IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

THOMAS HOOTSELLE, JR., et al., and MISSOURI CORRECTIONS OFFICERS ASSOCIATION,	)	
Respondents,	)	Case No. WD82229
v.	)	Div. 4
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
Appellant.	)	

RESPONDENTS' OPPOSITION TO APPELLANT'S MOTION TO STAY THE DECLARATORY ACTION PART OF THE AMENDED JUDGMENT ENTERED SEPTEMBER 14, 2018

Respondents Thomas Hootselle, Daniel Dicus, and Oliver Huff, individually and on behalf of the certified class, (collectively "Respondents' Class") and Respondent Missouri Corrections Officers Association ("MOCOA") (collectively "Respondents") hereby oppose Appellant Missouri Department of Corrections' ("Appellant" or "MDOC") Motion to Stay the Declaratory Action Part of the Amended Judgment Entered September 14, 2018 (the "Motion"). Staying the Circuit Court's order that Appellant comply with its obligations to compensate Respondent Class for time worked and properly record that time would cause significant harm to Respondent Class and only lead to additional litigation and expense in the future. Appellant has not demonstrated any probability of success on appeal, and it cannot satisfy its burden that a stay is in the public interest – in fact the opposite is true. Appellant requests this Court stop enforcement of what Appellant agreed

to do and what federal and state law requires. For these and the foregoing reasons, Respondents respectfully request that Appellant's Motion be denied.

I. PROCEDURAL HISTORY

Respondents' Class initiated this lawsuit against Appellant on August 14, 2012, seeking to enforce their rights under both a collective bargaining agreement (the "Labor Agreement"), which was originally entered into by MOCOA and Appellant on February 1, 2007 and renewed on October 1, 2014, and MDOC Procedure Manual D2-8.4 (the "Procedure Manual"). Respondents' Class was certified by the Circuit Court for Cole County on February 11, 2015, and the class definition was amended on September 29, 2015, to include the following:

> All persons employed in positions as Corrections Officer I or Corrections Officer II by the Department of Corrections of the State of Missouri at any time from August 14, 2007 to the Present Date for claims relating to unpaid straight-time compensation and from August 14, 2010 to the present date for unpaid overtime compensation.

This class encompasses approximately 14,161 current and former MDOC corrections officers and spans more than a decade.

Respondents' Class is charged with "supervising, guarding, escorting, and disciplining offenders incarcerated in [MDOC] prisons." Statement of Uncontroverted Material Facts in Support of [Respondents'] Motion for Partial Summary Judgment ("SOF") ¶ 55. They work 8-hour shifts and are only compensated for the time spent at their assigned posts. *Id*. ¶¶ 64-65. However, Appellant requires Respondents' Class to perform a number of nearly identical tasks at each facility, known as pre- and post-shift activities, before and after each shift that add an additional 10 to 20 minutes to each

workday, without pay. *Id*. ¶¶ 51, 58, 62, 105-110. Respondents' Class is also in uniform, carrying a badge, and according to the testimony of Appellants' directors, expected to be on duty, remain vigilant, monitor offender movement, and respond to incidents and emergencies the entire time they are performing these tasks and walking to and from their posts. *Id*. ¶¶ 71-80. As Appellant's former deputy division director testified, "There are bad histories and events that occur because these things aren't in place . . . . There are cause for these practices. It's sound correctional practice to have these activities occur." *Id*. ¶ 79.

Respondents allege that the Labor Agreement and Procedure Manual incorporated the Fair Labor Standards Act ("FLSA") and Missouri Minimum Wage Law and that Appellant is violating those statutes and breaching their contract by refusing to compensate Respondents' Class for their mandatory pre- and post-shift activity. They sought lost wages for work performed over the course of 1,392,505 shifts worked during the Class Period. Respondents also sought a declaratory judgment requiring Appellant to compensate them for pre- and post-shift activity in the future and to implement an adequate time-keeping system.

