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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CATHERINE REGINA HARPER and SHANNON JONES, on behalf of themselves and those similarly situated, and JENNIFER ESSIG, Plaintiffs, v. PROFESSIONAL PROBATION SERVICES, INC., Defendant.	Case No. 2:17-CV-1791-ACA **Class Action**

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

This Court should grant Plaintiffs' Motion for Class Certification.[1] Under the Due Process Clause, people sentenced to probation in Gardendale were entitled to "impartial and disinterested" decisionmakers. *Brucker v. City of Doraville*, 38 F.4th 876, 882 (11th Cir. 2022) (quoting *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1241 (11th Cir. 2020)). The "neutrality requirement applies to officials performing quasi-judicial functions and those performing enforcement functions. Probation or parole officers traditionally perform both types of functions." *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2021 WL 366776, at *23 (M.D. Tenn. Feb. 3, 2021) (citation omitted); *see also Brucker*, 38 F.4th at 886–88 (applying impartiality requirement to law enforcement officers). Because Plaintiffs argue that PPS's supervision model in Gardendale was itself unconstitutional, it is appropriate and economical to adjudicate all Class members' claims together.

Furthermore, PPS does not dispute that Plaintiffs have shown the impracticability of joinder of putative Class members, the typicality of Plaintiffs' due process claims, Plaintiffs' adequacy as Class representatives, adequacy of Class

[1] PPS's request to stay consideration of class certification until after PPS's motion for summary judgment should be denied because it would not serve judicial economy. PPS did not move for summary judgment on the enforcement theory of Plaintiffs' Fourteenth Amendment claim and therefore its Motion does not moot Plaintiffs' Class certification motion, *see* Def's Mot. for Summ. J., ECF 194 ¶ 2 (moving only on PPS's performance of "adjudicatory functions"); Def's Summ. J. Br., ECF 195 at 36 (arguing only that *Tumey* and *Ward* are not applicable to the performance of law enforcement functions); *see also Brucker v. City of Doraville*, 38 F.4th 876, 886–88 (11th Cir. 2022) (applying *Tumey-Ward* impartiality requirement to law enforcement officials).

counsel, or that a class action is a superior means of resolving this case,[2] thus conceding most of the elements of class certification.[3]

II. COMMON QUESTIONS OF FACT AND LAW PREDOMINATE AS TO EACH OF THE LIABILITY ELEMENTS.

PPS does not dispute that Plaintiffs' due process claim presents multiple common legal questions (e.g., whether the alleged policies of allocating supervisees' payments first to PPS supervision fees and requiring weekly payments until payment in full are judicial functions, *see* Def's Br., ECF 197 at 30–32). Plaintiffs thus satisfy Rule 23(a)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

As to predominance under Rule 23(b)(3), Plaintiffs demonstrate that every material fact is answerable through objective, classwide proof: PPS's admissions, business records, Standard Operating Procedures Manual, pre-printed probation forms, and Contract with the Gardendale Municipal Court. Immaterial dissimilarities among Class members identified by PPS do not defeat predominance.

A. Whether PPS had a financial conflict of interest in its performance of adjudicatory and enforcement functions is answerable classwide.

[2] PPS makes a conclusory argument, Def's Br., ECF 197 at 45–46, that does not meaningfully dispute superiority under Rule 23(b)(3). Thus, PPS abandoned the argument. Cf. Singh v. U.S. Atty. Gen., 561 F.3d 1275, 1278 (11th Cir. 2009) ("[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue . . . .").

[3] PPS incorporates by reference thirty-two pages of "undisputed facts" alleged in its Motion for Summary Judgment. Def's Br., ECF 197 at 6. Plaintiffs will respond to those allegations in their Response in Opposition to PPS's Motion for Summary Judgment.

Plaintiffs need not show "proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases. The test is whether a fee system presents a 'possible temptation to the average man as a judge'" to consider impermissible factors in the exercise of discretion. *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. 1981)[4] (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)); *see also Harper*, 976 F.3d at 1241. Though "[t]he constitutional standard of impartiality is less stringent for prosecutors than it is for judges," "a scheme injecting a personal interest, financial or otherwise, into the enforcement process raises serious constitutional questions." *Brucker*, 38 F.4th at 886 (alterations omitted) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980)) (applying the impartiality standard to prosecutors, police officers, and private code enforcement officers).

