's *Missouri* common-law claims for unjust enrichment and breach of contract—claims the district court erroneously dismissed as well.

Houston requests oral argument. This Court has not yet interpreted the FLSA's rounding regulation. Because of the important questions that this case raises about the limits the FLSA places on rounding, the Court should allow 20 minutes of argument per side.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because this case arose under the Fair Labor Standards Act, 29 U.S.C. § 216(b). The district court had supplemental jurisdiction under 28 U.S.C. § 1367 over Houston's Missouri state-law claims. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment on March 29, 2022. App. 256; R. Doc. 160. Houston filed a timely notice of appeal on April 26, 2022. App. 257; R. Doc. 162. This appeal is from a final judgment disposing of all parties' claims.

STATEMENT OF ISSUES

1. Did the district court err in granting summary judgment on Houston's FLSA and Missouri Minimum Wage Law claims on the ground that Saint Luke's rounding policy complied with the FLSA's rounding regulation?

- *Feltzs v. Cox Commc'ns Cal., LLC*, 2021 WL 5050259 (C.D. Cal. Oct. 27, 2021)
- 29 C.F.R. § 785.48(b)

2. Did the district court err in concluding that Saint Luke's was not unjustly enriched under Missouri law because it complied with the FLSA's de-minimis rule?

- *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033 (10th Cir. 2021)
- *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020)
- 29 C.F.R. § 785.47

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3. Did the district court err in granting summary judgment on Houston's breach-of-contract claim?

- *Avery v. City of Talladega,* 24 F.3d 1337 (11th Cir. 1994)
- *Campbell v. Shaw*, 947 S.W.2d 128 (Mo. Ct. App. 1997)

INTRODUCTION

Employers have long used time clocks to track time in the workplace. They haven't always used this power appropriately. In the early days of industrialization, some employers manipulated time clocks to stretch the workday and squeeze unpaid work out of employees.[1] This appeal presents a similar problem updated for the digital age. Appellee Saint Luke's doesn't fiddle with the time itself; it instead programs its timekeeping system to automatically round off time that employees work, leaving them uncompensated for that time.

Under Saint Luke's rounding policy, an employee who clocks in six minutes before or after the start of a scheduled shift receives compensation from the time the shift is scheduled to begin; and an employee who clocks out six minutes before or after the end of a scheduled shift is paid to the scheduled end of the shift.

There is no dispute that this policy consistently leads Saint Luke's to fail to pay the majority of employees for all the hours they work.

[1] Hilary M. Goldberg, Nanci K. Carr & Paul J. Silvia, *Stealing Time: The Propriety of Alleging Common Law Conversion in Modern Wage Theft Lawsuits*, 36 J.L. & Commerce 1, 8-9 (2017) ("*Stealing Time*").

Employees regularly perform compensable work before and after their shifts. Saint Luke's has rounded off this time for years on end, effectively stretching employees' workdays without paying them the compensation they are due.

None of this is guesswork. Both sides hired experts to analyze rounding's effects over millions of employee shifts and workweeks spanning many years. And both experts reached the same conclusion: Saint Luke's consistently underpays employees because of rounding.

Torri Houston brought this suit under the FLSA and Missouri law on behalf of herself and other workers to recover the wages they are owed. Recognizing that Saint Luke's rounding policy applies to all hourly, non-exempt employees, the district court certified a state-law class and an FLSA collective for Houston's claims.

Two federal regulations play a starring role in this case. The first permits rounding only if "it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 748.48(b). The second—known as the de-minimis doctrine—provides that "[i]n recording working time under the [FLSA], insubstantial or insignificant periods of time beyond scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." *Id.* § 748.47. Concluding that these regulations defeat both the state and federal claims of Houston and

the certified class and collective that she represents, the district court granted Saint Luke's summary judgment.

This was error. Like a casino game that reliably favors the house, rounding has overwhelmingly worked to the benefit of Saint Luke's and to the detriment of its employees. The undisputed evidence shows that over a six-year period Saint Luke's failed to pay nearly two-thirds of employees for all the time they worked, causing employees to work 75,000 hours without pay and to lose more than $2 million dollars in unpaid wages. No permissible application of the rounding regulation permits this result. Saint Luke's manifestly fails to compensate employees for "all the time they have actually worked." *Id.* § 748.48(b).

Nor does the de-minimis doctrine excuse Saint Luke's non-payment. The doctrine does not apply when employees regularly perform unpaid work that the employer can—and does—easily track. That's true here since Saint Luke's electronically records the exact time that employees clock in and out for their shifts.

Last, the *FLSA's* regulations do not apply to Houston's *Missouri* common-law claims for unjust enrichment and breach of contract. Even if they do, Houston has shown that Saint Luke's was unjustly enriched and that it breached its contract with Houston because it failed to pay her and other employees for all hours worked.

The district court's judgment must be reversed.

STATEMENT OF THE CASE

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Parties.

Defendant-Appellee Saint Luke's Health System runs 16 hospitals and medical practices across the Kansas City area. App. 89 n.5; R. Doc. 146, at 8-9 n.5. Defendant-Appellee Saint Luke's Northland Hospital Corporation is one of those facilities. *Id.* (Houston collectively refers to Appellees as "Saint Luke's.")

Plaintiff-Appellant Torri Houston worked as a surgical technologist at Saint Luke's from 2014 to 2017. App. 90-91; R. Doc. 146, at 9-10. Houston was a non-exempt, hourly employee, making her eligible for overtime pay when she worked more than 40 hours in a week. App. 91; R. Doc. 146, at 10.

B. Saint Luke's Uses a Rounding Policy When Calculating Employees' Hours Worked and Pay.

Saint Luke's uses a timekeeping system called Kronos Workforce Timekeeper to record employees' work hours. *Id.* Through Kronos, employees clock in and out for their shifts using an electronic time clock or an Internet-based portal. *Id.*

Saint Luke's has programmed the Kronos system to automatically apply the hospital's timekeeping rules. *Id.* These rules include timeclock-rounding policies for non-exempt, hourly employees like Houston. *Id.*

For scheduled shifts, Saint Luke's rounds employees' clock-in and clock-out times to the shift's scheduled start and end times, so long as

employees punch in or out within six minutes of when their shift was scheduled to start or end. App. 91-92; R. Doc. 146, at 10-11. So, when an employee clocks in between 7:54 a.m. and 8:06 a.m. for a shift scheduled to begin at 8 a.m., Saint Luke's rounds that employee's start time to 8 a.m. *Id.* Similarly, when an employee punches out between 4:54 p.m. and 5:06 p.m. for a shift scheduled to end at 5:00 p.m., Saint Luke's rounds that employee's end time to 5:00 p.m. *Id.*

Saint Luke's electronically records and maintains the exact times that employees clock in and out of work for each shift. App. 42; R. Doc. 48, at 6. These records include employees' actual, unrounded clock-in and clock-out times as well as their rounded start and end times. App. 147-48; R. Doc. 146-2, at 10-11.

Saint Luke's uses its rounding policy to calculate pay. App. 91-92; R. Doc. 146, at 10-11. The hospital does not pay non-exempt employees like Houston based on when they actually clock in or out of work. *Id.* It instead pays them based on their rounded times, compensating them only from their shift's scheduled start to its scheduled end. *Id.* The consequence is that employees are not paid for work done before and after their scheduled shifts. *Id.* So, when an employee clocks in at 7:54 a.m. and out at 5:06 p.m. for a shift scheduled to run from 8:00 a.m. to 5:00 p.m., she is compensated for 9 hours of work, not the 9 hours and 12 minutes of work she has actually performed. *Id.*

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C. Houston Files This Lawsuit Challenging Saint Luke's Rounding Policy.

Houston filed this lawsuit in April 2017. R. Doc. 1. Her amended complaint alleges that Saint Luke's consistently shaves employees' compensable time through rounding, in violation of Missouri and federal law. App. 1; R. Doc. 43.

The district court conditionally certified an FLSA collective action on September 6, 2018. R. Doc. 61, at 13. The court also certified a Rule 23 unjust-enrichment class under Missouri law for employees who, like Houston, worked in Missouri. *Id.* Although Houston alleges that Saint Luke's violated the Missouri Minimum Wage Law ("MMWL") and breached its contract with her, she did not seek class treatment for those claims. App. 89 n.4; R. Doc. 146, at 8 n.4.

The FLSA collective and the unjust-enrichment class span different statutory periods. The collective includes hourly, non-exempt employees who worked for Saint Luke's at any time from September 6, 2015 to September 6, 2018, R. Doc. 67-1, at 3, while the unjust-enrichment class includes all employees who worked in Missouri from April 10, 2012 to September 6, 2018, *id.*

The class and collective include some, but not all, of the same employees. The FLSA collective includes roughly 1,430 employees who filed notices of consent to join the case, while the Missouri class covers 13,683 class members. App. 90; R. Doc. 146, at 9. Approximately 1,240 employees are in both groups. *Id.*

D. The Parties' Expert Reports Conclusively Establish That Saint Luke's Fails to Pay a Majority of Employees Because of Rounding.

Both parties retained experts to analyze rounding's impact on employees' time and pay. The expert reports show that Saint Luke's consistently fails to pay employees for all hours worked because of rounding.

(1) Houston's expert report.

Houston's expert, L. Scott Baggett, analyzed rounding's impact on the class and collective in four ways: (1) per shift, (2) per workweek, (3) per employee, and (4) overall. App. 97-100; R. Doc. 146, at 16-19. Baggett used the same four metrics to examine rounding's effect on Houston. App. 100-01; R. Doc. 146, at 19-20. Baggett assessed whether rounding added or removed compensable time for Houston's and class members' timesheets and pay—or, in other words, whether employees received more, or less, compensation for the hours they worked than they would have had Saint Luke's not rounded their time. App. 97-101; R. Doc. 146, 16-20.

(a) Per shift.

Baggett's shift analysis reviewed 7,044,709 shifts worked during the relevant timeframes for the class and collective. App. 152-53; R. Doc. 146-2, at 15-16. Saint Luke's rounded away net time worked in almost half of those shifts—48.5%—or nearly *3.5 million* shifts. *Id.* Rounding added time to 36.6% of shifts and had no effect on 14.9% of shifts. *Id.*

Rounding's detrimental effect on employees was even more stark in weeks in which employees worked overtime. In those weeks, Saint Luke's rounded away net time in 50.3% of shifts. *Id.*

(b) Per workweek.

