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**IN THE CIRCUIT COURT**
**FOR COLE COUNTY, STATE OF MISSOURI**
**19TH JUDICIAL CIRCUIT**

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| THOMAS HOOTSELLE, JR., et al., and MISSOURI CORRECTIONS OFFICERS ASSOCIATION, | ) | |
| Plaintiffs, Individually and on behalf of all others similarly situated, | ) | Cause No. 12AC-CC00518 |
| v. | ) | Div. 4 |
| MISSOURI DEPARTMENT OF CORRECTIONS, | ) | |
| Defendant. | ) | |

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Missouri Department of Corrections' admissions resolve this case and Motion for Plaintiffs. First, Defendant admits that it has never and will never pay for pre- and post-shift activity and that it routinely denies requests for compensation for these activities, establishing as a matter of law that the grievance procedure is futile. Def. Resp. to Plf. Stmt. of Uncontroverted Material Facts ("Def. SOF") ¶¶ 42-44. Second, Defendant admits the Labor Agreement requires MDOC to comply with the Fair Labor Standards Act ("FLSA") and the Missouri Minimum Wage Law ("MMWL") and that the sole issue before this Court is whether refusing to pay Plaintiffs for pre- and post-shift activities is a breach of that term of the contract. *Id.* ¶ 14; *see also* Def. Memo. in Opp. to Plf. Mtn. for Partial Summary J'ment ("Def. Opp.") at 17 ("MDOC does not deny that the Labor Agreement states it agrees to comply with the [FLSA] for payment of overtime."); *id*. at 17-18 ("Whether there has been a breach of the FLSA and [MMWL] are therefore only being looked at in this case in terms of the breach of contract."). Third, and most

importantly, Defendant admits, without equivocation, that Class Plaintiffs are "on duty," "expected to act as prison guards whenever they are inside Defendant's prisons," and "responsible to observe offender behavior any time they are present inside the institution" and that "remaining vigilant and responding to fights and other incidents, even when not on post, is a job requirement." Def. SOF ⁋⁋ 71-73, 76.

Taken together, these admissions establish that Defendant has, as a matter of law, breached its contractual obligation to comply with the FLSA and the MMWL by failing to compensate Plaintiffs for the time spent performing pre- and post-shift activities inside Defendant's prisons. Moreover, these admissions: are based on Defendants' own testimony, discovery responses and documents; and are required by the undisputed facts material to analyzing Plaintiffs' case. As a result, summary judgment on Counts III and VI of the Second Amended Petition (as amended by interlineation) in Plaintiffs' favor is required.

## I. ARGUMENT

### A. The *Res Judicata* Defense Fails

#### *1. Defendant has forfeited the res judicata defense.*

The Court must reject Defendant's attempt to use *res judicata* as an affirmative defense as it has long been waived. It is black-letter law that "[t]he facts that give rise to *res judicata,* by their very nature, are known to the defendant from the inception of a lawsuit." *Heins Implement Co. v. Missouri Highway & Transp. Comm'n,* 859 S.W.2d 681, 685 (Mo. 1993) (en banc) *abrogated on other grounds by Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008), *as modified on denial of reh'g* (Sept. 30, 2008). Missouri rules therefore mandate that "a party **shall** set forth all applicable affirmative defenses and avoidances, including but not limited to…*res judicata*…and any



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other matter constituting an avoidance or affirmative defense." Mo. Sup. Ct. R. 55.08 (emphasis added). Importantly, "[a]s an affirmative defense, *res judicata* must be timely raised." *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 42 (Mo. 1999) (en banc). It "is not a stealth defense that can be held in reserve." *Id.*; *see also Heins Implement Co.*, 859 S.W.2d at 685 ("[A] defendant should not be able to hold preclusion in reserve as a 'stealth defense' long after the time for raising substantive defenses has passed.").

Defendant has waived the *res judicata* defense by failing to raise it in over six years of litigation, failing to assert it in multiple answers and dispositive motions (including the Answer filed on May 14, 2018), and raising it for the first time in a motion in limine filed two weeks before trial. By doing so, Defendant has violated the clear mandate of Rule 55.08 and Supreme Court precedent.

In *Johnson v. Allstate Indemnity Company*, in almost identical circumstances, the court rejected the defendant's attempt to assert *res judicata* as an affirmative defense. *See* No. 042-00697, 2007 WL 4352585 (Mo. Cir. Ct. 22nd Dist. June 25, 2007). The defendant there, like MDOC, waited an inordinate amount of time to raise the *res judicata* defense. *Id.* (noted that defendant "did not assert the defense of res judicata until more than three years after [the litigation was commenced]." *Id.* The facts of the case are remarkably similar to those presented here: new counsel entered the litigation late in the process, filed an amended answer, and even obtained a postponement of the trial date at the eleventh hour. *Id.* Relying on well-settled principles enunciated by the Missouri Supreme Court, the court denied the defendant's motion to amend its answer to allege *res judicata* as an affirmative defense, explaining that "'[i]t would be unjust to allow [defendant] to choose to defend both actions, wait

until one of them went to judgment and then argue that it is res judicata to the other.'" *Id.* (quoting *66, Inc.*, 998 S.W.2d at 43).

