

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

THOMAS HOOTSELLE, JR.,)	
DANIEL DICUS, OLIVER HUFF, et al)	Cause No. 12AC-CC00518-1
)	
Plaintiffs)	Div. 3
)	
Plaintiffs, Individually and on behalf of)	
All others similarly situated,)	
)	
v.)	
)	
MISSOURI DEPARTMENT OF)	
CORRECTIONS)	
)	
Defendants.)	

**AFFIDAVIT IN SUPPORT OF CLASS PLAINTIFFS' UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND SUGGESTIONS IN SUPPORT**

I, Gary Burger, state the following is true to the best of my knowledge, information and belief:

1. I am over 18 years old and am competent to make this affidavit. I submit this affidavit in support of Class Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Suggestions in Support. I am a partner at the law firm of Burger Law, LLC (the "Firm"). I and my co-counsel, Michael Flannery of the law firm Cuneo Gilbert and LaDuca, LLP ("CGL"), were appointed Class Counsel in this case. The Settlement Agreement is an Exhibit to the Motion as is this Affidavit

2. I and various members of my Firm, along with Michael Flannery and CGL and its lawyers, have actively participated in all aspects of representing the Certified Class in the litigation and trial of the above-captioned case ("Litigation") including, but not limited to: (1) case investigation; (2) retention of and communication with Class

Plaintiffs; (3) preparing formal and informal discovery requests and responses; (4) drafting amended complaints and numerous pleadings; (5) researching and drafting motions and briefs in a strongly defended case with highly complex legal and constitutional issues, including certification of class of over 13,000 Corrections Officers and opposing multiple motions to decertify the class; (6) participating in all litigation strategy decisions; (7) participation in all aspects of discovery, including taking and defending numerous depositions and review of thousands of pages of documents (8) numerous court appearances and motion arguments; (9) retention of an expert, preparation of multiple expert reports, full expert discovery and presentation of expert testimony at trial; (10) trial preparation, including multiple motions in limine, a two-week trial in August of 2018 and post-trial motions; (11) appeal, briefing and oral argument to two appellate courts over the course of three years (August 2018 to June of 2021); (12) trial preparation for a second trial in June of 2022, including a second round of expert reports and expert discovery; (13) participating in extensive settlement negotiations and mediation sessions, including arms-length negotiations before Judge Ray Price, a neutral mediator; (14) drafting and preparing all settlement-related documents; and (15) communicating with class members throughout the course of Litigation.

I. DISCOVERY

3. This lawsuit was filed in August of 2012 and in 2013, the undersigned took over as lead counsel in the case. Immediately upon assuming the lead counsel role, my Firm aggressively pursued discovery, propounding at least seven sets of Interrogatories and Requests for Production. Class Counsel filed and argued numerous Motions to Compel before the Court regarding discovery, prevailing on most of those motions,

leading to multiple Court Orders compelling discovery. After CGL joined the case, the aggressive approach to discovery continued, with Plaintiffs' counsel conducting extensive document reviews at four of Defendant's correctional institutions, where thousands of documents were pulled from boxes, inspected, scanned, and reviewed.

4. MDOC's document production included many stages and, over the course of the litigation, over 500,000 documents were produced. These document productions included hundreds of thousands of pages of entry and exit log data which enabled Plaintiffs' expert to determine an accurate estimate of time spent by class members in pre- and post-shift activity and calculate damages; Plaintiffs' expert damages estimate ultimately yielded a verdict for that precise amount at trial and provided the foundation for the instant settlement.

5. Class Counsel took approximately 43 depositions in the case. Relevant deposition excerpts were culled from thousands of pages of transcripts for presentation at the first trial in August of 2018. This powerful record supported Plaintiffs' appellate arguments, was the foundation for the second Motion for Partial Summary Judgment filed in March 2022 and described the evidence that was to be used at the second trial in June of 2022. Class Counsel took and defended numerous depositions of the parties' experts, with expert deposition testimony addressing complicated damage calculations and economic analysis. Class Counsel successfully struck MDOC's experts prior to the first trial, used their experts' testimony as an independent ground for summary judgment and were prepared to utilize MDOC's new expert report to create a floor for damages in advance of the second trial in June of 2022.