PPS ignores the relevant legal standard, and misapplies the facts, for whether a decisionmaker has an impermissible financial interest. First, whether a Class member could not or did not pay a supervision fee has no bearing on whether PPS had an unconstitutional interest in that person's probation. The financial interest inquiry is about the temptation of the *decisionmaker* and the structure of the *decisionmaker's* "fee system" and compensation scheme. *Brown*, 637 F.2d at 283 (*Tumey-Ward* test evaluates potential bias "on the part the judge or decisionmaker").

[4] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Whether a Class member paid the fee goes only to the issue of that person's *damages*, not whether PPS's incentive to collect its fee was unconstitutional.

Second, Plaintiffs demonstrate the existence of such an unlawful financial incentive. A supervision fee was ordered for every Class member. *See* Dr. Hanrath Decl., ECF 186-04 ¶ 12a. PPS's assertion that "the imposition of supervision fees was not universal across class members' cases" is incorrect. Def's Br., ECF 197 at 36 n.3 (citing Baggett Decl., ECF 196-13 at 40:16–18). PPS's speculation that the Municipal Court later waived some Class members' supervision fees, *see* Def's Br., ECF 197 at 24, 29, 36 n.3, 38 n.7, does not change the fact that the imposition of the fee biased PPS from the outset.[5]

Third, PPS's focus on its employees' financial interests is unsupported by law. *See* Def's Br., ECF 197 at 25–27. As the Eleventh Circuit recently explained, "[w]e look[] to the financial interests of the for-profit company as an entity, **not those of its individual employees**, because the company had allegedly promulgated a 'policy or custom' that made its employees' conduct part of 'one central scheme' that caused the constitutional violation." *Brucker*, 38 F.4th at 882 (quoting *Harper*, 976 F.3d at 1244 n.10). Because PPS's employees performed judicial and enforcement functions

[5] As evidence of waivers, PPS proffers sentence modification forms that do not mention, let alone waive, any Class member's probation supervision fee; the forms modify only the court-ordered fines. *See* Ex. 2, ECF 197 at 101–05 (enumerating options to vacate or modify the "fine balance" or complete community service "in lieu of payment of the remaining fines").

pursuant to PPS policy or custom, *see infra* Part II.B–C, the compensation scheme of its individual employees is irrelevant to PPS's liability. Even if the inquiry of PPS's liability focused on its employees' financial interests, PPS's compensation scheme for its employees was uniform such that determining PPS's financial interest is capable of class wide resolution.[6] *See* Pls' Br., ECF 186 at 16 & n.6

B. Whether PPS performed judicial functions is answerable classwide.

Contrary to PPS's argument, whether PPS performed judicial functions that triggered a duty of neutrality is subject to classwide proof for at least three judicial functions. *See* Def's Br., ECF 197 at 27–32; Pls' Br., ECF 186 at 33–38.

1. Whether PPS imposed the probation supervision fee is a factual question capable of classwide resolution.

Plaintiffs proffer classwide evidence that every Class member was sentenced to pay a supervision fee to PPS. *See* Dr. Hanrath Decl., ECF 186-04 ¶ 12a. To succeed on their due process claim, every Class member must also prove that PPS imposed that fee, *i.e.*, that PPS performed the judicial function of imposing the supervision fee. *See Harper*, 976 F.3d at 1243. At the class certification stage, all Plaintiffs need to show is that this question is answerable through classwide proof. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). In response, PPS

[6] Although PPS now claims that its employees did not receive a "commission" for fee collection, *see* Def's Br., ECF 197 at 25, its admissions prove the opposite. *See* PPS Dep. (Tom York), ECF 196-06 at 38:18–39:16 (admitting that Gardendale probation officer Rachel McCombs received "fee incentive" and office manager bonuses tied to revenue targets).

raises three arguments attempting to inject individual fact questions, but these arguments fail because they are either irrelevant or speculative.