Here, as in *Johnson*, the decision in *MDOC I* that Defendant claims gives rise to *res judicata* was rendered during the same year this litigation began. Defendant has long known the information needed to promptly invoke that affirmative defense as required by the Rule 55.08 and well-settled Missouri precedent. For that reason, Defendant may not belatedly assert *res judicata* as a "stealth defense" and, in doing so, frustrate its purpose, namely to promote judicial economy and enable parties to avoid the cost of protracted litigation. Defendant's failure to raise *res judicata* sooner is fatal to its attempt to raise it now, on the eve of trial, after six years of litigation, after failing to raise it in any of the answers previously filed in this matter, including the answer filed just two months ago, and in numerous Motions to dismiss and for Summary Judgment of the very same Counts at issue here (and motions to reconsider same).

#### ***2. Defendant has failed to prove the prerequisites for applying res judicata.***

Even if the Court were to consider the *res judicata* defense on its merits (which, for the reasons just stated, it should not), Defendant cannot satisfy the standard for its invocation. "For *res judicata* to apply, four identities must be present: '1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made.'" *Kesler v. Curators of the Univ. of Missouri*, 516 S.W.3d 884, 890 (Mo. Ct. App. 2017).

"The test to figure out if a cause of action is single and cannot be split is: (1) whether the separate actions brought arise out of the same act or transaction ***and*** (2)



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whether the parties, subject matter, and evidence necessary to sustain the claim are the same in both actions." *Holliday v. Holliday*, 190 S.W.3d 550, 556 (Mo. Ct. App. 2006) (emphasis added).

With respect to the first element, *MDOC I* involved a claim for a declaratory judgment relating to whether Defendant's changes to correctional officers' shift schedules amounted to a "mandatory compensatory time reduction" in violation of Section 7.9 of the then-operative Labor Agreement. Plaintiffs here allege that Defendant violated a different Section - 12.2's mandate that Defendant comply with the FLSA. In addition, *MDOC I* did **not** involve a claim for damages pursuant to theories of breach of contract, quantum meruit, or unjust enrichment, and Plaintiff MOCOA did not, as it does here, invoke the overtime provisions of the Labor Agreement and the Procedure Manual. Evidence of whether Defendant improperly changed shift schedules is completely different than evidence of whether Defendant failed to compensate Plaintiffs for compensable work. The transactions and acts of Defendant are different. Here there is a long failure to pay for pre and post shift activity required of Plaintiffs by Defendant with the class time from 2007 to date. In MOCOA I, Defendant changed its practice of shift scheduling in 2011 prompting the lawsuit. Note that defendant has submitted no new facts in this Motion for the court to consider as required by Rule 74.04(c)(2).

Thus, neither the "identity of the thing sued for" (declaratory judgment regarding scheduling of shifts versus declaratory judgment and monetary damages related to compensable work and overtime under Defendant's promise to comply with the FLSA) nor the "identity of cause of action" (declaratory judgment alone versus breach of contract, quantum meruit, and unjust enrichment claims) are met here. *Kesler, supra*. The two actions did not arise out of the same act or transaction and the subject matter



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and evidence necessary to sustain the claims are not the same. *Holliday, supra*. Defendant does not come close to meeting the r*es judicata* test, which is likely why it has not been raised before now.

#### ***3. MOCOA is excused from exhausting the Labor Agreement's grievance procedure.***

Defendant's renewed effort to invoke an "exhaustion of administrative remedies" defense must also fail. The grievance procedure set forth in the Labor Agreement governs how *employees* should raise complaints with Defendant. Def. SOF ⁋ 36; Ex. 6, Labor Agreement § 13.2. It specifically exempts MOCOA from complying with those procedures, stating "Nothing in this Article is intended to prohibit the Association from raising issues pertaining to conditions of employment of the Employees in the Bargaining Unit [Class Plaintiffs] throughout the life of this Labor Agreement." Ex. 6, Labor Agreement § 13.1. Even if MOCOA was ordinarily required to exhaust the grievance procedure, its failure to do so is excused for the same reasons Class Plaintiffs are excused, as set forth in Plaintiffs' opening brief and Section B.4 *infra*. Defendant has submitted no new facts for the court to consider on this issue as required by Rule 74.04(c)(2).

### B. Class Plaintiffs Have Standing to Enforce the Labor Agreement

Defendant's various assertions that Plaintiffs lack standing are entirely without merit.