On July 30, 2018, the Circuit Court granted Respondents' motion for partial summary judgment on their breach of contract claims, and the parties proceeded to trial on the issue of damages on August 6, 2018. After an 8-day trial that included the testimony of the Class Plaintiffs, current and former Corrections Officers, and an expert economist who testified for 9 hours, the jury rendered a verdict in Respondents' favor on August 15, 2018 in the amount of $113,714,632. The Circuit Court entered a final judgment the same

day and entered its Amended Judgment on September 14, 2018, making the following findings:

> a. The Labor Agreement and D2-8.4 of the Procedure Manual impose contractual obligations on Defendant to pay straight time and overtime compensation for all work performed by the COs as required by the Fair Labor Standards Act, and this work includes the time spent inside Defendant's prisons before and after each shift, including the time spent performing pre- and post-shift activities, as testified to at trial and referenced in [Respondents'] exhibits 6 and 33.
>
> b. Defendant requires all of [Respondents'] Class do this pre- and post-shift activity in violation of these agreements; it has failed and refused to ever compensate [Respondents'] Class for performing these activities, in breach of these agreements; it will continue to require this activity of [Respondents'] Class and refuse to pay them for it in the future; it has continued its policies in the face [of] governmental investigations, [Respondents'] Class complaints, years of litigation in this case, and the Court's partial summary judgment order and original judgment.
>
> c. Defendant has failed and continues to fail to comply with its legal obligation to keep comprehensive, accurate, and reliable records of all time worked by [Respondents'] Class (and its contractual obligations to do so under Policy D2-8.1).
>
> d. Defendant's past and ongoing course of conduct demonstrates that it will not comply with Section 12.2 of the Labor Agreement or the relevant terms of the Procedure Manual unless a declaratory judgment is entered requiring Defendant to do so. Thus, a justiciable dispute exists about Defendant's future compliance with the Labor Agreement, which is ripe for resolution by a judgment that declares and protects [Respondent] Missouri Correction Officer's Association (MOCOA) and [Respondents'] Class' contractual rights.

Amended Judgment at 4-5. In light of these findings, the Circuit Court ordered Appellant to immediately begin compensating Respondents' Class in accordance with the FLSA and to implement a proper timekeeping system for Respondents' Class within 90 days of entry of judgment. *Id*. at 5-6. Respondent was also ordered to "immediately inform the Court, MOCOA, and [Respondents'] Class counsel that such a system has been implemented."

Id. at 6. To date, no such notice has been provided, and the 3,000 corrections officers currently employed by Appellant continue to perform pre- and post-shift duties without compensation every day.

II. ARGUMENT

A. Appellant Failed to Request a Supersedeas Bond

Appellant argues for a stay of the Amended Judgment under the standard used by trial courts contemplating preliminary injunctions. *See State ex rel. Dir. of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996) (discussing "the elements required to obtain a preliminary injunction or a stay" and standard for granting a "preliminary injunction"). Judgments in those types of cases are stayed pending appeal under entirely different circumstances which are not present here:

> (1) when the appellant shall be an executor or administrator, personal representative, conservator, guardian, or curator, and the action shall be by or against the appellant as such, or when the appellant shall be a county, city, town, township, school district, or other municipality; [or]
>
> (2) when the appellant, at or prior to the time of filing notice of appeal, presents to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires.

Mo. Sup. Ct. R. 81.09(a); Mo. Ann. Stat. § 512.080.1.

> The recognized purpose of a supersedeas bond is to stay the execution or enforcement, pending the appeal, of any order or judgment **which commands or permits some act to be done**, or which is of a nature to be actively enforced against the party affected, where the case is not within the class of cases in which the appeal itself operates as a supersedeas.