Rounding provided an even greater benefit to Saint Luke's—and a greater detriment to its employees—when its impact on employees' workweeks was measured. In this mode of analysis, a "workweek" is a one-week period worked by a single employee. App. 153; R. Doc. 146-2, at 16. To determine rounding's overall impact on an employee's workweek, Baggett offset time that rounding added to shifts in that workweek against time that rounding removed from shifts in that same week. App. 153-54; R. Doc. 146-2, at 16-17.

Over the course of 1,762,137 individual workweeks, Saint Luke's rounded away net time in 55.9% of those workweeks. App. 153-54; R. Doc. 146-2, at 16-17. That is almost a *million* weeks in which employees were not paid for all the time they worked. *Id.* By contrast, 37.9% of workweeks had time added and 6.2% were not impacted by rounding. *Id.* And as Baggett's per-shift analysis showed, rounding favored Saint Luke's even more heavily in weeks in which employees worked overtime. Saint Luke's rounded employees' overall time down in 60.8% of those weeks. *Id.*

(c) Per employee.

Baggett then analyzed rounding's net impact on each employee in the class and collective. Here, too, Baggett computed the "overall

compensable hours gained or lost" per employee, offsetting time gained against time lost. App. 154; R. Doc. 146-2, at 17. Baggett found that rounding overwhelmingly favors Saint Luke's and harms employees, concluding that nearly two-thirds of employees—64.4%—lost net compensable time because of rounding. *Id.* That is almost 9,000 employees. *Id.* Only 35.6% of employees had time added by rounding or were unaffected by the practice. *Id.*

(d) Overall net impact on all employees.

Baggett then "computed [rounding's] overall net impact" on all employees. App. 155; R. Doc. 146-2, at 18. To do so, Baggett again offset all hours gained by employees against hours lost. *Id.*

Rounding's net impact when totaled across employees is staggering. Saint Luke's failed to pay employees for **74,282.37** hours that they worked. *Id.* Rounding's effects did not vary over time. Year after year, Saint Luke's rounded away thousands of hours that employees worked. A graph that Baggett prepared shows the consistent and unceasing accumulation of hours worked that Saint Luke's rounded away and never paid:

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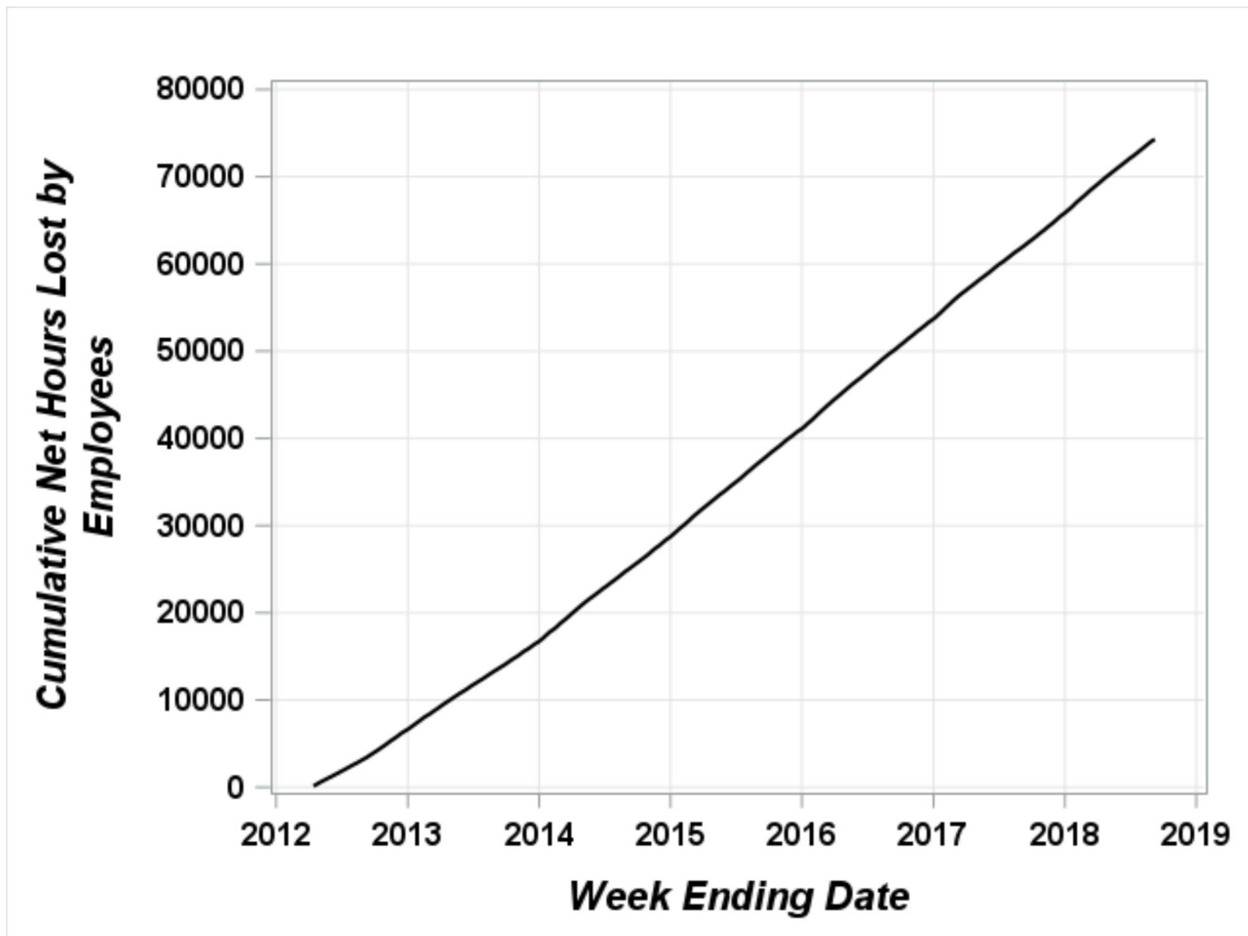

Id. As the graph shows, week after week, year after year, Saint Luke's always came out ahead, wringing thousands of hours of free labor from its employees. Looking at employees as a whole, employees lost net time and compensation in *100 percent* of workweeks because of rounding. *Id.* In other words, in the aggregate, Saint Luke's shortchanged employees as a group every single week—without exception. *Id.*

(e) Overall lost wages.

Translating the lost time to lost wages, Baggett calculated that the members of the FLSA collective lost $139,219.26 in overtime pay. App. 158-59; R. Doc. 146-2, at 21-22. The Missouri class members lost

$2,143,443.23 in pay, even after factoring in overpayments when rounding added time to employees' hours. App. 157, 159; R. Doc. 146-2, at 20, 22. Putting the two classes together (and considering that some employees are in both the state-law class and the FLSA collective), employees as a whole suffered **$2,212,425.29** in lost wages. App. 160; R. Doc. 146-2, at 23.

The timeclock-rounding data, as Baggett recognized, lends itself to an obvious conclusion: Saint Luke's "rounding policy…benefited [Saint Luke's] at the expense of the FLSA Collective Members and Missouri Rule 23 Class Members." App. 155; R. Doc. 146-2, at 18. The "policy has resulted, over a period of time, in the failure to compensate these employees for all of their actual recorded time on the clock." *Id.*

(f) Impact on Houston

Like her colleagues, Houston was consistently harmed by Saint Luke's rounding policy. Saint Luke's removed net time from 45.13% of her shifts, while it added time to only 18.58% of her shifts. App. 185; R. Doc. 146-2, at 48. Over 108 workweeks, Houston lost net time due to rounding in 77 of them—or more than 71% of the time. *Id.* The time lost added up to 7.63 hours—nearly a full day's worth of work—and $205.13 in lost wages. App. 101; R. Doc. 146, at 20.

(2) Saint Luke's expert report.

Saint Luke's expert, Deborah Foster, confirmed that rounding consistently works in Saint Luke's favor. Like Baggett, Foster analyzed

rounding's impact on shifts and employees. She tied these analyses to three statutory periods for the class and collective: (1) FLSA Lookback-1, spanning September 2016 to September 2018; (2) FLSA Lookback-2, covering September 2015 to September 2018; and (3) Missouri Lookback, extending from April 2012 to September 2018. App. 93-94; R. Doc. 146, at 12-13. There was little variability between the periods; in all three, Foster found that rounding benefited Saint Luke's across all metrics, causing Saint Luke's to fail to pay a majority of employees for all hours worked.

(a) Per shift.

Foster found that rounding impacted employees' shifts almost identically in each statutory period. Saint Luke's rounded away net time in just shy of half the shifts in each timeframe: 49.2% of shifts in FLSA Lookback-1 and the Missouri class period, and 49.4% in FLSA Lookback-2. App. 94-95; R. Doc. 146, at 13-14. Rounding added time in approximately 36% of shifts and had no effect in about 14% of shifts across all three timeframes. *Id.*

Not only did employees lose time more often than they gained it. They also lost more time when it was rounded away than when it was added: Employees lost roughly 3.6 minutes per shift on average when Saint Luke's rounded away time from shifts, while they gained just over 3 minutes on average when rounding added time. *Id.* Both the frequency and the extent of employees' loss due to rounding, in other words,

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exceeded the frequency and the extent of their gain. Overall, Saint Luke's removed an average of 39-42 seconds per shift through rounding. *Id.* Saint Luke's own expert therefore agrees that Saint Luke's employees lose time, on average, on every single shift that they work.

(b) Per employee.

Foster likewise found that rounding had a consistently negative net effect on employees' compensable time. Nearly two-thirds of employees lost net time because of rounding in each statutory period: 66.1% of employees during the Missouri class period; 65.4% of employees during FLSA Lookback-2; and 62.8% of employees during FLSA Lookback-1. App. 95-97; R. Doc. 146, at 14-16. By contrast, only a third of employees had net time added by rounding. *Id.*

Even after accounting for time added because of rounding, the *average* employee in the FLSA Lookback-1 and FLSA Lookback-2 groups *lost*—and therefore was not paid for—2.87 and 3.98 hours worked, respectively. *Id.*

During the Missouri-class period, the *average* employee—accounting, again, for time that rounding added—was not paid for 5.65 hours of work due to rounding. *Id.* Summing that number up over the 13,683 employees in the class means that Saint Luke's got **77,308.95** hours of work for free. That's the equivalent of more than 37 employees working a standard 40-hour shift for an entire year—all without pay.