First, PPS asserts that who ordered the fee is an individualized inquiry because not all supervisees *paid* supervision fees and only the judge could *waive* supervision fees. *See* Def's Br., ECF 197 at 28–29. But, as discussed *supra*, Part II.A, these objections are irrelevant to the factual question of who *imposed* the supervision fee.[7]

Second, PPS asserts that who imposed the fee depends on who completed the Sentence of Probation form. To the contrary, PPS charged the "monthly probation service fee" through a mandatory sentencing term that was *pre-printed* on every Sentence of Probation form. *See, e.g.*, ECF 187-02 at 4–5 (forms); *see* Pls' Br., ECF 186 at 17 n.13, 21 n.37 (judge did not review, fill out, or sign the form and court not monitor compliance with fee payments). This form was the "sentencing order" PPS used in every probation case. PPS Dep. (Tom York), ECF 196-06 at 78:22–79:4, 85:23–86:2. "PPS admits the Sentence of Probation was an internal company form" and that it "filled out a Sentence of Probation form during the meeting with the probationer following their sentence to probation supervised by PPS." *See* Answer,

[7] Furthermore, Plaintiffs have shown that PPS did have discretion to waive or convert fees. *See* Pls' Br, ECF 186 at 19 & n.27; ECF 186-23 (sample of probation officer notes documenting PPS's grant of fee waivers pursuant to its "six week maternity leave" policy).

ECF 120 ¶ 54.[8] Who filled out and checked off the *optional* conditions of probation on the Sentence of Probation form is immaterial to Plaintiffs' claim.

Third, PPS speculates that the PPS Sentence of Probation forms only ever imposed a supervision fee if the Municipal Court judge orally ordered the fee during sentencing. *See* Def's Br., ECF 197 at 30. Where PPS's arguments are "hypothetical, courts should not allow such 'speculation and surmise to tip the decisional scales' against class certification." *Rivera v. Equifax Info. Servs., LLC*, 341 F.R.D. 328, 345 (N.D. Ga. 2022) (quoting *Bridging Communities Inc. v. Top Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016)) (citing cases).

Furthermore, whether the judge informed supervisees about PPS's fee from the bench does not introduce individualized questions about PPS's liability. Even if the judge did orally order a supervision fee—which Plaintiffs dispute—supervisees would not be bound by it unless "incorporated into [the] court's written order of probation." *See* Ala. R. Crim. P. 27.1. PPS does not dispute that the only two written orders the judge filled out and signed, the Case Action Summary and Order of Probation, did not impose the supervision fee; only PPS's Sentence of Probation did.

[8] Although PPS now contests that it filled out the form on some occasions by relying on deposition testimony, *see* Def's Br., ECF 197 at 29, it is bound by its admission in its Answer. "The general rule is that a party is bound by the admissions in his pleadings." *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1177–78 (11th Cir. 2009) (alterations omitted) (quoting *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983)). "Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Id.* at 1178 (quoting *Hill v. Federal Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941)).

Cf. Dunn Dep., ECF 186-09 at 104:15–22; Pls' Br., ECF 186 at 35. At most, an oral order from the bench—like the Contract between PPS and the City—may have pre-authorized PPS to impose the supervision fee. But judicial "pre-authorization doesn't render a probation officer's sentence enhancement either non-final or non-binding," and thus does not render it non-judicial. *Harper*, 976 F.3d at 1243.

However, should the Court deem it necessary to review audio recordings of Municipal Court hearings to determine whether the judge orally ordered the fee in any given case, both parties received the recordings in discovery and can transcribe them. *See* Pls' Mot. to Extend Deadline, ECF 149 ¶¶ 13–17. The need to review sentencing hearing transcripts for the presence of a discrete, objective sentencing condition poses, if anything, a question of manageability, not commonality, and does not defeat class certification. *See Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021) (manageability issues are "rarely, if ever" sufficient to prevent certification); *see also Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) ("Common issues predominate" when "factual determinations can be accomplished using computer records, clerical assistance, and objective criteria.").

2. PPS admits that its payment allocation and weekly payment policies applied to every Class member.

PPS is bound by its Answer that as a matter of company policy, it apportioned payments first to its own supervision fees, ECF 120 ¶ 89, and required supervisees to pay weekly until "current" on all monetary obligations, ECF 120 ¶¶ 62, 76. The

Court can determine whether, as a matter of law, these policies imposed sentencing conditions on every Class member.

PPS does not deny that it exercised judicial functions in imposing these policies on supervisees; instead, PPS raises questions related to which class members suffered *compensable* injury and how damages are quantified. *See* Def's Br., ECF 197 at 30–31 ("policy did not affect probationers' [sic] uniformly"). But individualized damages issues do not defeat predominance. *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

C. Whether PPS performed enforcement functions is answerable classwide.

Even if this Court holds that it is not possible to determine whether PPS performed *judicial* functions on a classwide basis, whether PPS performed at least one *enforcement* function in each Class member's case is capable of classwide determination. The Eleventh Circuit recently reaffirmed that actors performing enforcement functions owe a duty of impartiality under the Due Process Clause. *Brucker*, 38 F.4th at 886–88 ("apply[ing] the same standard of impartiality to [police] as . . . to prosecutors"); *see also Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969).