#### ***1. The employment at-will doctrine is irrelevant.***

"'Under Missouri's employment at-will doctrine an employer can discharge—for cause or without cause—an at-will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for



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wrongful discharge.'" *Reed v. The Curators of the Univ. of Mo.*, 509 S.W.3d 816, 821 (Mo. App. W.D. 2016) (citation omitted). And in the cases cited by Defendant, the plaintiffs were seeking relief for wrongful discharge and damages for future wage loss. Class Plaintiffs make no such claims here, no claims challenging separation from employment, and this doctrine is irrelevant. Class Plaintiffs seek compensation for past work and past contract violations, not to somehow get around the employment at will doctrine and avoid termination. *See Robertson v. LTS Mgmt. Srvcs. LLC*, 642 F. Supp. 2d 922, 930-31 (W.D. Mo. 2008) (refusing to invoke employment at-will doctrine to dismiss state law contractual claims for wages). In any event, the terms of Class Plaintiffs' employment are very clearly governed by a contract, the Labor Agreement that Defendant admits governs Class Plaintiffs' rights and duties. Def. SOF ⁋ 12. And because that Labor Agreement was entered into for the benefit of Class Plaintiffs, they are entitled to enforce its terms. *Arbuckle v. Fruehauf Trailer Co.*, 372 S.W.2d 470, 473 (Mo. App. 1963); *Allen v. Globe-Democrat Pub. Co.*, 368 S.W.2d 460, 463 (Mo. 1963).

#### ***2. The "uniquely personal" and "fair representation" doctrines are irrelevant to public employees' state law claims.***

Defendant raises the "uniquely personal" and "fair representation" doctrines at several points in its opposition, relying exclusively on federal courts' interpretations of the LMRA in cases brought by private employees. As Plaintiffs have already pointed out, "[p]ublic employees of the political subdivisions of a state are not governed by the federal labor laws," and the standing and preemption issues surrounding the LMRA are simply irrelevant and inapplicable to this case. *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n (DPOA)*, 821 F.2d 328, 331-32 (6th Cir. 1987) (emphasis added); *see also* 29 U.S.C. § 152(2) (excluding "the United States . . . or any State or political

subdivision thereof" from the LMRA's definition of employer). In the cases relied on by Defendant, the courts were considering whether individual members had standing "to bring an action under § 301 to enforce their individual rights." *Brown v. Sterling Aluminum Prods. Corp.*, 365 F.2d 651, 656 (8th Cir. 1966); *see also Bills v. U.S. Steel, LLC*, 267 F.3d 785, 787 (8th Cir. 2001) ("The law is well settled that [employee]'s **invocation of jurisdiction under 301(a) of the [LMRA]** required him to allege and prove that [the union] breached its duty of fair representation.") (emphasis added); *Trompeter v. Boise Cascade Co.*, 877 F.2d 686, 687 (8th Cir. 1989) (finding that § 301 "specifically describes as parties (**to suits authorized by the section**) employers and labor organizations"); *id.* at 688 (discussing fair representation doctrine in context of bringing suit under 301(a) of the LMRA); *Sw. Bell Tel. Co. v. Buie*, 758 S.W.2d 157, 162 (Mo. App. E.D. 1988) (merely recognizing that employee bringing § 301 action must prove the union breached its duty of fair representation); *Gutierrez v. United Foods, Inc.* 11 F.3d 556, 561 (5th Cir. 1994) ("'[F]or an individual **to bring an action under § 301** he must be seeking to enforce a right that is *personal* to him and vested at the time of suit.'") (emphasis added).

Class Plaintiffs here are not attempting to bring an action under § 301 or the LMRA, and these cases plainly did not hold that public employees lack standing to bring common law breach of contract claims without asserting "uniquely personal" rights, "fair representation" claims or that employees are not third-party beneficiaries of collective bargaining agreements. Defendant offers no authority for those propositions because that is simply not the state of the law governing collective bargaining agreements with the State of Missouri and its political subdivisions. For Defendant to assert otherwise without noting this distinction misleads the Court and does not seek to



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expand the law – especially as Defendant asserted it was not an "employer" under the Missouri wage and hour law. The LMRA's "uniquely personal" and "fair representation" doctrines do not apply and do not destroy Class Plaintiffs' standing to enforce the Labor Agreement.

### *3. The Procedure Manual creates enforceable contract rights and is incorporated into the Labor Agreement.*

Defendant argues that Class Plaintiffs may not enforce the provisions of the Procedural Manual regarding compensation because that document does not confer enforceable contract rights. Def Op. at 8-11.