(c) Per shift for employees who lost net time.

Finally, Foster examined rounding's effect on shifts worked by employees who had a net loss of time. This analysis, then, excluded employees who broke even or who had a net gain because of rounding.

Rounding impacted employees with a net loss nearly the same in each period. Saint Luke's rounded net time away in roughly 57% of these employees' shifts and added time to about 29% of their shifts; rounding had no effect on approximately 14% of shifts. App. 96-97; R. Doc. 146, at 15-16.

And like employees in general, the subset of employees who had a net loss of time lost *more* time when it was rounded away than when it was added. These employees lost roughly 3.9 minutes per shift when Saint Luke's rounded away net time from their shifts, while they gained only about 2.7 minutes when rounding added time. *Id.* Overall, Saint Luke's rounded away an average of 1.4 minutes per shift for these employees during each statutory period. App. 128-29; R. Doc. 146-1, at 8-9.

(3) Both experts agree that rounding shortchanges employees.

The sometimes-granular nature of the experts' reports should not obscure the core point of agreement: Saint Luke's systematically undercounted employees' compensable hours and underpaid employees millions of dollars. These underpayments were remarkably consistent. Week after week, year after year, employees, as a whole, lost ground. The

reason for this is manifest: employees consistently lost time *more often* than they gained it; and they also lost *more time* when it was rounded away than they gained when it was added. Even when accounting for time that rounding added, the average employee unfailingly lost time and pay because of rounding.

And with every passing week, the gap between time worked and time paid grows wider. Saint Luke's initiated the rounding policy long before 2012—when the statute of limitations cuts off—and the policy remains in effect to this day. App. 209 n.3; R. Doc. 149, at 14 n.3. Both experts agree that on every metric, and in every time period, rounding has worked to the benefit of Saint Luke's and to the detriment of its employees, enabling Saint Luke's to reap the benefits of tens of thousands of hours of free labor and to retain millions of dollars in unpaid wages.

E. The Parties and District Court Agree to Bifurcate the Proceedings, with the First Phase Focusing on the Experts' Analysis of Rounding's Impact.

The parties, with the district court's blessing, agreed to structure the case into two phases.

The parties would first litigate Saint Luke's summary-judgment motion concerning rounding's effects on employees' pay. App. 72; R. Doc. 142, at 2. For the purposes of that motion, the parties stipulated to several key facts and procedural matters. *Id.* at 72-73. First, they stipulated that all the pre- and post-shift time employees spent on the clock and for which they were not paid because of rounding was

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compensable. App. 203; R. Doc. 149, at 8. Second, the parties agreed to table discovery and argument about why employees were on the clock before or after their scheduled shifts. *Id.* And third, the parties agreed not to challenge the experts' analyses, and that minor differences in those analyses were not material. App. 90 n.7, 93 n.8; R. Doc. 146, at 9 n.7, 12 n.8.

Under the bifurcation plan adopted by the district court, these and other issues would remain to be litigated during the second phase of litigation if the court did not grant summary judgment. App. 77-78; R. Doc. Order Granting Joint Motion to Amend Scheduling Order, at 1-2.

F. The District Court Grants Summary Judgment to Saint Luke's.

The district court granted Saint Luke's summary-judgment motion.

Applying out-of-circuit authority interpreting the FLSA's rounding regulation, the court first granted summary judgment on the FLSA and MMWL claims on the ground that Saint Luke's complied with the regulation. App. 245-50; R. Doc. 159, at 11-16.

The court then granted summary judgment on the unjust-enrichment claims. App. 250-53; R. Doc. 159, at 16-19. Citing no authority that either the FLSA's de-minimis doctrine or its rounding regulation applies to state common-law claims—much less to Missouri common-law claims—the court applied the regulations to Houston's

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unjust-enrichment claims, apparently concluding that Saint Luke's was not unjustly enriched because it complied with federal law.

Finally, the court granted summary judgment on Houston's breach-of-contract claim, deciding that Saint Luke's had substantially complied with the contract and that Houston's damages were not, in fact, due to any breach, but to Saint Luke's "legal timekeeping policies." App. 254-55; R. Doc. 159, at 20-21.

This appeal followed.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment.

The court first misinterpreted the FLSA's rounding regulation, construing it to require individual employees to show that employees as a class suffered an aggregate loss because of rounding. This view has no support. The text of the regulation, the FLSA, and guidance from the Department of Labor ("DOL") all show that rounding an employee's hours is permissible so long as *that* employee breaks even over time.

The district court erred a second time in its application of the regulation. Even under the court's erroneous interpretation, employers must ensure that *employees as a whole* break even. That did not happen here. The undisputed facts show that employees as a whole lost time and compensation because of rounding.

And the time they lost was not de minimis. The district court declined to decide whether the FLSA's de-minimis doctrine applies to the

FLSA claims. But the answer to that question is clear: it does not. Employees regularly lost time to rounding, and the lost time adds up to significant lost wages. And because Saint Luke's precisely records employees' time, that shows both that the de-minimis doctrine is inapplicable and that recording this time would not cause Saint Luke's any administrative burden—showings that are fatal to any de-minimis defense.

Next, rounding unjustly enriched Saint Luke's. The district court applied the FLSA's de-minimis rule to the class's Missouri common-law claim for unjust enrichment, apparently holding that the claim failed because Saint Luke's complied with the FLSA. But the state unjust-enrichment claims do not depend on the FLSA, so even if Saint Luke's rounding passed muster under the FLSA, that would not matter. In any event, the de-minimis doctrine is just as inapplicable to the unjust-enrichment claims as to Houston's other claims.

Finally, Saint Luke's breached Houston's contract. The district court's conclusion that Saint Luke's didn't breach depends on several false and improper assumptions. The substantial-compliance doctrine also doesn't affect Houston's contract claim. A party that substantially complies with a contract may avoid the contract's rescission, but it may not escape a claim for damages.

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ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is proper only 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). "Where the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, there is a genuine issue for trial." *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 999 (8th Cir. 2015).

This Court reviews a "grant of summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences that can be drawn from the record." *Minn. ex rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 686 F.3d 567, 571 (8th Cir. 2012). "[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Summary judgment therefore "should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts." *United States v. Perry*, 431 F.2d 1020, 1022 (9th Cir. 1970); *Chenette v. Trs. of Iowa Coll.*, 431 F.2d 49, 53 (8th Cir. 1970).

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II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE FLSA AND MMWL CLAIMS.

A. The FLSA Broadly Requires Payment for Compensable Work.

Congress enacted the FLSA to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Recognizing that broad coverage is essential to accomplish the FLSA's remedial and humanitarian purpose, courts "broadly interpret and apply the FLSA to effectuate its goals." *Specht v. City of Sioux Falls,* 639 F.3d 814, 819 (8th Cir. 2011) (cleaned up).

The FLSA meets Congress's remedial objectives, in part, by requiring that a non-exempt employee working "in excess of" forty hours in a workweek be compensated for those excess hours "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). Because the FLSA requires prompt payment, *Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 707 n.20 (1945), wages typically must be paid on the regular payday for the period worked, 29 C.F.R. § 778.106; *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993).

Two limited—and significantly different—exceptions to these rules are relevant here. The first, known as the de-minimis doctrine, permits employers to "disregard" recording otherwise compensable time if certain conditions are met. 29 C.F.R. § 785.47. The second, the FLSA's rounding regulation, provides that employers may round employees' time only if,

over time, employers properly compensate employees "for all the time they have actually worked." 29 C.F.R. § 785.48(b).[2]

B. The FLSA Prohibits Wage Theft; Employers Have Long Used Time Clocks to Commit it.

A central purpose of the FLSA is to prohibit wage theft, which occurs when employers fail to pay workers the wages they are owed for the work they have performed. *See Conner v. Cleveland Cty.*, 22 F.4th 412, 423 (4th Cir. 2022).

Clocks have played a key role in both enabling and limiting wage theft since the early days of industrialization. "During the early stages of industrialization when timekeeping devices were expensive, employers exploited an information asymmetry concerning time." *Stealing Time*, at 8-9. Because workers typically could not afford pocket watches, "only the employer knew the time that regulated the workday," enabling him to manipulate the factory clock without employees' knowledge. *Id.* This crude and early form of wage theft grew less common as workers began to be able to afford less expensive pocket watches. *Id.*

But wage theft is far from a thing of the past. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting). And many

[2] The MMWL is "interpreted in accordance with the [FLSA]…and any regulations promulgated thereunder" unless the MMWL provides differently. Mo. Rev. Stat. § 290.505.4. For purposes of this appeal, the parties agree that the MMWL and FLSA claims are subject to the same analysis.

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modern forms of it are still rooted in ways in which employers control time, "such as how it is recorded." *Stealing Time*, at 9.

"Electronic timekeeping is a ubiquitous feature of the modern workplace." Elizabeth Tippett, Charlotte Alexander & Zev Eigen, *When Timekeeping Software Undermines Compliance*, 19 Yale J. L. & Tech. 1, 2 (2017) ("*Timekeeping Software*"). Although electronic timekeeping systems enable employers to easily record hours worked, they can also enable employers "to deprive employees of earned pay by...setting up automatic default rules that shave time." *Id.* "Using software, firms can implement systems"—like rounding—that "avoid or evade rules on the margin." Elizabeth Tippett & Charlotte Alexander, *The Hacking of Employment Law*, 82 Mo. L. Rev. 973, 974 (2017) ("*Hacking of Employment Law*"). With a rounding system in place, "[t]hough any given employee might lose only a few minutes per day, software's ability to automate this function and apply it across an entire workforce can result in significant losses—and wage and hour law violations—in the aggregate." *Id.* That's because even "facially neutral rounding rules can act like casino odds…consistently favoring 'the house.'" *Timekeeping Software*, at 38. Rounding, in effect, can enable "a kind of statistical cheating." *Id.* at 37.