II. CLASS CERTIFICATION

6. As described in more detail in Plaintiffs' Petition, before each shift, Officers must perform the following tasks: picking up equipment such as keys and radios; logging their arrival either electronically or manually; passing through security gates and entry-egress points, including a metal detector and an airlock (a set of doors where one is always closed that accommodates less than ten Officers at a time); reporting to a supervisor to obtain their post; walking to their posts; and receiving a "pass down" of pertinent information. At the end of each shift, they perform these same tasks in reverse. These tasks are universally known as pre- and post-shift activities at MDOC.

7. The Department of Corrections denies that the pre- and post-shift activities identified by Plaintiffs are compensable and that it must compensate employees for time spent performing those activities. It raises several affirmative defenses, including that the time spent on such activities is small, or de minimis, and that the activities are pre- or post-work activities that are not compensable under applicable law.

8. After extensive discovery and briefing, the Court certified Plaintiffs' Class, issuing an initial Class Certification Order (and an Amended Class Certification Order addressing statute of limitations issues) in 2015. Class Counsel provided notice of the Class Certification to the entire class by mail. Over the course of the seven subsequent years of litigation, Class Counsel had extensive oral, written and email communication with the 13,000 class members, keeping them apprised of major litigation events, including the dissemination of two additional Supplemental Notices ordered by the

Court following the trial verdict in August of 2018 and in advance of the second trial in March of 2022.

9. In addition, during the pendency of the case and via successful Motions to Compel, thousands of additional class members were identified. My Firm also maintained a website page devoted to the case and updated it regularly. Many class members relied on that website to get pleadings and updates about the case.

III. MAJOR LITIGATION EVENTS IN THE CASE

10. Class Counsel extensively briefed and gathered evidence for Plaintiffs' successful Motion for Class Certification and combatted Defendant's vigorous opposition thereto. Defendant moved and were successful in dismissing, in decisions of relative first impression, Counts I and II of Plaintiffs' Petition, which sought relief under the MMWL and FLSA. Plaintiffs also coordinated with the Missouri Corrections Officers Association, which eventually joined the litigation as a named Plaintiff (and asserting separate breach of contract and equitable claims). The Original Petition was amended three times.

11. Class Counsel defended against MDOC's multiple Motions for Judgment on the Pleadings on all other Counts. After MDOC's emergency trial continuance in February of 2018, MDOC moved for Class Decertification, which involved extensive briefing and oral argument. MDOC's motion for decertification was ultimately denied, but MDOC sought reconsideration of that decision (also denied) and subsequently renewed the motion multiple times before, during and after trial, as well as seeking decertification on appeal. Class Counsel successfully opposed every instance where MDOC sought decertification.

12. Extensive work was done to prepare Plaintiffs' expert and defend against MDOC's experts. For the first trial, Cross Motions to Strike experts were filed, briefed, and argued before the Court. Motions to Reconsider regarding the Motions to Strike experts were also filed, briefed, and argued. Prior to the first trial, Class Counsel successfully struck MDOC's experts and successfully defended MDOC's attempts to strike Plaintiffs' expert.

13. Expert work continued after Supreme Court remand to prepare for the second trial in June of 2022. All expert work was completed in advance of the final round of settlement discussions, which began on April 15, 2022. Class Counsel worked with their expert to reassess damages for the new trial and update all the damage calculations. Following remand by the Supreme Court, MDOC successfully sought leave to identify a new expert and thereafter provided a supplemental disclosure that included extensive data and the opinions of two new experts who assessed damages at a figure far below the total damages figure assessed by Plaintiffs' expert.