Green v. Perr, 238 S.W.2d 922, 923 (Mo. App. St. Louis 1951) (emphasis added); *Roussin v. Roussin*, 792 S.W.2d 894, 898 (Mo. App. E.D. 1990). The Amended Judgment is certainly the type of order contemplated by *Green* and *Roussin* – it commands Appellant

to properly record time worked by Respondents' Class and to compensate them for the same. It does not fall within the first category of cases, so a stay is not automatic.

Appellant was required to seek a supersedeas bond "at or prior to the time of filing notice of appeal" in order for the Amended Judgment to be stayed. *State ex rel. GTE N., Inc. v. Missouri Pub. Serv. Comm'n*, 835 S.W.2d 356, 366 (Mo. App. W.D. 1992); Mo. Sup. Ct. R. 81.09(a). It chose not to.

> The sole and only purpose of an appeal bond is to stay the issuance of an execution until the cause can be passed upon and disposed of by the appellate court." A bond guarantees that a party's ability to collect on a judgment is not impaired although execution is deferred, if that party is successful on appeal.

Id. Without a bond in place here, there are no funds available to reimburse Respondents' Class for the wages earned during the pendency of the appeal in the event they prevail and the Amended Judgment is affirmed. *Id*. "[S]ince there is no specific statute authorizing a stay without a bond, [Appellant] is not entitled to the issuance of a stay." *Id*.

B. Appellant is Not Likely to Succeed on Appeal

Even if Appellant is correct that the preliminary injunction standard applies, its request for a stay must still be denied. The standard proposed by Appellant for obtaining a stay is high and requires consideration of the following factors:

> (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

State ex rel. Dir. of Revenue, State of Mo. v. Gabbert, 925 S.W.2d 838, 839-40 (Mo. 1996) (en banc). Note that the law and standard relied on by Appellant is not appropriate here.

Respondents have already proven, through full discovery, a summary judgment motion, and trial, they did prevail on the merits, and they recovered their harm at trial. Thus, by its very definition, Appellant cannot meet the asserted *Gabbert* test. Appellant has not directed the Court or Respondent to legal authority supporting a stay, and for good reason. The stay contemplated under this jurisprudence is only available when full "merits" determinations have not, unlike here, been made. But mindful that this Court has the power to "suspend, modify, restore, or grant an injunction during the pendency of an appeal" under Rules 92.03 and 92.04, Respondents provide this Opposition.

To meet its high bar, Appellant "must provide the court with evidence supporting each of these assertions." *Gabbert*, 925 S.W.2d at 840. It must also "show that the probability of success on the merits and irreparable harm **decidedly outweigh** any potential harm to the other party or to the public interest if a stay is issued." *Id*. (emphasis added). The balance of these factors in the instant case clearly requires that the Amended Judgment not be stayed. Moreover, the overwhelming evidence strongly supports the Circuit Court's judgment.

1. Appellant agreed to accurately record the Respondent Class' time, and its system was found inadequate.

Appellant's argument that it has no contractual obligation to maintain a timekeeping system misrepresents the uncontroverted trial record. First, Appellant's Procedure Manual mandates that Appellant "shall maintain and preserve payroll and other records containing . . . hours worked per day and per week." Plf. Tr. Ex. 42 at 9-10. Second, Appellant's Procedure Manual D2-8.1 "establishes guidelines for recording employees' time and

attendance: to ensure hours worked . . . and overtime earned are correctly recorded and compensated according to state and federal guidelines." Plf. Tr. Ex. 59 at 1. Third, the U.S. Department of Labor ("DOL") explicitly found that Appellant's was violating the FLSA by "fail[ing] to keep accurate records." Plf. Tr. Ex. 41 at DOC-021077, 79. Finally, the requirement to accurately record employees' time work is required under federal and state jurisprudence. "It is the duty of the employer to keep proper records of employee wages and hours." *Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 100 (Mo. App. ED. 2014) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)). "The employer's duty to maintain accurate records of its employees' hours is non-delegable." *Id*; *see* 29 C.F.R. §§ 785.13, 516.2.