The cases cited by Defendant, relating to whether employee handbooks give rise to contracts, do not apply here for at least two reasons. First, the Procedural Manual is much more than an employee handbook containing general statements about MDOC's policies—a fact recognized in *MDOC I*. *Mo. Corr. Officers Ass'n v. Mo. Dept. of Corr.* ("*MDOC I*"), 409 S.W.3d 499 (Mo. App. W.D. 2013). It is signed by the Defendant's former director, George Lombardi and explicitly states that it is intended "to ensure departmental compliance with the [FLSA]." Def. SOF ⁋ 15. To that end, the Procedure Manual defines how overtime is accrued and calculated. *Id.* ⁋ 17. This is a far cry from the handbook at issue in *Johnson v. McDonnell Douglas Corp.* (a wrongful discharge case involving the employment at-will doctrine), which was "merely informational" and "provid[ed] a **nonexclusive** list of acts for which an employed **might** be subject to discipline." 745 S.W.2d 661, 662 (Mo. 1988) (en banc). Second, the Procedural Manual is wholly devoid of the types of disclaimers found in the cases on which Defendant relies. *See, e.g.*, *id.* at 662-663 (handbook stated that it was only informational and expressly stated that provisions could be changed anytime); *Jennings v. SSM Health*

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*Care St. Louis*, 355 SW3d 526, 534 (Mo. App. E.D. 2011) (handbook expressly reserved right to change provisions and stated employer could make exceptions to severance policy).[1]

In any event, as Plaintiffs have already made clear, Defendant is collaterally estopped by the findings of *MDOC I* from arguing that the Procedure Manual is not a part of its contract with Plaintiffs. In that case, Plaintiff MOCOA claimed that Defendant violated the Labor Agreement by unilaterally changing the way correctional officers accrued and used compensatory time for overtime worked, as provided by Defendant's Procedural Manual. Defendant insists that, in ruling in MOCA's favor, the Western District merely looked to the Procedural Manual for a definition of "compensatory time" because the Labor Agreement did not provide one. A fair reading of *MDOC I* demonstrates that Defendant's contention plainly lacks merit.

In *MDOC I*, the court set forth, at length, Procedural Manual provisions that described how correctional officers accrued compensatory time and how Defendant was to administered its use—terms not found in the Labor Agreement. *See MDOC I,* 409 S.W.3d at 500-505. Notably, the Western District went far beyond referring to the Procedural Manual for the definition of "compensatory time." It held, based on Defendant's concessions and the sworn testimony of its same employees who testified in this case, that the "definitions and terminology" of the Procedural Manual were

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[1] *See also Johnson v. Vatterdott Educ. Ctrs., Inc.*, 410 S.W.3d 735, 739-741 (Mo. App. W.D. 2013) (handbook expressly stated that it did not constitute a contract and employer could unilaterally change provisions); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008) (same); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 738-739 (Mo. App. W.D. 2011); *W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs of Kansas City, Mo.*, 939 S.W.2d 565, 568-569 (Mo. App. W.D. 1997).

integrated into the Labor Agreement and created enforceable contract rights.[2] *Id.* at 500. The Western District then explicitly stated that the incorporated definitions include "how state compensatory time **and federal overtime** are earned by correctional officers." *Id.* at 500 (emphasis added). In other words, the Procedure Manual provides this Court the same assistance in interpreting Section 12.2 of the Labor Agreement (regarding accrual and payment of overtime) that it provided the Western District in interpreting Section 7.9 of the Labor Agreement (regarding accrual of compensatory time). Clearly, the issue of whether the Procedure Manual is part of Defendant's contract with Plaintiffs (including the terms governing accrual of overtime) has been litigated and decided in litigation involving the same parties, and the use of collateral estoppel against Defendant is proper. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 86 (Mo. App. S.D. 2006); *Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 797 (Mo. App. W.D. 2005). In any event, if Defendant were correct, it would not change the outcome as the Labor Agreement, standing alone, requires Defendant to comply with the FLSA and MMWL. Def. SOF ⁋ 14.

#### ***4. Defendant admits that Class Plaintiffs' administrative remedies are futile***

Class Plaintiffs' argument in favor of futility is not based on mere "[a]necdotes about a handful of complaints." Def. Opp. at 16. Instead, it is based on Defendant's conduct and admissions. First, Defendant admits that it "has repeatedly and consistently denied, in writing and otherwise, requests for overtime pay for the time it

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[2] The court stated that it was not addressing whether Defendant could unilaterally change those provisions, but the opinion emphasized that Defendant had not exercised whatever discretion it had retained to do so. For that reason, Defendant was bound by the Procedural Manual, as currently written. *See MDOC I,* 409 S.W.3d at 500-505.



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takes to complete the pre- and post-shift activities at issue in this litigation." Def. SOF ⁋⁋ 42, 43. It also admits that Class Plaintiffs are aware of this policy, stating that they "have been informed that they would not be paid for the time it took them to complete the pre- and post-shift activities at issue in this class action litigation." *Id.* ⁋ 44. Second, Defendant admits that it has enforced this policy, denying grievances by Plaintiffs' Class members seeking payment for pre- and post-shift activities. *Id.* ⁋⁋ 38-39. Third, Defendant has admitted that it has not complied with, nor will it comply with, the Department of Labor finding that this policy violates the FLSA. *Id.* ⁋⁋ 53-54.