14. To prepare for the first trial, Plaintiffs filed hundreds of pages of Motions in Limine, trial briefs, and other briefing regarding numerous complex legal issues. Responding to a similarly extensive set of Motions in Limine from MDOC, Class Counsel provided Memorandum in Opposition to many of MDOC's legal defenses and various issues in the case. These were argued before the Court at the pre-trial conferences.

15. Class Counsel briefed and argued an extensive Motion for Partial Summary Judgment on liability that was granted shortly before the first trial.

16. The above list is a sampling of the work performed by the Firm and CGL in this Litigation, highlighting the most significant events over the past ten years.

IV. DAMAGES EXPERTS

17. Class Counsel retained William Rogers, an economist with Lindenwood University, to testify as an expert in this Litigation. Plaintiffs advanced the cost of Dr. Rogers' work, consisting of over 200 hours at a cost of \$62,000 prior to the trial in 2018. Dr. Rogers engaged in extensive work during the course of the Litigation, working with Class Counsel to review over 440,000 pages of records, as well as electronic and handwritten entry and exit log data produced by the MDOC. Over the course of two years, Class Counsel worked with Dr. Rogers to develop an economic model to present to the fact finder in this case. This effort required extensive time, with Class Counsel expending enormous effort and time to track down MDOC's documents to prove Plaintiffs damages, to supplement reports with new information and to oppose MDOC's Motions to Strike.

18. In addition, MDOC retained their own experts in advance of the 2018 trial, as well as in preparation for the June 2022 trial. Class Counsel engaged in significant efforts to strike MDOC's first set of experts, successfully arguing that they should not be allowed to address the trier of fact at the August 2018 trial. And when MDOC retained new experts in advance of the June 2022 trial date, Class Counsel undertook extensive discovery efforts to flesh out their opinions in advance of the new trial.

19. Class Counsel's extensive work with Dr. Rogers with respect to entry and exit data entry and damage methodology resulted in an extremely robust report and eventual trial testimony in August of 2018. At the August 2018 trial, Dr. Rogers' analysis – perhaps the most robust and accurate analysis of the MDOC work force ever undertaken -- proved extremely persuasive and successful, as the jury awarded damages in the precise amount Dr. Rogers had arrived at. Class Counsel had every expectation

that Dr. Rogers' analysis in advance of the June 2022 trial would be similarly well-taken.

V. TRIAL

20. Class Counsel engaged in extensive work to prepare this complex class action matter for trial, as evidenced by the above-description of this case's long history, eventually engaging in full trial preparation efforts on three separate occasions, in late 2017/early 2018 (before MDOC's first request for a continuance), then again in June of 2018 (before MDOC's second request for a continuance, which allowed for the parties to engage in good-faith settlement negotiations) and most recently in advance of the June 2022 trial date (leading to the current settlement negotiations and presentation of the Settlement Agreement that is the subject of this Preliminary Approval motion).

21. Beginning August 6, 2018, Class Counsel presented the live testimony of witnesses from across the State of Missouri and presented legal memoranda on various legal issues, including Motions for Decertification of the Class, Motions for Directed Verdict, Motions to Reconsider Summary Judgment, and Motions to Reconsider Striking of Experts. These legal issues were extensively briefed including filing lengthy memoranda during trial. Class Counsel presented extensive evidence at the August 2018 trial, marking numerous exhibits for presentation to the Court and the jury. Class Counsel presented the testimony of all three individual Class Plaintiffs, Dr. Rogers, and 11 live witnesses. Class Counsel also presented the video and deposition testimony of 10 other witnesses. Class Counsel vigorously and successfully cross-examined MDOC's witnesses, including preparation that involved the review of thousands of pages of documents for these witnesses. Because MDOC's officers and employees changed during the course of this Litigation, only two of the nine witnesses MDOC called to testify had

been deposed, necessitating a review of documents that had previously been unused in the case. And because partial summary judgment was entered right before trial, many aspects of proof and the jury instructions changed at the last minute.