PPS does not deny that it performed enforcement functions, or that it was bound by the impartiality requirement for those enforcement functions it admits to

performing. Instead, PPS alleges that it only performed enforcement functions "in a limited subset of cases," because it narrowly defines enforcement functions as either reporting non-compliance to the court or sanctioning supervisees for non-compliance. Def's Br., ECF 197 at 32. This interpretation of enforcement functions is not supported by the case law and misrepresents Plaintiffs' claim.

PPS is correct that "the preparation of reports . . . relied [upon] in issuing a parole [or probation] violation warrant" is "investigatory in nature, and therefore [] analogous to a law enforcement function." *See Johnson v. Williams*, 699 F. Supp. 2d 159, 168 (D.D.C. 2010), *aff'd sub nom. Johnson v. Fenty*, No. 10-5105, 2010 WL 4340344 (D.C. Cir. Oct. 1, 2010). But preparing compliance reports is but one of many law enforcement functions performed by probation officers: supervising people on probation, including "the decision to enforce—or not to enforce" probation conditions is a core enforcement function which, if performed with an impermissible personal interest, "may itself result in significant burdens" on supervisees, *see Marshall*, 446 U.S. at 249–50; *see also Johnson*, 699 F. Supp. 2d at 168 (stating "parole supervision" is "investigatory in nature, and therefore [] analogous to a law enforcement function").[9]

[9] Probation officers perform myriad other enforcement functions, including investigating alleged probation violations, *Johnson*, 699 F. Supp. 2d at 168; authorizing or issuing warrants, *Swift v. California*, 384 F.3d 1184, 1192 (9th Cir. 2004); requesting revocation proceedings, *id.* at 1193; and prosecuting probation violations, *cf. Marshall*, 446 U.S. at 247 (enforcement functions include "act[ing] as the complaining party" and bearing the burden of proof in judicial proceedings).

Plaintiffs' Fourteenth Amendment claim alleges that, pursuant to PPS policy and practice at probation case initiation, PPS began enforcing probation conditions on every Class member on the date of their sentencing, such that at least two enforcement functions are common across the Class: PPS required each person, under threat of sanctions, to (1) attend an initial check-in appointment, and (2) pay PPS the first monthly supervision fee at or before that first check-in. Whether PPS enforced these universal probation conditions can be resolved through common evidence, including PPS's admissions and documentation of official policies, and its electronic supervisee data, which include searchable, standardized notes regarding reporting and payment compliance, *see, e.g.*, Answer, ECF 120 ¶¶ 61–62 ("PPS admits it also provided probationers with an Enrollment Form" and that "the Enrollment Form also advised probationers of the terms of their court-ordered probation."); Second Am. Compl., ECF 56 at 19 (sample PPS Enrollment Form emphasizing "MONTHLY PAYMENT DUE AT FIRST VISIT!!!"; prohibiting rescheduling of the first check-in appointment and rescheduling past the "Deadline Date (the date all money is due)"; requiring supervisees to "report to the probation officer as directed" and report weekly if "non-compliant" with probation conditions, "including payments"; and threatening "the issuance of a warrant for your arrest" upon missed appointments); McCombs Dep., ECF 186-17 at 279:6–16, 389:4–389:7; Waters Dep., ECF 186-16 at 50:9–22, 53:1–11, 62:16–64:4. Furthermore,

whether PPS's enforcement of reporting and payment compliance gave rise to a duty of impartiality, *see Brucker*, 38 F.4th at 886, is a question of law common to Class.

D. Whether Class members have timely claims is answerable classwide.

PPS argues its affirmative statute of limitations defense defeats predominance. *See* Def's Br., ECF 197 at 39–40. This argument fails because it raises a mixed question of law and fact capable of classwide resolution: whether the continuing violations doctrine defers the accrual of Class members' due process claims, because PPS violated their constitutional rights as a matter of company policy and in an ongoing manner from the commencement to the close of their supervision period. *See Winn-Dixie Stores, Inc. v. Dolgencorp*, LLC, 746 F.3d 1008, 1044 (11th Cir. 2014) (two material facts relevant to continuing violations inquiry: whether "acts took place within the limitations period" and whether they were "sufficiently similar to qualify as 'continuing' the prior events" (citation omitted)).