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C. The District Court Erred in Granting Summary Judgment on the FLSA and MMWL Claims.

Saint Luke's failed to pay overtime that Houston and other employees earned, violating the FLSA and making summary judgment inappropriate. This is true for two overarching reasons. First, it is undisputed that Saint Luke's underpaid a significant majority of its employees—Houston among them—because of rounding. Because the FLSA and the rounding regulation do not permit employers to offset underpayments to some employees against overpayments to others, the employees who were underpaid must be fully compensated. Second, even assuming the rounding regulation permits employers to underpay some employees as long as they overpay other employees in equal measure, summary judgment was still inappropriate. Saint Luke's systematically underpaid employees in the aggregate—week after week, month after month, year after year. The FLSA and the rounding regulation do not let employers do that.

(1) FLSA regulations permit rounding, but only if, over time, rounding results in employees being paid for all hours worked.

Before turning to the rounding regulation, three baseline rules provide critical context. First, the FLSA requires employers to "total *all the hours worked* by the employee…in [each] workweek…and pay overtime compensation for each hour worked in excess of" 40. 29 C.F.R. § 778.103 (emphasis added); 29 U.S.C. § 207(a)(1). Second, the FLSA generally "takes a single workweek as its standard and does not permit

averaging of hours over 2 or more weeks." 29 C.F.R. § 778.104. And third, employers generally must pay any overtime owed on the employee's first regular payday following the relevant pay period. *Id.* § 778.106.

These rules provide the backdrop to the DOL's rounding regulation. That regulation relaxes the second and third rules set forth above—allowing employers to blend time and delay pay, provided that the first rule—paying employees for all hours worked—is carefully honored. Rounding may not result, over time, in underpaying employees. The full regulation provides:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R. § 785.48(b).

The regulation dates back to 1961. It made good sense in the 1960s when many employers used physical punch cards and calculated hours worked and wages owed by hand—an often long and tedious process. The regulation permitted "employers to efficiently calculate hours worked," offering them a "practical method for calculating work time." *See's Candy*

Shops, Inc. v. Superior Court, 148 Cal. Rptr. 3d 690, 701 (Cal. Ct. App. 2012).

But as several courts and commentators have observed, the practical underpinnings of the regulation have eroded significantly. "The rule represents a vestigial legal accommodation to employers previously burdened with pen-and-paper calculations." *Hacking of Employment Law*, at 989. When employers like Saint Luke's use sophisticated timekeeping software that precisely records unrounded time punches, there is "no technological need for rounding." *Id.* Nor are any "efficiencies…gained from this practice." *Donohue v. AMN Servs., LLC*, 481 P.3d 661, 672 (Cal. 2021). Just the opposite, as employers that automatically calculate the precise time employees work must "take the extra step of converting the unrounded time punches to rounded ones." *Id.*

(2) The case law addressing rounding generally requires an employer's rounding policy to be neutral on its face and in application.

This Court has not yet had occasion to consider the rounding regulation, and no courts appear to have interpreted it before the 1990s. Only two federal appellate courts have applied the regulation, *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020); *Corbin v. Time Warner Ent.-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016); *Gillings v. Time Warner Cable LLC*, 583 F. App'x 712 (9th Cir. 2014),

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leaving much of the interpretive spade work to be done by state and federal district courts.

The limited case law addressing rounding is not entirely consistent. But courts have coalesced around a set of principles that purport to distinguish between lawful and unlawful rounding policies. Many courts hold that "[r]ounding policies may be permissible if they, 'on average, favor neither overpayment nor underpayment' of wages." *Mendez v. H.J. Heinz Co.*, 2012 WL 12888526, at *2 (C.D. Cal. Nov. 13, 2012) (quoting *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1126 (C.D. Cal. 2011)). But they "are unlawful 'if they systematically undercompensate employees.'" *Id.* (quoting *Alonzo*, 832 F. Supp. 2d at 1126-27). Rounding, in other words, "is unlawful if it consistently results in a failure to pay employees for time worked." *Sloan v. Renzenberger, Inc.*, 2011 WL 1457368, at *3 (D. Kan. Apr. 15, 2011). "To determine whether a rounding policy is lawful, courts consider whether it is 'neutral, both facially and as applied.'" *Feltzs v. Cox Commc'ns Cal., LLC*, 2021 WL 5050259, at *4 (C.D. Cal. Oct. 27, 2021) (quoting *Corbin*, 821 F.3d at 1076).

Determining whether a rounding policy is facially neutral is usually "straightforward." *Id.* "So long as the system gives equal opportunity to round up or down and the employers' other policies do not interfere with its application, it will be found facially neutral." *Id.*

Showing that a policy is neutrally applied is "more complicated." *Id.* Although courts have established several guideposts, anchoring them is

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the notion that an employee who was underpaid because of rounding can prevail only by showing that her employer did not properly compensate "the *average* employee." *Wright v. Menzies Aviation, Inc.*, 2013 WL 5978628, at *7 (Cal. Ct. App. Nov. 12, 2013) (emphasis added).

(3) The text of the FLSA and the rounding regulation require payment for all hours worked for each employee; employers cannot escape liability by pointing to rounding's aggregate effect on all employees.

The text of the FLSA and the rounding regulation lead to a straightforward result. An employer must pay each employee for all hours that he is "employ[ed]"—including any overtime premiums. 29 U.S.C. § 207(a)(1). Consistent with that statutory directive, employers may round time as long as "this arrangement averages out so that the employees are fully compensated for all the time they actually work." 29 C.F.R. § 785.48(b). Rounding is permissible, in other words, provided that it does "not result, over a period of time," in underpaying employees. *Id.*

Some of the cases interpreting the rounding regulation—including, now, the district court's decision—have failed to faithfully follow the text of the FLSA and the regulation. These cases permit rounding that underpays some employees so long as it overcompensates others. The principal error of these cases is interpreting the regulation to allow employers to avoid liability by aggregating rounding's effects on all employees, totaling and averaging time and compensation lost and gained across all employees. *E.g.*, *Levanoff v. Dragas*, 280 Cal. Rptr. 3d

610, 627 (Cal. Ct. App. 2021); *Shiferaw v. Sunrise Senior Living Mgmt.*, 2016 WL 6571270, at *28 (C.D. Cal. Mar. 21, 2016). On this analysis, what matters is rounding's impact on employees in the aggregate, or on the average employee, not its effect on individual employees.

Under this approach, even when it is undisputed that an employee lost pay because of rounding, that does not suffice to prove her FLSA claim. The viability of *her* claim depends on how rounding affects *all* employees in the aggregate. In *Utne*, for instance, the court held that the plaintiff could not prove that *his* rights were violated without showing "how rounding affects all employees." *Utne v. Home Depot U.S.A., Inc.*, 2017 WL 5991863, at *4 (N.D. Cal. Dec. 4, 2017). The court reached the same conclusion in *Wright*, holding that "statistical evidence indicating that the rounding policy properly compensated the average employee would provide the employer a complete defense, despite evidence that a particular employee was disadvantaged." *Wright*, 2013 WL 5978628, at *7. According to these authorities, then, an individual employee must show that "the rounding system consistently results in underpayment to the *average* employee over time." *Id.* (emphasis added). The upshot of this analysis is that if employees in the aggregate are fully compensated, employers do not violate the FLSA even when some employees are underpaid because of rounding. Employers, in effect, can offset rounding's gains to some employees against losses to others.

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The notion that employers may aggregate rounding's effects across employees and avoid liability even when they underpay individual employees derives from a misreading of the rounding regulation. The Ninth Circuit's *Corbin* decision provides the clearest expression of this error. There, the court held that the regulation does not include an "individual employee" requirement because it "applies to 'employee *s*' and contemplates wages for the time '*they'* actually work." 821 F.3d at 1077 (quoting 29 C.F.R. § 785.48(b)).

This analysis does not withstand scrutiny. Most critically, it conflicts with the text of the FLSA. And "between two potential interpretations of a regulation, the Court must choose an interpretation which comports with the statute over one which does not." *Miss. ex rel. Moore v. Marsh*, 710 F. Supp. 1488, 1503 (S.D. Miss. 1989). The FLSA permits employees to bring suit on an individual basis. 29 U.S.C. § 216(b). To prevail on a claim for unpaid overtime, an individual employee must show only that *she* performed compensable overtime and the number of hours of overtime for which *she* was not properly paid. *Hertz v. Woodbury Cty.*, 566 F.3d 775, 783 (8th Cir. 2009). What the employer has done to *other* employees is irrelevant; the employer cannot defend underpaying one employee by asserting that it has properly paid *other* employees. Doing so would flatly contravene the plain text of the FLSA. 29 U.S.C. § 207(a)(1) ("[N]o employer shall employ any of his employees who in any workweek…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*.") (emphasis added). Courts' interpretation of the rounding regulation turns these basic rules on their head.

The text of the rounding regulation similarly supports the conclusion that each individual employee must be paid for her time. The regulation thrice uses the term "employees," concluding that rounding "will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b). This language cannot be read to provide an exception to the rule that *each* employee must be paid the wages she is owed, or that this turns on whether employees *as a whole* are properly compensated. Hundreds of provisions of the FLSA and its implementing regulations use the plural term "employees,"[3] regularly using it interchangeably with the singular term "employee." None of these provisions allows employers to escape liability for underpaying *an* employee so long as employees, on average or as a group, come out ahead. Aggregating rounding's effects on employees effectively permits employers to offset payments made to some

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[3] Here is a collection of only a small number of those provisions: 29 U.S.C. §§ 203(m)(2)(B) & (s)(1)(A), 206-07(a), 210(b), 213(e), 216(b)-(c) & (e)(2), 217, 251(a); 29 C.F.R. §§ 531.3(a), 531.32(a), 531.36(a), 531.40(c), 776.0, 776.0a, 776.1-7, 776.9-19, 776.21, 778.0, 778.100, 778.104, 778.317, 785.5.

employees against non-payments made to others. But the FLSA strictly limits permissible offsetting, and in no circumstance does it allow offsetting one employee's pay against another's. *See* 29 U.S.C. 207(e)(5)-(7).