22. Class Counsel successfully thwarted MDOC's numerous attempts to dismiss or obtain summary judgment in this case, successfully struck MDOC's experts (in advance of the first trial, on a Daubert motion), successfully supported and defended efforts to disqualify our own expert, successfully obtained Class Certification and defeated Class Decertification, obtained summary judgment on our breach of contract claims, and won a trial where the jury awarded the class the full amount calculated by our expert – more than what was requested in closing argument - to fully compensate the Certified Class. Class Counsel obtained a \$113,714,632 class verdict on behalf of 13,000 corrections officers in the State of Missouri after six years of Litigation against the State challenging its illegal, long-standing practice against its correction officers. This success was against long odds – a risk born by Class Counsel - and against MDOC's vigorous defense of the case through trial.

VI. APPEAL AND REMAND

23. Following the verdict of the jury at the August 2018 trial, this Court appropriately entered judgment on August 17, 2018.

24. The undersigned filed an affidavit similar to this one which supported the first trial Court's order that Class Counsel receive 1/3 of the judgment as appropriate compensation for attorney's fees, costs and service awards. The judgment was appealed.

25. The Firm and CGL prepared the record on appeal and briefed the appeal to the Western District Court of Appeals. The undersigned argued the appeal, the judgment was affirmed and all issues were found in Plaintiffs' favor. *Hootselle v. Mo.*

Dep't of Corr., 2019 WL 4935933 (Mo. App W.D. October 8, 2019). The parties also briefed and argued MDOC's Motion to Stay the Judgment.

26. MDOC thereafter sought and was granted transfer to the Missouri Supreme Court. The Firm and CGL briefed the appeal to the Missouri Supreme Court. The undersigned argued the Appeal to the Court. The Supreme Court affirmed in part and vacated in part the trial court's judgment, and remanded the case to the trial court to recompute damages. *Hootselle v. Missouri Dept. Corr.*, 624 S.W.3d 123 (Mo. 2021).

27. This Court, the Court of Appeals and the Supreme Court all found that: certification of this case as a class action was appropriate; there is no sovereign immunity from Plaintiffs' breach of contract claim; the contract in this case is established, was breached by MDOC and significant damages resulted therefrom. The Missouri Supreme Court affirmed the order refusing to decertify the class, *Hootselle*, 624 S.W.3d at 133-34. The Court found the State was not immune from this contract action and cases like *Alden v. Maine*, 527 U.S. 706 (1999), and *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011), did not bar it. The Court found the MDOC employs these Officers "for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." The Court found that under the continuous workday rule of the Portal-to-Portal Act, all activities performed after an employee begins the first principal activity of a shift and before the employee completes the last principal activity of a shift are compensable, *regardless of whether some of the intervening activities, standing alone, would not be compensable as principal activities*. *Hootselle*, 624 S.W.3d at 136 (emphasis added). Plaintiffs won many additional points on appeal.

28. The Missouri Supreme Court remanded this case solely to determine “[i]f the remaining activities are indispensable and integral to the corrections officers’ work or if they occur after the first and before the last principal activity.” *Id.* at 143. If the answer to either of those two questions is “yes”, the activities “are compensable” and “damages must be recomputed accordingly.” *Id.* at 143, 144.

29. On remand, this Court granted more discovery to both sides. Plaintiff served new discovery and worked with MDOC to produce more documents and information. Plaintiffs’ expert, Dr. Rogers, recalculated damages to bring the damage number up to date; Class Counsel produced Dr. Rogers for deposition.

30. Following remand to this Court, MDOC identified an internal lay expert, as well as a retained expert, on damages, along with entirely newly produced documents and data that MDOC contended were supportive of their damages figure, which was below that of Plaintiffs’ expert, Dr. Rogers. Class Counsel reviewed and assessed MDOC’s new information and deposed MDOC’s two experts in preparation for the June 2022 trial.

31. Upon remand to this Court, Plaintiffs reassessed the case in light of the Supreme Court opinion and refocused their trial presentation to walk the path established by the Court and recompute damages, including seeking damages after the contract expired under the equity theories in the case. Leading to the most recent settlement negotiations, Class Counsel filed and briefed a new Summary Judgment Motion (that included extensive exhibits and over 80 new affidavits) and responded to MDOC’s Motion for Summary Judgment.