These facts, which cannot be disputed, are directly relevant to the Circuit Court's finding that Appellant breached its contract with Respondents' Class by failing to comply with the FLSA and properly record their time. Appellant is obligated, under its Procedure Manuals to comply with the FLSA, and that law, along with federal and state regulations and decisions, requires the timekeeping system ordered by the Circuit Court and which Appellant asks this Court to stop. Paragraphs 7(a) and (b) of the Amended Judgment therefore properly enforce Appellant's continuing obligation, under its contract and the FLSA, to properly record the Respondents' Class's time and compensate them for the same.

2. The Western District previously interpreted the documents at issue.

Appellant's likelihood of success on appeal has nothing to do with whether handbooks, statutes, or regulations can form a contract. The documents Appellant refers to in the Motion were not the basis for Respondents' partial summary judgment motion or the Circuit Court's partial summary judgment order. Instead, Respondents and the Circuit Court relied solely on the Labor Agreement and the Procedure Manual, documents the Western District has already interpreted in prior litigation between Appellant and MOCOA and found to be binding between the instant parties. Specifically, this Court previously ruled:

- "[T]he Fair Labor Standards Act . . . requires [Appellant] to compensate corrections officers who actually work more than forty hours in a single work week at 'a rate not less than one and one half hours for each hour of employment for which overtime compensation is required;'"
- "The definitions and terminology in [Appellant's] [Procedure] Manual are incorporated into the Labor Agreement;"
- "[T]he [Procedure] Manual defines how state compensatory time and federal overtime are earned by correctional officers;" and
- The incorporated definitions include "how state compensatory time **and federal overtime** are earned by correctional officers."

Missouri Corr. Officers Ass'n v. Missouri Dep't of Corr., 409 S.W.3d 499, 500 (Mo. App. W.D. 2013) (emphasis added). Appellant has yet to explain, in this Motion or any of its prior briefing on this issue, why a conflicting interpretation should result here.

3. Public policy forbids waiver of statutory rights to compensation.

It is well established that an employee's rights under the FLSA and Missouri Minimum Wage Law "cannot be abridged by contract or otherwise waived this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). *See also Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 680 (8th Cir. 1996) ("Employers and employees may not, in general, make agreements to pay and receive less pay than the statute provides for. Such agreements are against public policy and unenforceable."); *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 761 (Mo. 2014) (recognizing that "the MMWL, like the FLSA, is a remedial statute with the purpose of ameliorating the 'unequal bargaining power as between employer and employee' and to 'protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others'"); *State v. Benn*, 69 S.W. 484, 486 (1902) (finding that a laborer cannot waive or contract away rights conferred on him by statute). Instead, "the provisions of the [FLSA] with reference to minimum wages, overtime compensation and liquidated damages are read into and become a part of every employment contract that is subject to the terms of the [FLSA]." *Roland Elec. Co. v. Black*, 163 F.2d 417, 426 (4th Cir. 1947). Otherwise, wage and hour laws simply "would have no teeth and no purpose if their minimum requirements could be waived by alleged acquiescence." *Metro Louisville/Jefferson Cty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009).

Even if the Respondents' Class could waive their statutory rights, the record below is replete with evidence that its members made multiple efforts throughout the class period to enforce their rights. First, Appellant rejected grievances filed by the Respondents multiple times throughout the Class Period regarding payment for pre- and post-shift activities. SOF ⁋ 38; *see also* trial testimony and exhibits. Second, there have been informal complaints from officers about Appellant's refusal to pay them for pre- and post-shift activity for 30 years, and Appellant has admitted in this litigation that requests for overtime pay and related grievances were submitted and summarily denied: "Consistent with its policy, [Appellant] has repeatedly and consistently denied, in writing and otherwise, requests for overtime pay for the time it takes to complete the pre- and post-shift activities at issue in this litigation." *Id.* ⁋⁋ 42, 46. "**[C]lass members requested compensation or comp time for doing pre and post shift activity," and "such requests were denied.**" *Id.* ⁋ 43. Finally, Appellant has been investigated and fined by the DOL for its failure to compensate Respondents' Class for pre- and post-shift activity. *Id.* ⁋⁋ 49-54. In short, Respondents' Class cannot and did not waive its rights under the Labor Agreement or the FLSA, and Appellant is unlikely to succeed on this prong of its appeal.