The continuing violations doctrine forestalls the accrual of Section 1983 claims where the violation is ongoing or recurring. *See Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 798 (11th Cir. 1992) (applying continuing violations doctrine to delay accrual where injury was the "direct result of on-going policy actively maintained" by defendant); *Carter v. City of Montgomery*, 473 F. Supp. 3d 1273, 1307 (M.D. Ala. 2020) ("The statute of limitations . . . may be extended if the defendant engages in a pattern of unlawful conduct."). When the alleged violation

involves continuing injury, the claim accrues "at the time the tortious conduct ceases." *Donaldson v. O'Connor*, 493 F.2d 507, 529 (5th Cir. 1974), *vacated on other grounds*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

Classwide evidence will prove that the continuing violations doctrine applies to PPS's financially-conflicted probation scheme. Plaintiffs proffer evidence that PPS imposed continuing obligations on every Class member via its allegedly unlawful policies of adding and enforcing sentencing terms with a systemic financial conflict of interest, such that Class members' legal injuries began on their sentencing date and were continuous in nature. District courts have applied the doctrine under analogous facts. *See, e.g.*, *Carter*, 473 F. Supp. 3d at 1307 (applying continuing violations doctrine in Section 1983 suit for damages against private probation company); *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at *22 (D. Ariz. June 18, 2019) (limitations period to challenge a "continuing series of violations relating to [] unlawful supervision" in diversion program did not begin until supervision ended) (citation omitted)).

If the continuing violations doctrine applies here, it delays the accrual of all Class members' claims until their supervision with PPS ended, when PPS's "tortious conduct cease[d]."[10] *Donaldson*, 493 F.2d at 529. Hence, Plaintiffs' proposed Class

[10] As explained above, PPS offers no proof but instead speculates that the judge reduced PPS's financial interest in unspecified cases by waiving the supervision fee. *See supra* Part II.A. When

definition includes supervisees whose probation period had not *terminated* before December 28, 2015. But if the doctrine does not apply, the question of who has a viable claim is easily answered using sentencing dates in PPS's electronic records, *see generally* Degnan Decl., ECF 186-02, and the Court may narrow the Class definition to exclude supervisees sentenced before the limitations period. *See, e.g.*, *Tillman v. Ally Fin. Inc.*, No. 2:16-CV-313-FTM-99CM, 2017 WL 7194275, at *2 n.3 (M.D. Fla. Sept. 29, 2017) (A "revised class definition [that] is a narrower version of the original class definition . . . is generally allowable.").[11]

III. THE COMPONENTS OF PLAINTIFFS' DAMAGES MODEL ARE CONSISTENT WITH THEIR LIABILITY CASE AND CALCULABLE ON A CLASSWIDE BASIS.

As Plaintiffs state in their Motion, the Court does not need to determine at the class certification stage whether Plaintiffs' trial plan—which PPS does not address—or damages model are perfect, only that they do not present manageability concerns that make a class action more difficult than "whatever other forms of litigation might realistically be available to the plaintiffs." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also* Fed. R. Civ. P.

PPS waived supervision fees pursuant to its own discretionary policies, *see supra* note 7, it continued to maintain its financial interest in fee collection.

[11] For the reasons discussed in this section, PPS's claim that the Class definition "fails to adequately" exclude persons with time-barred claims is meritless. *See* Def's Br., ECF 197 at 14.

23(b)(3)(D). Notably, PPS does not dispute that at least one component of compensatory damages—supervision fees—is calculable classwide and that, indeed, Plaintiffs have already calculated it for each Class member. *See* Dr. Cross Decl., ECF 186-05 at 26 ¶ 43.

Where PPS does criticize the model, its arguments raise legal and factual questions common to the class; demand a degree of exactitude in calculations not required at the certification stage; and rely almost exclusively on unsworn, inadmissible expert testimony to assert facts not in the record. PPS fails to show that individualized damages render a class action unmanageable here.

E. PPS's affirmative defense and counterclaim raise common questions.

Contrary to PPS's argument, neither its affirmative defense that damages are time-barred nor its counterclaim for damages offsets introduce individualized issues that weigh against predominance. *See* Def's Br., ECF 197 at 38–39; *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016). First, whether Class members may recover damages for injuries occurring before December 28, 2015, presents common questions of law and fact: whether the continuing violations doctrine permits Class members to recover for all harm they suffered, not just harm suffered during the limitations period. *See White v. Mercury Marine*, 129 F.3d 1428, 1430 (11th Cir. 1997); *see also supra* Part II.D.