The varying degrees of success discussed by Plaintiffs in a prior filing do not change this result. The undisputed evidence clearly shows that Class Plaintiffs have never been paid for performing Defendant's standard and mandatory pre- and post-shift activities; instead, Defendant has only conceded to compensating Class Plaintiffs "if an emergency occurs before the corrections officer has reached his/her assigned post." Def. SOF ⁋⁋ 42-44, 65.

In any event, "[t]his is not a case involving an individualized grievance . . . . Rather, the facts relating to all the employees . . . are the same. The contract claims of each of these employees are also identical." *Schultz v. Owens-Illinois Inc.*, 696 F.2d 505, 511-12 (7th Cir. 1982). As a result, Defendant's denial of Class Plaintiff grievances is enough, standing alone, to satisfy any exhaustion requirements and prove futility. *Id.* at 512. When those grievance denials are coupled with Defendant's admissions that (a) they were denied pursuant to MDOC policy and (b) it will not comply with DOL findings, there is no question that Class Plaintiffs "w[ere] 'justified, as [] reasonable person[s], in believing that nothing further could be accomplished.'" *Barks v. Bi-State*



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*Dev. Agency*, 727 S.W.2d 464, 468 (Mo. App. E.D. 1987) *abrogated on other grounds, Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

#### ***5. There are no genuine issues of material fact surrounding the terms of the contract.***

Defendant incorrectly states that there are genuine issues of material fact regarding the terms of the contract. Def. Opp. at 21. Whether Class Plaintiffs have standing to enforce the terms of the Labor Agreement and whether the terms of the Procedure Manual have been incorporated into that contract are issues of law for the Court to decide. *Nodaway Valley Bank v. E.L. Crawford Const., Inc.*, 126 S.W.3d 820, 825 (Mo. App. W.D. 2004). The only remaining question is, as Defendant puts it, "whether the alleged pre- and post-shift activities in this case are compensable." Def. Opp. at 22. This too is an issue of law for the Court to decide. *Helmert v. Butterball, LLC*, 805 F. Supp. 2d 655, 659-60. (E.D. Ark. 2011).

### **C. Defendant Breached the Terms of the Labor Agreement and Procedure Manual**

#### ***1. Defendant admits that pre- and post-shift activities are compensable.***

Defendant admits the following undisputed facts:

- "Class Plaintiffs are hired 'for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons.'" Def. SOF ⁋ 55. Their" job is down inside watching offenders." *Id.* ⁋ 56.

- "Class Plaintiffs 'are on duty and expected to respond' when walking to and from their posts." *Id.* ⁋ 71. They "are expected to act as prison guards whenever they are inside Defendant's prisons." *Id.* ⁋ 72.

- This means Class Plaintiffs "'are responsible to observe offender behavior any time they are present inside the institution regardless of their bid posts, including walking to/from their bid posts." *Id.* ⁋ 73; *see also* id. ⁋ 77 (admitting "Class Plaintiffs '"have to monitor and pay attention to offenders walking to their post and walking back.'").

- Class Plaintiffs "are trained and expected to be vigilant whenever they are in the presence of often dangerous offenders." *Id.* ¶¶ 75-76.

In other words, Defendant has admitted that Class Plaintiffs are "on duty" and engaged in the activities which they are "employed to perform," namely monitoring – surely a synonym for supervising and guarding – offenders the entire time they are inside its prisons. *See* 29 C.F.R. 790.8(a) (defining the term "principal activity"); *cf.* § 553.221(b) ("Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises."). As a result, Defendant has admitted that Class Plaintiffs' are engaged in a "principal activities" during that time, and the time must be compensated. *Id.* § 790.8. This is, quite simply, the ultimate issue of the case. Defendant admits that it is violating the FLSA, which is a violation of material terms of the Labor Agreement and the Procedure Manual. *See Hertz v. Woodbury Cty., Iowa*, 566 F.3d 775, 783 (8th Cir. 2009) (Violations of the FLSA occur when "the plaintiff has performed compensable work" and "the plaintiff has not been properly paid."). This alone requires summary judgment in Plaintiffs' favor.