The DOL's interpretive guidance about the rounding regulation, which is entitled to respect, confirms this analysis. *See Baouch v. Werner Enters., Inc.*, 908 F.3d 1107, 1117 (8th Cir. 2018). The DOL's fact sheet for the healthcare industry—the industry at issue in this case—provides examples of permissible and impermissible rounding. Dep't of Labor*, Fact Sheet #53: The Health Care Industry and Hours Worked*, Revised July 2009, https://www.dol.gov/agencies/whd/fact-sheets/53-healthcare-hours-worked. Two examples concern rounding's effects on individual employees. In each the DOL concludes that the employee is entitled to overtime compensation, and in one it determines that the employer has violated the FLSA because of improper rounding. *Id.* There is no indication that the employers may avoid paying overtime or escape liability for *these* employees by aggregating rounding's effects on other employees. A 1994 DOL opinion letter also supports this conclusion. That letter states that rounding is permissible "providing such practice is more beneficial to *the employee*, and *he/she* is compensated for all the time worked." Dep't of Labor, Nov. 7, 1994 Opinion Letter (FLSA-843), 1994 WL 1004879, at *1 (emphasis added). Consistent with the FLSA's general

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rules, DOL guidance makes clear that what matters for rounding is how it impacts individual employees.

Precedent supports this conclusion, too. When rounding is done properly, "it would necessarily have no effect on the amount of work time for which [an employer] owed *an employee* payment." *Brown v. L&P Indus., LLC*, 2005 WL 3503637, *6 (E.D. Ark. Dec. 21, 2005) (emphasis added). Just because an employer properly compensates many or even a majority of employees "does not absolve [it] of liability at the summary judgment stage for the undercompensation of" *other* employees because of rounding. *See Eddings v. Health Net, Inc.*, 2012 WL 994617, at *4-5 (C.D. Cal. Mar. 23, 2012).

Putting these pieces together, the proper interpretation of the rounding regulation is straightforward. Rounding an employee's hours is permissible so long as *that* employee breaks even over time. That employee, like all others, must be "fully compensated" for the time that he works. 29 C.F.R. § 785.48(b).

That interpretation accords with the regulation's provision allowing rounding "provided that it is used in such a manner that it will not result, *over a period of time*, in failure to compensate the employees properly for all the time they have actually worked." *Id.* (emphasis added). Although the regulation does not permit employers to aggregate rounding's effects *across* employees, it does allow them to aggregate rounding's effects *over time* for each employee. Rounding thus functions

as an exception to the prohibition on averaging an employee's hours over two or more weeks and to the requirement to pay overtime owed on the employee's first regular payday following the relevant pay period. 29 C.F.R. §§ 778.104, 778.106. When employers use rounding, then, they need not pay for time rounded away from an employee's pay in a given workweek on the regular payday for that week so long as they make up the difference to her later.

When the rounding regulation is properly interpreted, this is an easy case. The district court erred in aggregating rounding's effects across all employees. Saint Luke's underpaid two-thirds of employees, including Houston, for years. App. 95-96; R. Doc. 146, at 14-15. Saint Luke's rounding practice unquestionably resulted in a failure to compensate *these* employees for all the time they worked, and this non-payment extended for far longer than the rounding regulation permits.[4] Saint Luke's therefore violated the FLSA by underpaying these employees.

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[4] Few courts have "addressed what 'period of time' is to be considered in determining whether a rounding policy violates the regulation," but those that have have concluded that "'for employees paid weekly, a period of at least several weeks, if not months, is appropriate' because '[a] lesser period would be incapable of producing the averaging of wages contemplated by the regulation." *Stidham v. Day & Zimmermann NPS, Inc.*, 2007 WL 9684060, at *7 (M.D. Tenn. Sept. 10, 2007) (quoting *McElmurry v. US Bank Nat'l Ass'n*, 2004 WL 1675925, at *15 (D. Or. 2004)). The employees are well beyond that—or any other reasonable—amount of time here.

This analysis is consistent with the outcome and much of the reasoning in *Corbin*. There, the Ninth Circuit rejected the plaintiff's contention that the regulation required employees to break even in every pay period or set of periods. 821 F.3d at 1077. Houston agrees with that. What matters is whether rounding "average[s] out *in the long-term*." *Id.* And in *Corbin*, the evidence showed that the plaintiff's pay *was* on track to average out. *See id.* at 1077-79 (explaining that plaintiff "gained both time and compensation in eight of his last ten pay periods," so while he had lost $15.02 due to rounding, "a few more pay periods of employment may have tilted the total time/compensation tally in the other direction"). But since Saint Luke's employees have lost tens of thousands of hours and millions of dollars over 6 years because of rounding, and because rounding's negative effects have remained constant through every time period, there is no basis to reach the same conclusion here.

(4) Even when Saint Luke's rounding is viewed in the aggregate, summary judgment isn't appropriate.

This case is just as easy when Saint Luke's rounding is viewed in the aggregate. Both experts' analyses show that employees as a whole overwhelmingly lost net time and compensation. Indeed, Saint Luke's concedes that "[b]oth experts found employees had an aggregate loss." App. 229; R. Doc. 150, at 6. Viewed in the aggregate, then, Saint Luke's "fail[s] to compensate…employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b).

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The parties have agreed for purposes of the summary-judgment motion that Saint Luke's rounding policy is facially neutral. The fighting issue is whether the policy is neutral in application. *Feltzs*, 2021 WL 5050259, at *4 ("To determine whether a rounding policy is lawful, courts consider whether it is 'neutral, both facially and as applied.'") (quoting *Corbin*, 821 F.3d at 1076). It is not.

Several types of datapoints—including whether rounding increased or decreased the compensation of the class as a whole and what percentage of employees had a net increase or decrease in compensation—are relevant to whether rounding is neutrally applied. *Id.* at *5; *AHMC Healthcare, Inc. v. Superior Court*, 234 Cal Rptr. 3d 804, 815 (Cal. Ct. App. 2018); *Shiferaw*, 2016 WL 6571270, at *28. The weight to be given this evidence and whether it shows employees have been undercompensated are questions of fact. *See's Candy*, 148 Cal. Rptr. 3d at 708. Just as an employer has the burden to prove that the de-minimis exception applies, it is Saint Luke's burden to establish that the rounding regulation permits it to fail to pay employees. *Cf. Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 868 (W.D. Wis. 2007).

The undisputed facts show that Saint Luke's rounding policy was not neutral as applied because it resulted in aggregate underpayment of overtime without fail for years on end. Both experts agreed on this point. Houston's expert found the following:

- Nearly two-thirds of employees—64.4%—lost net time and pay because of rounding over a six-year period. App. 154; R. Doc. 146-2, at 17. That is almost 9,000 employees. *Id.*

- Saint Luke's rounded away net time in 55.9% of all workweeks and in 60.8% of workweeks in which employees worked overtime. App. 153-54; R. Doc. 146-2, at 16-17.

- Employees lost time due to rounding in 50.3% of shifts in weeks in which they worked overtime, and in 48.5% of all shifts overall. App. 152-53; R. Doc. 146-2, at 15-16. In contrast, employees gained time in only 36.6% of their shifts. *Id.*

- Saint Luke's failed to pay employees for 74,282.37 hours worked, totaling $2,212,425.59 in unpaid wages. App. 155; R. Doc. 146-2, at 18. This time period covered 2,340 days, resulting in average lost wages—and an average gain to Saint Luke's—of $945.48 per day. Saint Luke's rounding policy is still in effect to this day, with employees' wage loss now likely exceeding $3 million.

- As for Houston, Saint Luke's removed time from 45.13% of her shifts and 71% of her workweeks, adding up to 7.63 hours of unpaid work and $205.13 in unpaid wages. App. 101, 185; R. Doc. 146, at 20 & R. Doc. 146-2, at 48.

Saint Luke's expert confirmed these findings. Like Houston's expert, she found that nearly two-thirds of employees lost net time and wages in every time period that she examined. App. 95-96; R. Doc. 146, at 14-15. Even after accounting for time and pay added because of rounding, the *average* employee still lost several hours of pay. *Id.* Saint Luke's rounded away time in over 49% of shifts and added time in 36% of shifts. App. 94-95; R. Doc. 146, at 13-14. And rounding caused the

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average employee to lose approximately 40 seconds per shift in each timeframe. *Id.*

On every measure and in every period, then, both the average employee and employees as a whole consistently lost time and compensation because of rounding. The experts' analysis confirms that rounding "result[ed], over a period of time, in failure to compensate [Saint Luke's] employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b).

The most factually similar precedent buttresses this conclusion. Consider the *Feltzs* decision. There, the data showed that rounding removed time from 58% of shifts, added time to 32.5% of shifts, and had no effect on 9.5% of shifts. 2021 WL 5050259, at *6. Employees as a whole had a net loss of about 9,500 hours and an average loss of 1.6 minutes per shift because of rounding over a five-year period. *Id.* Roughly 80% of class members had a net loss of time. *Id.*

The *Feltzs* court denied summary judgment to the employer. Even though the employer's rounding policy was "facially neutral," the employer had "not shown that [the policy wa]s sufficiently similar to other rounding policies that other courts found to be neutral in application." *Id.* at *8. "An examination of the multiple datapoints presented" distinguished that case from others in which courts ruled in the employer's favor. *Id.* at *8. The *Feltzs* court carefully compared the evidence there to what was presented in other rounding cases, observing

that many cases involved data that was either much slimmer (e.g., evidence of rounding's effect on only one employee or only on shifts), or that tilted more heavily in employers' favor, or both. *See id.* at *7. But in *Feltzs*, the court had "additional data before it," and that data supported the plaintiffs. *Id.*

This case is just like *Feltzs*. A raft of undisputed evidence shows that rounding uniformly harms Saint Luke's employees in the aggregate. As in *Feltzs*, the evidence establishes that "the class as a whole lost time" and compensation "over a [multi-]year period." *Id.* Far more than half of employees had net time and pay rounded away in both cases. And in both cases, the data show that rounding caused a net loss of time on a per-shift basis when "averaged across all shifts for all employees, regardless of whether an employee personally experienced a net reduction or increase in hours from rounding." *Id.* The percentage of shifts in which employees lost time in the two cases is also similar. As in *Feltzs*, the data all support employees here, showing that Saint Luke's rounding was far from neutral.