Second, PPS's assertion that it is entitled to damages offsets for settlement credits from the City, *see* Def's Br., ECF 197 at 42–43, is premature: "A set-off is a permissive counterclaim," and "the appropriate time to assert counterclaims against individual class members is during the damage phase of the case." *Allapattah Servs., Inc. v. Exxon Corp.*, 157 F. Supp. 2d 1291, 1322–23 (S.D. Fla. 2001), *aff'd*, 333 F.3d 1248 (11th Cir. 2003) (citation omitted). But even if the Court were to address this argument now, it would not defeat Class certification. Whether PPS is entitled to an offset will be resolved uniformly for every Class member, because any facts relevant to the legal analysis regarding offsets, contribution, or collateral source payments will be identical: all credits were negotiated from the City under a uniform Settlement agreement dismissing three Class claims, *see* Joint Mot. to Dismiss, ECF 48. *See, e.g.*, *In re Noletto*, 281 B.R. 36, 43 (Bankr. S.D. Ala. 2000) (offsets do not prevent class certification where "individualized proof" not present).

F. Plaintiffs' damages methodology meets Class certification requirements.

Damages "[c]alculations need not be exact" at the class certification stage. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). PPS's remaining objections are not to the methodology created by Plaintiffs' damages expert, Dr. Philip Cross, but to the calculation or selection of certain inputs. Def's Br., ECF 197 at 43–45.

First, PPS states that Dr. Cross's model awards damages for court review hearings that PPS would have omitted, hearings "[n]ot [i]nitiated by PPS." Def's

Br., ECF 197 at 43–44. Plaintiffs dispute that PPS is not liable for general compensatory damages based on its testimony at court hearings scheduled by the Municipal Court, rather than PPS. *See* Pls' Br., ECF 186 at 48–49 & n.103. However, should the factfinder determine that those hearings are not compensable, they can be excluded from Dr. Cross's methodology.

Second, PPS criticizes Dr. Cross's calculations as compensating too many days in jail[12] and overvaluing the time Class members spent traveling to and attending PPS check-in appointments and review hearings. *See* Def's Br., ECF 197 at 44–45. Neither of these arguments impugns the underlying damages methodology or suggests that damages are incalculable—instead, PPS contests what numbers the jury should plug into the formula. *See In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 421 (M.D. Fla. 2018) (class certification only requires determination that methodologies are available, not which methodology is best).

Furthermore, PPS's arguments concerning Class damages rely almost entirely on the unsworn testimony of its expert, Mr. Don Lochabay, Jr. Because Mr. Lochabay's unsworn expert report, *see* ECF 197 at 49–100, improperly asserts legal conclusions and facts without a proper evidentiary foundation, it is inadmissible and

[12] Dr. Cross intends to supplement his expert report to correct these limited miscalculations, none of which change his underlying methodology. Exhibit 1 (Decl. of Dr. Philip J. Cross in Supp. of Pls' Reply Br. in Supp. of Mot. for Class Certification); *see also Perrigo Co. v. Merial Ltd.*, No. 1:15-cv-03674, 2018 WL 11350563, at *7–8 (N.D. Ga. April 30, 2018) (supplementation proper where expert changed data inputted into model, but not the underlying model itself).

should be excluded from consideration at class certification. *See generally* Pls' Mot. to Strike, ECF 204 (detailing reasons to strike Lochabay's report).

IV. THE CLASS DEFINITION IS PRECISE AND CLASS MEMBERS ARE ASCERTAINABLE.

PPS's ascertainability arguments fail because they rely on an abrogated legal standard and mischaracterize Plaintiffs' claim. *See* Def's Br., ECF 197 at 9–21. As the Eleventh Circuit recently clarified, "a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination." *Cherry*, 986 F.3d at 1304. "[M]embership can be capable of determination without being capable of *convenient* determination." *Id.* at 1303.

Plaintiffs' Class definition easily meets this standard because, as detailed by Plaintiffs' counsel, *see* Pls' Br., ECF 186 at 27–28 (citing Degnan Decl., ECF 186-02 ¶ 6), membership in the Class turns on "objective, verifiable criterion" (supervision with PPS) within the statute of limitations period. *Rensel v. Centra Tech, Inc*., 2 F.4th 1359, 1370 (11th Cir. 2021).