C. Appellant Can Implement A Proper Timekeeping System with Relative Ease.

Appellant obligation to implement proper timekeeping systems was not suddenly thrust upon it in the past three months. It has an existing and continuing obligation to keep proper records of time worked, pursuant to its contract with Respondents' and the FLSA. *Stanbrough*, 445 S.W.3d at 100; *Anderson*, 328 U.S. at 686-87; 29 C.F.R. §§ 785.13, 516.2.

Appellant calculated the cost of paying Respondents' Class for an additional 15 minutes per shift in 2004. Plf. Tr. Ex. 18; trial testimony of Dwayne Kempker and Joseph Eddy. Appellant has also known since at least 2007, when a corrections officer filed a grievance "requesting a time keeping method be placed in the control center lobby for the purpose of accountability and compensation," that its timekeeping system failed to meet those obligations. Plf. Tr. Ex. 37 at DOC-020958. And Appellant was reminded of these shortcomings again when Respondents' Class filed the instant lawsuit in 2012, when the DOL found that Defendant was violating the FLSA by "fail[ing] to keep accurate records" in 2014, and when the Circuit Court granted Respondents' motion for partial summary judgment on July 31, 2018. Plf. Tr. Ex. 41 at DOC-021077, 79. Appellant has had ample time to conduct the assessments it claims are necessary and to implement proper systems. It has simply refused, for more than a decade, to take those basic, requisite steps.

In any event, Appellant fails to offer any evidence in support of its claim that "each facility will require an individualized assessment, plan, and installation process," that costs will never be recovered, or that irreparable harm will be suffered. App. Mtn. at 8. First, no "individualized" assessments are required. Appellant has admitted that Respondents' Class is on duty the entire time they are inside its facilities. And this Court found, when it entered summary judgment, that all of that time must be compensated. As a result, the mandates of Paragraphs 7(a) and (b) only necessitate the installation of time clocks at each facility's entry point. Second, Appellant did not present evidence to trial or in opposition to summary judgment supporting the assertions of difficulty now late made to this Court. Third, evidence at trial showed that a large number of Appellants' facilities

already have systems at those entry points that electronically record the corrections officers' entry and exit and are designed for employee timekeeping with the push of a button. As one corrections officer stated at trial, Respondents just want "what most employers already have." Appellant estimated the time at 15 minutes a shift in 2004. Ex. 18. These systems are ubiquitous at worksites where employees like those in Respondents' Class are paid on hourly basis, and Appellant is obligated to use them. As a result, there is simply **no risk** of irreparable harm from their implementation here.

D. The Potential Harm to Respondents' Class is Significant

Appellant has refused to compensate Respondents' Class for pre- and post-shift activity for more than a decade. Its refusal has come in the face of complaints, formal grievances, lawsuits, DOL investigations, and the Circuit Court's partial summary judgment order and Amended Judgment. This has, per the verdict of a jury after trial, resulted in $113.7 million in lost wages. According to calculations by the Respondents' Class expert, Respondents' Class is incurring an additional $787,989 in lost wages every month after trial that they are not paid. Plf. Tr. Ex. 86 at 1. This is not small or the result of some "hasty execution." App. Mtn. at 6.