32. Plaintiffs also prepared (once again) for trial by preparing and updating pretrial filings, assessing the jury and judge issues for trial, preparing exhibits,

preparing testimony, and contacting many witnesses to prepare them. All of the extremely voluminous material had to be re-reviewed and prepared as the new trial would have additional issues, in light of the Supreme Court's guidance regarding the process for retrial.

VII. SETTLEMENT

33. Plaintiffs and MDOC mediated the case in June 2018 and again in April 2022 in multiple arm's-length mediation sessions. Former Missouri Supreme Court Judge and neutral mediator Ray Price, Esq. of Armstrong Teasdale mediated the case for the parties. The mediation was hard fought, intensive and involved Plaintiffs' counsel, all three individual class plaintiffs and multiple MDOC counsel and representatives. The parties mediated all day on April 15 and for about four hours on April 19, 2022. The mediation process included MDOC's obtaining approval internally with the MDOC budget and finance personnel, as well as approval of key legislators, the Missouri Attorney General and the Missouri Governor. On the evening of April 19, 2022, the Parties reached the proposed Class Action Settlement Agreement (the "Settlement"). The Parties executed a term sheet that evening. Thereafter, over the course of the next month, MDOC proposed and obtained approval of the consideration for part of the settlement with the budget committees of the Missouri Legislature and then approval in the final state budget passed by the Missouri legislature. That budget was then signed by Missouri's Governor. The Parties thereafter engaged in a drafting process leading to the fully-formed Settlement Agreement that they present to the Court on this Motion for Preliminary Approval of Settlement.

VIII. THE SETTLEMENT AGREEMENT MERITS PRELIMINARY APPROVAL

34. In my judgment, as well as the judgment of my fellow Class Counsel, the proposed settlement represents an excellent and fair result for the Plaintiffs and the Certified Class, and is in all respects, fair, reasonable and adequate.

35. The Settlement, which was the result of hard-fought, arm's-length negotiations, provides a cash Settlement Fund of \$49,500,000. The Settlement Fund alone represents a recovery of nearly 33% of the damages projected by the expert as the best possible day in court for the Settlement Class, and 95% of the damages projected by MDOC's June 2022 trial expert. The Settlement monies will be distributed to the Class Members without requiring them to complete a claim form or take any additional steps. A second payment will occur and payments will continue until the Settlement Fund is depleted.

36. The Settlement also pays all Class Members an extra 15 minutes of time per shift to pay for pre- and post-shift activity in the future guaranteed for 8 years at least, which has a value of about \$54 Million to the Certified Class and will cost MDOC about \$65 Million to pay with employer benefits. The total Settlement value, including the Settlement Fund and the going-forward wage payments, is well in excess of \$100 million.

37. The Settlement represents an excellent result for the Settlement Class in this litigation, is fair, reasonable and adequate and the Court should grant preliminary approval of it. Granting preliminary approval will allow notice of the Settlement to be distributed to the Settlement Class so that members can opt out of, object to, or choose to participate in the Settlement

38. The other facts that support preliminary approval are the risk, expense, complexity and duration of the continued litigation. This is a large and complex case with countervailing issues on liability and the compensability of the remaining pre- and post-shift activities. A jury could award any amount, or nothing on retrial and the jury or court could go either way on whether five of the seven activities were compensable under applicable law. Plaintiffs faced the risk that the jury would believe the MDOC's expert, whose damages figure (\$52 million) was much lower than that of Plaintiffs' expert. Trying a case of this complexity in front of an entirely different jury meant that Plaintiffs could not be certain of prevailing again. The MDOC continued to maintain vigorous defenses like immunity from an equity claim after September 30, 2018 and that the State may have another layer of immunity from execution and garnishment not yet fully litigated. The MDOC successfully made an immunity from execution argument in the court of appeals relying on *Nacy v. LePage*, 111 S.W.2d 25 (Mo. 1937) (holding that the State Treasurer cannot be garnished, and the State enjoys immunity from garnishment) and *Otte v. Mo. State Treasurer*, 141 S.W.3d 74, 74 (Mo. App. E.D. 2004) (holding that sovereign immunity prevented an employee from "bringing a Chapter 513 action in execution against the Treasurer."). MDOC made a similar argument with Missouri Constitution Article IV, § 28 as well, asserting the State never has to pay a judgment unless the legislature explicitly so directs. The MDOC also asserted it never would have to post a bond and any judgement would be stayed under *State ex rel. Dir. of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). Continued litigation would bring a second trial and a second appeal to the Court of Appeals and/or courts above that. The Settlement guarantees are substantial recovery for the Class