The district court disagreed, but its determination that rounding was neutral rested on three flawed conclusions. First, it decided that employees' net loss of 75,000 hours of unpaid work was not significant because when spread across all employees, it totaled only roughly 5.5 hours of unpaid work per employee. App. 248; R. Doc. 159, at 14. That conclusion is a non sequitur. It improperly imports a de-minimis analysis

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into whether rounding is neutral, reasoning that rounding is permissible even when it harms employees in the aggregate if the negative effect is small enough. But the FLSA's de-minimis doctrine applies only when its conditions are met, *see* 29 C.F.R. § 785.47; it is not relevant to whether a rounding policy is neutrally applied. *See Lacy v. Reddy Elec. Co.*, 2013 WL 3580309, at *14 (S.D. Ohio July 11, 2013). And nothing in the rounding regulation says employers win when rounding harms employees only a little. 29 C.F.R. § 785.48(b).

Second, the court held that even though two-thirds of employees lost pay over a six-year period, "analysis of a slightly different timeframe could produce a result in which a majority of employees had time added through rounding." App. 248-49; R. Doc. 159, at 14-15. The record emphatically does not support that conclusion. No matter the size of the group of employees and no matter the period of time—the 1,426 employees in the two- and three-year FLSA periods, or the 13,683 employees in the six-year Missouri class—rounding consistently deprived two-thirds of employees of pay. Contrary to the district court's unsupported hypothesis, a majority of employees *never* gained time; they *lost* time and pay because of rounding *in every pay period* for more than *6 years*. As in *Feltzs*, "viewing the class of [employees] as a whole, the employees in this case were undercompensated for the period in question, as well as for each year within that period." 2021 WL 5050259, at *7.

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Third, the court placed improper weight on the fact that rounding removed time from roughly 50% of shifts. App. 249; R. Doc. 159, at 15. That datapoint is of limited value to the FLSA overtime claims. Employees are not entitled to overtime based on how much time they work in a *shift*; they receive overtime when they work more than 40 hours in a *workweek*. *See* 29 C.F.R. § 778.103; 29 U.S.C. § 207(a)(1). That matters here. Saint Luke's removed net time from workweeks more often than it did so from shifts: it rounded away net time in 55.9% of all workweeks and in 60.8% of workweeks in which employees worked overtime. App. 153-54; R. Doc. 146-2, at 16-17.

The reason for this is simple. Saint Luke's rounded time away from shifts *more often* than it added time to shifts; and, on top of that, Saint Luke's rounded away *more time* when it removed time from shifts than when it added time to shifts. App. 94-95; R. Doc. 146, at 13-14. When that net lost time is summed up over several shifts in a single workweek, the negative impact on employees is compounded: employees are more likely to work net unpaid time in any given workweek than in any given shift. And that is what matters for the FLSA. The district court's analysis ignores all of this.

Think of it this way. Imagine a casino game that comes with a 36.6% chance of winning, a 14.9% chance of tying, and a 48.5% chance of losing on each roll of the dice. Imagine further that winning a round is worth $3.05, but that losing a round means you will be out $3.59. Unless

you like losing money, this is not a game you should play. You will not only lose more often than you will win; you will lose *more* when you lose than you will gain when you win.

But this is the precise game Saint Luke's requires its employees to play, each and every shift.[5] Just as casinos always win overall without winning every hand, Saint Luke's invariably comes out ahead even though it doesn't shortchange each employee every shift or workweek. Saint Luke's rounding is designed to appear neutral, but in practice it is not.

At day's end, case law and commonsense both support this conclusion. Saint Luke's underpaid most of its employees for years, costing them $2 million in lost wages. Employees, as a group, lost time and pay every single week—without exception. In sum, because of rounding, Saint Luke's did not "compensate employees properly for all the time they…actually worked." 29 C.F.R. § 785.48(b).

D. The FLSA and MMWL Claims Are Not De Minimis.

There is similarly no basis to grant summary judgment to Saint Luke's on the ground that the FLSA and MMWL claims are de minimis.

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[5] The numbers for this game come from the experts' findings about the percentage of shifts with time added and removed because of rounding, and the average time lost or gained per shift because of rounding. App. 94, 97; R. Doc. at 146, at 13, 16.

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(1) This Court should decline to address the de-minimis doctrine's application to the FLSA and MMWL claims.

As a threshold matter, the district court should be given the first crack at applying the de-minimis rule. The district court did not reach the question whether the de-minimis doctrine applies to the FLSA and MMWL claims, applying the doctrine instead only to the state-law claim for unjust enrichment. App. 250 n.3; R. Doc. 159, at 16 n.3. Because this Court is not a court of first view, "[w]hen a district court fails to address a matter properly presented to it, [this Court] ordinarily remand[s] to give the court an opportunity to rule in the first instance." *Fergin v. Westrock Co.*, 955 F.3d 725, 730 n.3 (8th Cir. 2020) (citation omitted). That is an appropriate course of action here.

(2) The de-minimis doctrine does not apply here.

And though the Court need not and should not reach the issue, the FLSA and MMWL claims would withstand summary judgment on this record.

(a) Legal principles.

The de-minimis doctrine has no "textual basis in the FLSA and instead originated with a passing statement in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) regarding 'the application of a de minimis rule when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours.'" *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033, 1042 n.9 (10th Cir. 2021) (quoting

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Mt. Clemens, 328 U.S. at 692) (cleaned up); *see Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 376 (4th Cir. 2011) (Wilkinson, J., concurring) (explaining that the rule "has no obvious statutory derivation").

Following the Supreme Court's dicta in *Mount Clemens*, the DOL issued an interpretive rule in 1961 codifying the de-minimis doctrine. The regulation provides that "[i]n recording working time under the [FLSA], insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." 29 C.F.R. § 785.47. The regulation limits when the doctrine applies, giving the rule a narrow scope:

> This rule applies *only where* there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, *and* where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

Id. (emphasis added). This Court considers "the following factors when determining whether the work performed by the employee is *de minimis*: '[1] the amount of time spent on the extra work, [2] the practical administrative difficulties of recording additional time, [3] the regularity with which the additional work is performed, and [4] the aggregate

amount of compensable time.'" *Lyons v. Conagra Goods Packaged Foods LLC*, 899 F.3d 567, 584 (8th Cir. 2018) (quoting *Kellar*, 664 F.3d at 176).

Courts must apply the doctrine narrowly because "to give the de minimis rule too broad a reach would contradict congressional intent by denying proper effect to a statute that is remedial and humanitarian in purpose." *Perez*, 650 F.3d at 378 (Wilkinson, J., concurring) (quotation omitted). Whether the de-minimis rule applies is an issue of fact for a jury to decide. *See Guyton v. Tyson Foods, Inc.*, 767 F.3d 754, 759 (8th Cir. 2014) (affirming jury verdict determining that rule did not apply). The employer—not the employees—bears the burden of showing that the time is de minimis. *Peterson*, 15 F.4th at 1042-43; *Kellar*, 664 F.3d at 176.

(b) The doctrine does not apply because Saint Luke's records employees' time.

Right out of the gate, the de-minimis rule does not apply when, as here, the employer actually records the amount of time employees work.

The text of the de-minimis regulation leaves no doubt about this. It authorizes employers to "disregard" "*recording* working time…which cannot as a practical administrative matter be precisely *recorded* for payroll purposes." 29 C.F.R. § 785.47 (emphasis added). The doctrine therefore does not apply when the employer not only *can* but *does* record the time in question. *See, e.g.*, *Eddings*, 2012 WL 994617, at *5; *Hoyt v. Ellsworth Co-op. Creamery,* 579 F. Supp. 2d 1132, 1138-39 (W.D. Wis. 2008).

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The de-minimis rule does not apply here. Saint Luke's electronically records and maintains the exact times that employees begin and end their workdays by clocking in and out. App. 42, 91, 147-48; R. Doc. 48, at 6; R. Doc. 146, at 10; R. Doc. 146-2, at 10-11. Saint Luke's therefore not only can but does precisely record all the time at issue in this case. Having recorded that time, Saint Luke's cannot disregard it.

(c) The four-factor test favors Houston.

Because Saint Luke's records employees' time, rendering the de-minimis exception inapposite, the Court need not apply the four-factor balancing test to determine whether the exception applies. Even so, those factors favor Houston.

i. The amount of time is not de minimis.

Employees who lost net time due to rounding during the FLSA period lost an average of almost 4 minutes per shift. App. 96-97; R. Doc. 146, at 15-16. In *Lyons*, this Court determined that a two-to-five minute period was de minimis, but it emphasized that "no precisely calculated, rigid durational period applies" when deciding whether time is de minimis. 899 F.3d at 584. And this Court did not analyze this factor independently, weighing it instead in conjunction with "the additional administrative burden" of recording that time—a burden that is not present here. *Id.* Courts have held that similar or even lesser amounts of time than the almost 4 minutes at issue here are not de minimis. *See Peterson*, 15 F.4th at 1044, 1049 (2.27 minutes); *Bouaphakeo v. Tyson*

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Foods, Inc., WL 3421541, at *11 (N.D. Iowa Aug. 4, 2011) (three-plus minutes); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008) (4.117 to 4.755 minutes).

ii. The time not only can be but is precisely recorded.

Saint Luke's faces no administrative difficulty in recording the time at issue. We know that because Saint Luke's already *does* record this time. This factor could not weigh more heavily in favor of Houston.

Courts uniformly hold that this factor favors employees when, as here, their employer records the time in question. *See, e.g.*, *Aguilar*, 948 F.3d at 1284-85; *Flavie Bondeh Bagoue v. Developmental Pathways, Inc.*, 2019 WL 4597869, at *9 (D. Colo. Sept. 23, 2019); *Eddings*, 2012 WL 994617, at *5; *Hoyt*, 296 F. Supp. 2d at 1138-39; *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 929 (N.D. Ill. 2003). These holdings make perfect sense. It is the employer's burden to show that the de-minimis rule applies. *Kellar*, 664 F.3d at 176. Employers simply cannot carry their burden of showing that recording the time is infeasible when they *do* record the time.