***2. The cases relied on by Defendant are easily distinguishable.***

The cases cited by MDOC are easily distinguishable. Each one required a careful analysis of factual scenarios that differ from those in this case in key respects. *See Helmert*, 805 F. Supp. 2d at 659 (consideration of relevant factors "necessarily involves factual determinations"). First, *Integrity Staffing Solutions, Inc. v. Busk* is not the silver bullet of Defendant's dreams. 135 S.Ct. 513 (2014). The plaintiffs were "warehouse workers who retrieved inventory and packaged it for shipment" and were required to "undergo an antitheft security screening before leaving the warehouse each day." *Id.* at 515. Their sole question before the Supreme Court was "whether the



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employees' time spent waiting to undergo and undergoing those security screenings [wa]s compensable." *Id.* By comparison, Class Plaintiffs seek compensation for a number of activities beyond "waiting to undergo and undergoing" security screenings, such as going through airlocks designed to prevent prisoner escape, reporting to receive assignments, picking up equipment, monitoring incarcerated felons and passing tourhg locked doors while walking to and from their posts. Def. SOF ⁋ 58. Also unlike here, the employees' principal activity in *Busk* was wholly unrelated to maintaining security at the warehouses; it was simply to retrieve and package products. *Id.* at 518. As a result, "[t]he screenings were not an intrinsic element" of retrieving and packaging products. *Id.* Class Plaintiffs, on the other hand, are – as Defendant admits – "on duty" and responsible for monitoring offenders *the entire time they are inside Defendant's* prisons. Def. SOF ⁋⁋ 71-77. This is an intrinsic element of their principal activity, supervising and guarding offenders, and is therefore compensable under the FLSA and MMWL. Def. SOF ⁋⁋ 55-57. As a result, while *Busk* provides the framework for considering whether Class Plaintiffs' pre- and post-shift activities, it does not mandate a ruling in Defendant's favor.

The same is true for other cases cited by Defendant. For example, in *Mertz v. Wis. Dep't of Workforce Dev.*, the guards, unlike members of Plaintiffs' Class, were not required to respond to emergencies that occurred between the time they entered the facility and they arrived at their duty posts. 871 N.W.2d 866, 2015 WL 6181046, at *1 (Wis. Ct. App. 2015). They also knew their post before arriving for work, there was no pass down of information, and the process lasted only one minute. *Id.* Similarly, the correctional officers in *Aguilar v. Mgmt. & Training Corp.* did not present evidence that they were required to be ready to respond to incidents immediately after checking into



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the prison. No. 16-cv-00050, slip. op., 2017 WL 4804361, at *4-13 (D.N.M. Oct. 24, 2017). In fact, the Court granted summary judgment, in part, because "none of the walking done by officers to and from their posts involve[d] inmates." *Id.* at *14-15. In stark contrast, Plaintiffs have presented detailed evidence, which is undisputed by Defendant, that they are "on duty," in the presence of offenders, charged with monitoring them, expected to respond to incidents, and have in fact responded to serious incidents, during the time spent walking to and from their posts. Def. SOF ¶¶ 70-84.

The other cases cited by Defendant did not even involve correctional officers. *See Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) (nuclear plant security guards); *Albrecht v. Wackenhut Corp.*, 379 Fed. App 65 (2d Cir. 2010) (Same); *Bonilla v. Baker Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007) (construction workers at secure job sites at airport); *Corella v. City of New York*, 986 F. Supp. 2d 320 (S.D.N.Y. 2013) (employees were carpenters, electricians, cement masons, roofers, and plumbers who maintained buildings). As a consequence, those employees' duties did not include responding to the type of incidents which Class Plaintiffs are required to be ready to handle and have handled. Given these stark factual differences, the cases relied on by Defendant simply have no bearing on the outcome of this case.

#### ***3. Minor variations in pre- and post-shift activities relate to Plaintiffs' damages calculations and not liability.***

Defendants' assertion – and citation to a handful of witness statements -- that some Class Plaintiffs did not perform each and every pre- and post-shift activity is a red herring that has no bearing on Defendant's liability for breach of contract. *See* Def. Opp. at 22-23. Plaintiffs are not asking this Court to make a factual determination regarding



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the precise amount of compensable time they spend on pre- and post-shift activities. Memo. in Support of Plf. Mtn. for Summary J'ment at 32 ("the only issue that remains for trial is a computation of Class Plaintiffs' damages"). Furthermore, Plaintiffs are not required to prove the precise amount time spent on pre- and post-shift activities. As Plaintiffs explained in their opposition to Defendant's motion to strike Dr. William Rogers (Plaintiffs' damages expert), they are not required to prove damages with precision. Of course, Plaintiffs bear "the burden of proving that [they] performed work for which [they] w[ere] not properly compensated." *Anderson v. Mt. Clemens Pottery Co.* ("*Mt. Clemens*"), 328 U.S. 680, 687 (1946), *superseded on other grounds by statute*, Portal to Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, *as recognized in IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

> The remedial nature of [the FLSA] and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under section 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed.

*Id.* As a result, Plaintiffs need only demonstrate "the amount and extent of that work **as a matter of just and reasonable inference**." *Stanbrough v. Vitek Sols., Inc.*, 445 S.W.3d 90, 100 (Mo. Ct. App. 2014) (emphasis added).

> [T]he burden then shifts to the employer to produce evidence of the amount of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to meet that burden, a court may award damages *even though they are approximate*.