It is also not something that "c[an] easily be repaired through a monetary payment," particularly if no supersedeas bond is posted and Appellant fails to keep records of time worked by Respondents' Class during the appeal. *Id*. Instead, it will require the filing of a petition under Rule 87.10 to enforce the Circuit Court's Amended Judgment. Then, it will force Respondents' Class to seek production of entry and exit logs at all of Appellants' prisons and procure a second report from their expert, Dr. William Rogers, calculating the

wages owed. Dr. Rogers again would have to use a procedure that required the review of millions of data points when damages were first calculated for trial. *See* Plf. Tr. Ex 86 at 5-8 (detailing the records, information, and formulas used to calculated Respondents' Class's damages). Appellant severely criticized Dr. Rogers for the alleged lack of reliable time records, and its claim that minimal harm will result from a stay is at odds with the enormous challenges it knows come with retroactively calculating hours and wages for over 3,000 employees. Respondent also had to battle Appellant in discovery with Orders granting Motions to Compel to get these records. In short, that challenge is significant and wholly avoidable. Appellant need only implement the timekeeping systems it is already obligated, and agreed, to use. For these reasons, the harm to Respondents' Class that will result from a stay clearly outweighs the minimal risk of harm to Appellant. *Gabbert*, 925 S.W.2d at 839-40.

E. Public Interests Are Served by Appellant's Compliance with the Law

Appellant's arguments about public interest and budgetary restraints are disingenuous. As stated above, Appellant has known about Respondents' complaints for since at least 2004 and 2007, and it was ordered by the DOL to implement proper timekeeping systems in 2014. Its failure to correct these problems and properly compensate its public servants, who risk their safety every day to maintain Missouri's prisons, has resulted in a verdict in the state exceeding $113 million. Clearly, the public interest, including the interests of the Respondents' Class members who serve the public and pay taxes, is best served by immediately implementing proper timekeeping systems,

properly paying its employees who already earn incredibly low wages, and avoiding another $20 million in lost wages (and over $20 million in interest on the verdict) when the trial verdict and Amended Judgment are affirmed on appeal.

Appellant's ability to satisfy the verdict and implement these changes are likewise not as constrained by the budget as it claims. Missouri's constitution specifically created a Budget Reserve Fund for these situations:

> The commissioner of administration may, throughout any fiscal year, transfer amounts from the budget reserve fund to the general revenue fund or any other state fund *without other legislative action* if he determines that such amounts are necessary for the cash requirements of this state.

Mo. Const. art. IV, § 27(a). According to Missouri's treasurer, the Budget Reserve Fund currently sits at $407,573,012. *See* Show-Me Checkbook, *available at* https://treasurer.mo.gov/showmecheckbook/cashflow (last visited Dec. 17, 2018). Thus, the mandates of Paragraphs 7(a) and 7(b) can be met without "using public funds for purposes for unauthorized purposes" or "skirting the democratic process of appropriations." App. Memo. at 9-10. In sum, Missouri has the funds to comply with the Amended Judgment, and the public interests are best served by treating the State's employees fairly and avoiding further debt. As a result, this factor weighs against staying the Amended Judgment's enforcement.

III. CONCLUSION

Appellant's motion to stay is yet another attempt to avoid its obligations to fairly compensate its employees. Allowing it to deprive Respondents' Class of their wages while it drags out the appeals process, with no supersedeas bond in place to secure the Amended

Judgment, will result in millions of dollars in losses and only cause further harm to the public and its employees. A wealth of facts and law supporting the Amended Judgment exist in the record below, and Appellant has made no showing that it is likely to succeed in its appeal. Enforcing the Amended Judgment will ensure that Appellant complies with its continuing obligations under the Labor Agreement and federal and state wage and hours laws and that Respondents' Class is paid in accordance with state and federal laws and regulations. Accordingly, the factors enunciated in *Gabbert* weigh heavily against a stay, and Respondents respectfully request that the Court deny Appellant's motion requesting the same.

Dated: December 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed and served via the Missouri Court e-filing system and served on counsel of record for Appellant thereby as follows:

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