These principles apply here. Saint Luke's uses sophisticated timekeeping software to record when employees clock in and out, tracking each minute they spend on the clock during their workday. Saint Luke's has not produced a single piece of evidence showing that it would be even remotely difficult for it to record or pay employees for this time.

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Like other employers that have failed to provide evidence of actual administrative difficulty, Saint Luke's is a long way from carrying its burden on this factor. *See, e.g.*, *Peterson*, 15 F.4th at 1045-46; *Gillings v. Time Warner Cable LLC*, 583 F. App'x 712, 715 (9th Cir. 2014).

The district court believed that this factor favored Saint Luke's, reasoning that "to compensate Plaintiffs on the basis of actual time worked, Defendants would have to individually assess each employee's actual time worked for every pay period." App. 252; R. Doc. 159, at 18.

This analysis is flawed for several reasons. First, the court cited no evidence for its conclusion and ignored that it was Saint Luke's burden to produce this evidence. Had the court examined the record, it would have found no evidence to support its analysis. The evidence, in fact, shows just the opposite. Because Saint Luke's electronically records and automatically processes employees' time for payroll, it would not need to "individually assess" anything; the computer does the work. Second, the notion that Saint Luke's would be burdened if it had to verify employees' time for payroll purposes proves too much. *All* employers need to confirm that payroll is accurate. Nor is this supposed burden relevant to the de-minimis analysis. The administrative-feasibility factor concerns the difficulty of *recording* time, not the difficulty of *paying* employees once that time is recorded. *See Lyons*, 899 F.3d at 584. There is no basis to conclude that Saint Luke's would face any difficulty in doing either.

iii. The regularity of the work favors employees.

The regularity of the work also favors employees. The district court concluded that this factor favored Saint Luke's because "the record does not suggest Plaintiffs must regularly clock in early." App. 253; R. Doc. 159, at 19. That, again, is a non sequitur. The issue is not whether employees *had* to clock in early or clock out late; the question is whether they *did* so with sufficient regularity. The answer to that is clear: they did.

Houston lost net time in 71% of workweeks due to rounding. App. 185; R. Doc. 146-2, at 48. Rounding had a similar effect on other employees. Employees who had a net loss of time because of rounding lost time in 57% of their shifts. App. 96; R. Doc. 146, at 15. And even when shifts worked by employees who had a net gain of time because of rounding (and who therefore cannot recover under the FLSA) are included in the analysis, Saint Luke's rounded away employees' time in almost half of all shifts worked—49.4%—and in more than half of all workweeks—55.9%. App. 152-54; R. Doc. 146-2, at 15-17. Rounding's effects were even more dramatic in weeks in which employees worked overtime. Saint Luke's rounded employees' net time down in 60.8% of those weeks and in 50.3% of those weeks' shifts, meaning that employees performed uncompensated work more than half the time. App. 152-54; R. Doc. 146-2, at 15-17.

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No matter how it's looked at, the employees' work was regular here. Work need not be done every day to be considered regular. Courts routinely find that this factor weighs in employees' favor when the work is performed on a weekly or even a monthly basis. *See, e.g.*, *Aguilar*, 948 F.3d at 1286; *Butler v. DirectSAT USA, LLC*, 55 F. Supp. 3d 793, 813 (D. Md. 2014); *Reich v. IBP, Inc.*, 1996 WL 137817, at *7 (D. Kan. Mar. 21, 1996), *aff'd sub nom., Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997); *cf.* 29 C.F.R. § 541.100(a)(3) (for purposes of the FLSA's executive exemption, "[t]he phrase 'customarily and regularly' means a frequency that must be greater than occasional but which, of course, may be less than constant"). Here, too, the work occurred with sufficient regularity to favor the employees. Indeed, the data shows that employees, as a whole, performed such uncompensated work in *every single workweek*. App. 155; R. Doc. 146-2, at 18.

iv. The aggregate size of the claim is significant.

The size of the aggregate claim also favors the employees.

"Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). In analyzing this factor, courts consider both the aggregate claim for each individual employee, and the aggregate claim for all employees combined. *Peterson*, 15 F.4th at 1046.

The aggregate size of the claim for individual employees is significant. Every Saint Luke's employee who lost overtime pay due to rounding lost significant earnings. The 906 employees in the FLSA collective who lost such pay during the three-year FLSA period lost a combined $139,219.26. App. 158, R. Doc. 146-2, at 21. That is an average loss of $153.66, or $51.22 each year. Although this estimate "necessarily undervalues the individual claims at issue in this litigation" because not every employee worked during the entirety of the collective period, *Peterson*, 15 F.4th at 1047, even that amount is not de minimis. Courts and the DOL have long recognized that as little as $1 per week for 50 weeks is not de minimis. 29 C.F.R. § 785.47; *Aguilar*, 948 F.3d at 1286; *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981, 987 (8th Cir. 1952); *see also Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (8th Cir. 2014) (Benton, J., respecting denial of rehearing en banc) ("Nothing in the record or case law supports the dissent's conclusion that damages under $100 are de minimis."). These amounts are "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares." *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Cal. 2018). In short, "[w]hat [Saint Luke's] calls 'de minimis' is not de minimis at all to many ordinary people"—like Houston and her colleagues—"who work for hourly wages." *Id.*

Analyzing the aggregate claim for all employees combined only makes things worse for Saint Luke's. The employees who opted into the

FLSA collective action lost $139,219.26, but that represents only a fraction of employees' true loss. App. 158, R. Doc. 146-2, at 21. Thousands more employees were eligible to opt into the case, and Saint Luke's has applied its rounding policy since 2009—and still does to this day. Employees' total unpaid wages exceed more than $2 million. App. 160; R. Doc. 146-2, at 23.

Viewed from any vantage point, employees' aggregate loss was significant. *See Peterson*, 15 F.4th at 1046-48 ($31,585 aggregate claim not de minimis); *Aguilar*, 948 F.3d at 1285-86 (weighing factor in employees' favor for claim of $355,478). This factor favors Houston.

v. On balance, the factors favor Houston.

The de-minimis factors must be "balanced" and "analyzed in concert." *Scott v. City of New York*, 592 F. Sup. 2d 386, 402 (S.D.N.Y. 2008). Even when the amount of time is small, that "is not a dispositive factor but merely one of four factors." *Hoyt*, 579 F. Supp. 2d at 1138. Properly weighed, the factors favor Houston.

Although the compensable time at issue per shift is relatively modest, all other factors weigh decisively in employees' favor. Saint Luke's precisely records the time, the employees regularly engage in unpaid work, and the aggregate claim is substantial. A jury could find in Houston's favor on these facts. *See, e.g.*, *Peterson*, 15 F.4th at 1049 (balancing factors in employees' favor and granting them summary judgment when time at issue was only 2.27 minutes per shift); *Flavie*,

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2019 WL 4597869, at *9 ("[F]actors collectively favor[ed]" employees even though time was "small and weigh[ed] in defendants' favor").

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE UNJUST-ENRICHMENT CLAIMS.

Summary judgment is likewise inappropriate on the unjust-enrichment claims.

To show that a defendant has been unjustly enriched under Missouri law, a "plaintiff must prove that (1) he conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010). Although "[t]he essence of unjust enrichment is that the defendant has received a benefit that it would be inequitable for him to retain," *Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 536 (Mo. Ct. App. 2011), it is not necessary to show that the defendant engaged in wrongdoing, *Petrie v. LeVan*, 799 S.W.2d 632, 635 (Mo. Ct. App. 1990). Whether a defendant has been unjustly enriched is a question of fact. *Chouteau Dev. Co., LLC v. Sinclair Mktg., Inc.*, 200 S.W.3d 68, 71 (Mo. Ct. App. 2006).

Houston has established each element of her and the class's claims. She and other employees conferred a benefit on Saint Luke's through their work, and Saint Luke's appreciated and retained the benefit of that work without compensating them for it. When, as here, employers fail to

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pay employees for work they have done, courts in Missouri and across the country regularly find that the employers have been unjustly enriched. *See, e.g.*, *Boswell v. Panera Bread Co.*, 2016 WL 1161573, *17 (W.D. Mo. Mar. 24, 2016), *aff'd*, 879 F.3d 296 (8th Cir. 2018); *Jennings*, 355 S.W.3d at 536; *Agerbrink v. Model Serv. LLC*, 196 F. Supp. 3d 412, 418-19 (S.D.N.Y. 2016); *Encinas v. J.J. Drywall Corp.*, 840 F. Supp. 2d 6, 9-11 (D.D.C. 2012); *Singleton v. Adick*, WL 1103001, at *7 (D. Ariz. Mar. 25, 2011). Saint Luke's has been unjustly enriched here, too. Rounding is a significant income generator for the hospital, enabling it to enjoy thousands of hours of free labor and save millions of dollars in wages.

It is not easy to track the district court's rationale for granting Saint Luke's summary judgment on this claim. The court appeared to hold that the FLSA's de-minimis rule bars the claim, but it did not complete the analysis that rule requires, failing to fully analyze the aggregate-claim factor and to balance the factors. App. 250-53; R. Doc. 159, at 16-19. The court's ultimate conclusion seems to be that failing to pay employees is not inequitable because the "rounding policy is consistent with applicable statutes and regulations." App. 253; R. Doc. 159, at 19. By that the court could only mean that Saint Luke's supposed compliance with the FLSA's de-minimis and rounding regulations operated as a complete defense to the unjust-enrichment claim.

That decision was serious error. First, Houston is not arguing that Saint Luke's was unjustly enriched *because* it violated the FLSA. Saint

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Luke's was unjustly enriched because it retained the benefit of its employees' labor without compensation. This claim does not depend on the FLSA. It has its own elements, and its own facts. It covers a different period (6.5 years vs. 3 years), different employees (13,683 vs. 1,430), and different work (hours done *between* 0 and 40, not just overtime hours).