*Id.* at 100-01 (emphasis added). *See also Childress v. Ozark Delivery of Missouri L.L.C.*, No. 6:09-CV-03133-MDH, 2014 WL 7181038, at *2 (W.D. Mo. Dec. 16, 2014) ("Where, as here, defendants failed to maintain proper and accurate records, employee



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testimony may be considered 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'").

In the instant case, Defendant did not use time clocks or automated methods to record the exact amount of compensatory time worked by Plaintiffs and the Class Members. Defendant failed to so record this despite the above cited law and numerous allegations of FLSA violations before this case was filed and even before the class time period. Had defendant used time clocks beginning in 2004 when it calculated the $7.5 million it would take to pay for 15 minutes a shift for pre and post shift activity (Exhibit 18) the damages of Plaintiffs' Class could be calculated with precision. Defendant does, however, maintain logs at its facilities to track the exact times when Plaintiffs and the Class Members enter and exit the security envelopes. Def. SOF ¶¶ 105-06. Plaintiffs' expert has analyzed those logs, as well as data from the Bureau of Labor Statistics, the Missouri Accountability Portal, and Defendant, to calculate the hours worked and wages owed to Class Members at each facility. *Id.* ¶¶ 107-08. Such data sampling and representative evidence is proper because "each employee worked in the same facility, did similar work, and was paid under the same policy." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016); Order Denying Def. Mtn. for Class Decertification at 2-3.

"[U]nder these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them." *Bouaphakeo*, 136 S. Ct. at 1048; *see also Childress*, 2014 WL 7181038, at *4 (permitting testimony of expert who "used the overtime hours reported by 49 employees to deduce the average number of overtime hours worked by 9 other employees"). "Reasonable minds may differ as to whether the average time [plaintiffs' expert] calculated is probative as to the time actually worked by

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each employee. Resolving that question, however, is the near-exclusive province of the jury." *Bouaphakeo*, 136 S. Ct. at 1049.

Similarly, Defendant's assertions that Plaintiffs are not "working" the entire time they are inside the security envelope – *see* Def. Opp. at 30-32 (MDOC argues that COs are engaging in "leisure activities" while at the prison, such as eating breakfast, drinking coffee and surfing the internet) – are both thinly supported and also irrelevant to the liability issues for which Plaintiffs are seeking partial summary judgment. In any event, Class Plaintiffs are only seeking compensation for the average time spent inside the security envelope, which Dr. Rogers calculated to be 8 hours and 30 minutes. Def. SOF ¶¶ 109-10. Once again, these calculations satisfied the relaxed burden of proof established by *Mt. Clemens* and reinforced in *Bouaphakeo*. Dr. Rogers made "just and reasonable inferences" using what data was available and following the same formulas used in those and other wage and hour cases. However, as stated above, Class Plaintiffs are not asking the Court to accept Dr. Rogers' calculation as true – rather grant summary judgment and permit Plaintiffs' to present their evidence of damages.

The decisions relied on by Defendant do not support its argument that "time inside the security envelope cannot be used as a proxy for the time an officer spends working." Def. Opp. at 30. *Nobles v. State Farm Mutual Auto. Ins.*, which preceded the U.S. Supreme Court's decision in *Bouaphakeo*, considered only whether the plaintiffs could prove actual time worked using common evidence. No. 2:10-cv-04175, 2013 WL 12153518, at *4 (W.D. Mo. July 8, 2013). Following the burden-shifting rule in *Mt. Clemens*, the court found that the defendants "produced direct evidence showing that the logon/logoff data d[id] not prove . . . time worked." *Id.* at *7. Importantly, the plaintiffs in *Nobles* were not using statistics, representative samples, or labor and wage

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data, like those relied on by Dr. Rogers and the experts in *St. Clemens*, *Bouaphakeo*, *Childress*, and *Stanbrough* but were instead relying "solely on the logon/logoff records." *Id.* at *9. Similarly, the Eighth Circuit did not rule, in *Hertz v. Woodbury County, Iowa*, that certain dispatch records were inappropriate for calculating damages. 566 F.3d 775 (8th Cir. 2009). Rather, the court found that they were insufficient to establish the county's constructive knowledge of employees working overtime, an issue Defendant has not raised in the instant case. *Id.* at 781-82. Also, unlike here, there was no evidence in *Hertz* that employees "were discouraged from submitting overtime slips or that submitted slips went unpaid." *Id.* at 782.

Defendant's argument that the entry and exit logs are a "security measure" intended only to show who is in the prison at a particular time (see Def. Opp. at 32) does not affect either its liability or Plaintiffs' damages. Whatever Defendant ***<u>intended</u>*** with respect to the entry and exit logs is irrelevant. What is relevant is that Defendant failed to keep accurate time records, which under the applicable case law means – as Plaintiffs have demonstrated above – that Plaintiffs are permitted to use the entry and exit logs to make just and reasonable inferences like those made in Dr. Rogers report. *See Stanbrough*, 445 S.W.3d at 100.