PPS improperly conflates ascertainability with administrative feasibility, *see* Def's Br., ECF 197 at 17–21, which is a legal standard rejected by *Cherry*. 986 F.3d at 1304 ("Because administrative feasibility has no connection to Rule 23(a), it is not part of the ascertainability inquiry.").

This argument also fails because Plaintiffs have identified a clear method for identifying Class members, *see* Degnan Decl., ECF 186-02, and PPS misrepresents

the record in stating otherwise, *see* Def's Br., ECF 197 at 21.[13] Furthermore, PPS has not identified a single supervisee improperly included in the resulting Class list, *see* ECF 186-47, despite PPS's attempts to downplay the accuracy of its own business records, *see* Def's Br., ECF 197 at 20.[14] Ultimately, even if inaccuracies in PPS's electronic records would affect the Class list—which Plaintiffs dispute, *see* Degnan Decl., ECF 186-02 at nn.5–6[15]—PPS itself names multiple sources of objective information available to the Parties to resolve any uncertainties that may arise, including PPS paper supervision files, Municipal Court files, and court hearing audio, *see* Def's Br., ECF 197 at 20. *See also* Jordan Decl., ECF 186-01 ¶¶ 21–25 (describing Plaintiffs' extensive review of PPS paper supervision files and non-party Municipal Court files for nearly 2,000 potential Class members); *Rensel*, 2 F.4th at 1370 (ascertainability satisfied with reference to available records with information on class members, even if precise method for identification had not been explained).

[13] Plaintiffs' counsel—not Plaintiffs' expert, Dr. Lily Hanrath—constructed the Class list, contrary to PPS's assertions. *See* Def's Br., ECF 197 at 19. PPS's discussion of Dr. Hanrath's expert report, via Mr. Lochabay's unsworn testimony, is therefore misplaced. *See also supra*, Part III.B; Pls' Mot. to Strike, ECF 204 ¶ 4(a)–(b).

[14] PPS's assertion that its electronic supervisee records "were subject to errors associated with data entry problems" is unsupported by the deposition testimony it cites. *See* Def's Br., ECF 197 at 20 (citing PPS Dep. (Tom York), ECF 196-06 at 63:4–18).

[15] PPS is incorrect that the Class list "assume[s] that all the probation cases without termination dates were still active cases. . . ." Def's Br., ECF 197 at 19. Plaintiffs' counsel **excluded** cases whose termination date was unspecified when their case status was nevertheless "CLOSED." *See* Degnan Decl., ECF 186-02 ¶ 12 n.6; PPS Dep. (Tom York), ECF 196-06 at 82:25–83:10 ("[c]losed" case same as a "terminated" case for purposes of case status designation).

Second, PPS argues that the Class definition and liability theory lack a "clear nexus" because Class membership is tied to "supervision" by PPS rather than specific actions PPS performed in individual cases. *See* Def's Br., ECF 197 at 15. But this argument misconstrues Plaintiffs' claim. In support of their systemic challenge to PPS's financially-conflicted supervision system, Plaintiffs proffer classwide evidence to show that PPS performed a set of common judicial and enforcement functions for *every* person under PPS supervision. *See supra* Part II.B–C. Accordingly, the Class definition encompasses **all individuals** who were supervised by PPS within the limitations period. Pls' Br., ECF 186 at 14. By contrast, tying the Class to specific judicial or enforcement functions, as PPS demands, would create an improper, "fail-safe" class definition contingent on merits determinations. *JWD Auto., Inc. v. DJM Advisory Grp. LLC*, 218 F. Supp. 3d 1335, 1342 (M.D. Fla. 2016); *cf. Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276–77 (11th Cir. 2019).[16]

V. CONCLUSION

For the foregoing reasons, and as set forth in their Motion, Plaintiffs respectfully request that this Court certify the proposed class.

[16] Plaintiffs have met the requirements for class certification at this time. However, even if the evidence ultimately requires modifying the Class definition or creating subclasses, this Court retains the ability to amend the certification order at any time prior to judgment. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 988 (11th Cir. 2016) (citing Fed. R. Civ. P. 23(c)(1)(C)); *cf. Smilow*, 323 F.3d at 40. Plaintiffs request the opportunity to brief these issues should the Court find the proposed Class definition over-inclusive.

DATED: August 2, 2022. Respectfully Submitted,

s/ Ellen Degnan

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CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including:

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