Second, whether a *state* common-law claim incorporates the *FLSA*'s regulations is a question of state law. Citing no authority from Missouri or any other jurisdiction to support applying the FLSA's regulations to state common-law claims, the court provided no reason to believe that these regulations have any bearing on common-law claims in Missouri. There is none. Missouri knows how to incorporate the FLSA into state law, and it has done so for certain claims arising under the MMWL. *See* Mo. Rev. Stat. § 290.505.4. But there is no authority suggesting it has done so for *common-law* claims. Saint Luke's identifies a handful of out-of-state cases applying a *general* de-minimis rule to claims for unjust enrichment, but none is relevant here. App. 116 n.20; R. Doc. 146, at 35. None is from Missouri, none is an employment case, and none applied the *FLSA*'s unique de-minimis rule. With the FLSA's de-minimis doctrine out of the picture, Saint Luke's has no defense to the unjust-enrichment claim because that is the only defense it has put forward.

Even if the FLSA's regulations applied and even if Saint Luke's had complied with them, that would not warrant summary judgment. Compliance with federal law does not defeat a state common-law claim.

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A plaintiff may prevail on a negligence or products-liability claim, for instance, even when a defendant complies with federal law. *See, e.g., Rader v. Teva Parental Meds., Inc.*, 795 F. Supp. 2d 1143, 1149 (D. Nev. 2011); *Foyle by & through McMillan v. Lederle Lab'ys*, 674 F. Supp. 530, 534 (E.D.N.C. 1987). This general rule applies with special force here because the FLSA expressly provides that state law may supply greater protection to employees than the FLSA. 29 U.S.C. § 218(a); *see Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95-96 (Mo. 2010); *Fernandez v. City of Fruitland Park*, *7 (M.D. Fla. Dec. 6, 2016). The notion that compliance with the FLSA is a full defense to a Missouri unjust-enrichment claim cannot be squared with either the FLSA or Missouri law.

Finally, even if the de-minimis or the rounding regulation applied, that would not matter because Saint Luke's did not comply with either regulation for the reasons described above.[6]

The district court erred in granting judgment on employees' unjust-enrichment claims.

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[6] Assuming the de-minimis doctrine applies, the aggregate unjust-enrichment claim is significantly larger than the FLSA claim, totaling 75,000 hours and $2 million in unpaid work. That is substantial. *See Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1994) ($1.57 million aggregate claim was "very large"). Averaged over the more than 9,000 employees who lost pay during the class period, App. 97; R. Doc. 146, at 16, that is more than 8 hours and $220 of unpaid compensation for each employee—a full day of free work that Saint Luke's got out of each of these 9,000-plus employees.

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IV. SUMMARY JUDGMENT WAS INAPPROPRIATE ON THE BREACH-OF-CONTRACT CLAIM.

The district court also erred in granting summary judgment on Houston's individual breach-of-contract claim.

To prevail on a claim for breach of contract under Missouri law, a plaintiff must establish "(1) the existence and terms of a contract; (2) that [she] performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Smith Flooring, Inc. v. Penn. Lumbermens Mut. Ins. Co.,* 713 F.3d 933, 941 (8th Cir. 2013) (quoting *Keveney v. Mo. Mil. Acad.*, 304 S.W.3d 98, 104 (Mo. 2010)).

Houston has established each element. She had a contract with Saint Luke's guaranteeing that Saint Luke's would pay her an agreed-upon hourly rate for every hour she worked. The district court correctly held that Houston established this element. App. 254; R. Doc. 159, at 20. She fully performed her end of the bargain by working for Saint Luke's from 2014 to 2017. App. 90-91; R. Doc. 146, at 9-10. And Saint Luke's breached its contract with Houston by failing to pay her for 7.63 hours of work, causing Houston $205.13 in damages. App. 100-01; R. Doc. 146, at 19-20.

The district court awarded Saint Luke's summary judgment on the contract claim on two grounds: (1) Saint Luke's substantially complied

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with the contract, and (2) Saint Luke's did not breach the contract at all. App. 255; R. Doc. 159, at 21. Neither reason has merit.

Start with the conclusion that Saint Luke's didn't breach. The court held that "even assuming Houston incurred $205.13 in damages over the course of her employment, these alleged damages are not attributable to any breach of contract, but rather Defendants' legal timekeeping policies to which Houston *presumably* assented under the employment contract now sued upon." App. 255; R. Doc., at 21 (emphasis added). This conclusion follows only if the contract incorporates Saint Luke's rounding policy—only if, that is, Houston "assented" to this being in the contract. But there is no evidence that the contract includes rounding, and the court was wrong to presume that it does without that evidence. *See Mo. Corr. Officers Ass'n v. Mo. Dep't of Corr.,* 409 S.W.3d 499, 505 (Mo. Ct. App. 2013); *Pepsi MidAmerican v. Harris*, 232 S.W.3d 648, 654-55 (Mo. Ct. App. 2007).

The district court's analysis includes other legally and factually unsound assumptions. Even if the contract embraced Saint Luke's supposedly "legal timekeeping policies," that would matter only if two more things were true: that the policies *were* legal and that the contract *also included* the FLSA's rounding and de-minimis regulations, since these provisions undergird the claim that Saint Luke's rounding was legal. Neither assumption is true: Saint Luke's rounding wasn't legal, and the contract doesn't incorporate the FLSA and its regulations.

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Employment contracts incorporate provisions of the FLSA only when they *actually* incorporate those provisions. *See Hootselle v. Mo. Dep't of Corr.*, 624 S.W.3d 123, 129, 132-33 (Mo. 2021) (contract expressly incorporated FLSA's overtime provisions); *Roberts v. TJX Cos., Inc.*, 2015 WL 1064765, at *2 (M.D. Fla. Mar. 11, 2015) (contract may incorporate some FLSA standards without incorporating all of them); *Avery v. City of Talladega,* 24 F.3d 1337, 1348 (11th Cir. 1994) (contract can provide more generous overtime than FLSA if contract doesn't incorporate FLSA, but if contract incorporates FLSA rules, then contractual rights are no greater than rights those FLSA rules would provide).

Here, Houston asserted that her contract required Saint Luke's to pay her an "agreed-upon hourly rate" for every hour worked, that Saint Luke's breached this contract by failing to pay her 7.63 hours, and that Saint Luke's damaged her by withholding wages she was owed. *See* App 34-35; R. Doc. 43, at 18-19. She did not assert that the contract included any provision of the FLSA, much less that it incorporated the FLSA's rounding or de-minimis regulations. Nor did Saint Luke's provide any evidence that the contract incorporated any provision of the FLSA. There is no basis, then, for the court's assumptions that the contract incorporates the FLSA and that Houston must show that Saint Luke's violated the FLSA to establish a breach. *See Roberts*, 2015 WL 1064765, at *3.

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The district court also erred in holding that Saint Luke's was entitled to summary judgment because it had substantially complied with the contract. That conclusion is wrong for several reasons. To begin with, Saint Luke's did not substantially perform or comply with the contract.[7] Saint Luke's contends that it substantially performed because it paid Houston most of what it owed her. But "there can be no substantial performance when the performance owed is the payment of money." 15 *Williston on Contracts* § 44:52 (4th ed. May 2018). And that is the only performance Houston seeks here.

There is an even more fundamental problem with the district court's analysis: whether Saint Luke's substantially complied is irrelevant to Houston's contract claim. The substantial-compliance doctrine works in two ways. First, a defendant may oppose a contract claim seeking damages by arguing that the *plaintiff* failed to substantially comply with the contract. That's because "[t]o recover for breach of contract, a party must show its own substantial compliance with the contract." *Weitz Co. v. MH Washington*, 631 F.3d 510, 524 (8th Cir. 2011) (applying Missouri law). But Saint Luke's does not argue that *Houston* failed to substantially comply with the contract. Nor could it. Houston upheld her end of the bargain. Second, when a defendant does

[7] Missouri courts use the terms "substantial compliance" and "substantial performance" interchangeably. *See Schaefer v. Rivers*, 965 S.W.2d 954, 957 (Mo. Ct. App. 1998).

not substantially comply, the plaintiff may cancel the contract without performing her end of the bargain. "Substantial performance is performance without a material breach, and a material breach results in performance that is not substantial." *Fire Sprinklers, Inc. v. Icon Contracting, Inc.*, 279 S.W.3d 230, 233 (Mo. Ct. App. 2009). "If one party materially breaches a contract, the aggrieved party may cancel the contract and be relieved of its performance under the contract." *Id.* at 234. But Houston has not sued to rescind the contract, so this rule has no bearing on this case.

Saint Luke's argument that it substantially performed is therefore no help to it. In fact, the argument hurts Saint Luke's. A plaintiff may recover damages for breach *even if* the defendant has substantially performed. When a defendant has substantially performed and its breach is not material, "the other party may not cancel the contract but may seek other remedies," such as damages. *Campbell v. Shaw*, 947 S.W.2d 128, 131-32 (Mo. Ct. App. 1997); *see R.J.S. Sec., Inc. v. Command Sec. Servs., Inc.*, 101 S.W.3d 1, 18-19 (Mo. Ct. App. 2003); *Curt Ogden Equip. Co. v. Murphy Leasing Co., Inc.*, 895 S.W.2d 604, 608-09 (Mo. Ct. App. 1995); *see also* 23 Williston on Contracts § 63:3 (4th ed. July 2018) ("[T]he nonbreaching party is entitled to damages caused even by the immaterial breach."). So, even if Saint Luke's substantially complied, Houston can recover the damages she seeks. The substantial-performance doctrine is no defense to Houston's claim.

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The district court's grant of summary judgment on Houston's contract claim must be reversed.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's Order granting Houston's request for an overlength brief because the brief contains 14,496 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

The text of the electronic brief is identical to the text in the paper copies.

Dated: August 31, 2022

s/ Colin Reeves
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STATEMENT REGARDING VIRUS SCANNING

A virus detection program—Norton Antivirus 360—has been run on Appellant's brief and addendum and no virus was detected.

Dated: August 31, 2022

s/ Colin Reeves
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CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of August, 2022, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's CM/ECF system, and that such electronic filing automatically generates a Notice of Docket Activity constituting service. I certify that all participants in the case are registered CM/ECF filing users and that service will be accomplished by the CM/ECF system. The CM/ECF system generated a Notice of Docket Activity sent to the following counsel for Defendants-Appellees St. Luke's Health System, Inc., and St. Luke's Northland Hospital Corporation:

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