#### ***4. Defendant's only remaining de minimus defense fails.***

Defendant admits that its good faith and sovereign immunity defenses are irrelevant, and its only remaining defense to Plaintiffs' breach of contract claim fails for the following reasons.

"'When evaluating whether work performed by an employee is *de minimis,* courts typically consider the amount of time spent on the extra work, the practical

administrative difficulties of recording additional time, the regularity with which the additional work is performed, **and the aggregate amount of compensable time**.'" *Rikard v. U.S. Auto Prot., LLC*, No. 4:11CV1580 JCH, 2013 WL 5671342, at *4 (E.D. Mo. Oct. 17, 2013) (quoting *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir.2011)) (emphasis added). However, "[b]eing a short amount of time alone is not enough, it **must also be impractical to record it.**" *Rother v. Lupenko*, 2011 WL 1311773, at *2 (D.Or. Apr. 1, 2011), *cited by Rikard*, 2013 WL 5671342, at *5.

Class Plaintiffs offer ample evidence that they spend at least 30 minutes each inside the security envelope that is uncompensated. Def. SOF ¶¶ 109-10. The million entry and exit log data relied on by Dr. Rogers shows almost no Class Plaintiffs work 8 hour shifts. Instead they work 15, 30 or 45 minutes over that each shift. Federal Department of Labor and Missouri Division of Labor investigations found 30 minutes a day of pre and post shift activity. All Class members who have recorded their time and provided declarations to the court on other motions show significant time for pre and post shift activity. In all of the depositions of George Lombardi, Dwayne Kempker, and David Dormire, as well as the designee deposition of the Defendant, the Defendant's representatives did not have any knowledge of any time of pre and post shift activity of their employees.

This significant time is not de minimus under federal regulations. "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." 29 C.F.R. § 785.47. The regulation points to decisions finding that even "$1 of additional compensation a week is 'not a trivial matter to a workingman,' and was not de minimis." Id.



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Defendant's argument that some of this time might be spent stopping for a cup a of coffee fails in evidentiary support before the court and ignores the continuous workday rule. "Under the FLSA, the 'workday' is 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *Helmert*, 805 F. Supp. 2d at 658 (quoting 29 C.F.R. § 790.6(a)). The workday "'includes all time within that period whether or not the employee engages in work throughout all of that period.'" *Id.* Thus, the clock does not stop when a Class Plaintiff stops for a cup of coffee and begin again when he continues proceeding to his post. It runs the entire time. As a result, Defendant need only place a clock by each facility's air lock to capture the time Class Plaintiffs spend supervising and guarding offenders inside those facilities.[3] By doing so, Defendant would have precise data regarding when COs started and stopped their work. "Periods of time between the commencement of the employee's first principal activity [in this case, entering the security envelope and monitoring offender activity] and the completion of his last principal activity [in this case, exiting the security envelope] on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." Id. § 790.6(b).

Defendant attempts to overcome the "administrative difficulties" hurdle by arguing that there is somehow no place, in any of their 21 facilities, where it can place a time clock to capture the time spent by Class Plaintiffs performing their compensable pre- and post-shift activities. Def. Opp. at 37-38; *see* Def. SOF ⁋ 66 (identifying

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[3] Though Defendant fails to explain why they can't install clocks at other locations, Plaintiffs submit that there is nothing in the record to suggest Defendant is unable to install clocks at the prison gym that could be used to record time spent exercising or in the lounge to record time spent socializing or "surfing the Internet."

facilities). Its argument is devoid of any citation to the record. Because Defendant failed to prove or even allege that tracking this time is impractical or unfeasible, it may not invoke the *de minimis* defense. Nor does Defendant offer any statistical evidence to support the argument that Class Plaintiffs spend any significant time on supposed personal activities, instead relying on the testimony of a single correctional officer – without foundation – and not on any testimony of the many correctional officers and Defendant's officials taken in this case. Because Defendant offers no evidence supporting its claim, it must be rejected. *See* Mo. Sup. Ct. R. 74.04(c)(2) ("A denial may not rest upon the mere allegations or denials of the party's plating. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.").

## II. CONCLUSION

Defendant admits that the Labor Agreement requires it to comply with the FLSA and MMWL. It has admitted that Plaintiffs are on duty and supervising or guarding offenders the entire time they are inside its prisons' security envelopes. And it has admitted it will never pay Class Plaintiffs for this principal activity, which amounts to approximately 2.5 hours of compensable work per week. This conduct is a breach of its contract with MOCOA and Class Plaintiffs, and Plaintiffs therefore respectfully request that this Court grant partial summary judgment in their favor on Counts III and VI of the Second Amended Petition.



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Respectfully submitted,

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## CERTIFICATE OF SERVICE

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