Members now and stops the complained of practice in the future – eliminating the need for an uncertain trial and appellate process in complicated, novel legal areas.

IX. EXPERIENCE OF COUNSEL

39. I have 30 years of experience as a trial lawyer. I am admitted in Missouri, Illinois and numerous federal courts. I and my firm have extensive experience in class actions and I have litigated and tried many cases in many contexts over my career. I have represented large numbers of people in class actions in various wage and hour, consumer fraud, breach of contract and employment discrimination cases. I can provide further details if required. I was appointed class counsel in certified class actions in *Williams, et al. v. Corizon Health, Inc.*, No. 19-3365-CV-S-SRB in the Western District of Missouri, *Aguilar, et al. v. Management & Training Corp.*, No. 1:20-cv-00058-DAK-DBP in the District of Utah, and *Cummins v. State of Illinois*, No. 4:02-CV-04201, in the Southern District of Illinois. In those cases, after litigation and discovery, I resolved them with a recovery to the class.

40. Michael Flannery of the law firm Cuneo, Gilbert and LaDuca, LLP has extensive experience in complex civil class action litigation as well. Mr. Flannery has nearly 30 years of class action experience, and has been appointed to leadership roles throughout his career. Most recently, Mr. Flannery was appointed Co-Lead Counsel in a case that was litigated in the Central District of California, *In re Toll Roads Litigation*, No: 8:16-cv-00262 ODW (ADS), where thousands of drivers alleged privacy violations and excessive fines from improper operation of Orange County, California toll roads. This litigation has recently settled, with substantial monetary relief provided to those affected. Class Counsel's firm resumes are attached as Exhibits A and B. I, my firm, Mr.

Flannery and CGL are well qualified to represent Plaintiffs and the Class in this case and have been approved as Class Counsel in this case.

41. The above detail of Class Counsel's work and success in this case, along with our extensive collective experience, qualifies us to represent the Certified Settlement Class as Class Counsel.

X. CLASS REPRESENTATIVES' ADEQUACY

42. Each of the Class Representatives in this action has actively participated in the prosecution of this action by: reviewing and approving their original complaints and amendments; sitting for a full-day deposition; responding to multiple lengthy sets of written discovery; communicating regularly with Class Counsel; communicating to class members and being ambassadors of the case to the class members; gathering evidence and providing affidavits to support or defend motions; attending the entire trial and testifying in same; providing advice as part of the litigation and trial team; attending the mediations and participating in the settlement decisions; and generally staying informed about the progress of the litigation and acting in the interests of the Class. Each put their name and reputation on the line for the sake of the Class in the face of great odds against their employer, and no recovery would have been possible without their critical role. Each of the Class Representatives adequately represented the class members throughout this litigation. None of the Plaintiffs have any interests that conflict with the interest of other class members. Plaintiffs are fully aware of their duties as class representatives and are knowledgeable and informed about the claims in this action.

43. Each of the Class Representatives is a member of the proposed Settlement Class. They have each suffered the same injuries as the rest of the Class Members: they

have each had to do pre- and post-shift activity for decades without being paid. Each of them supported the terms of the Settlements and have expressed their continued willingness to protect the Class until the Settlement is approved and its administration completed. No Class Representative was promised, nor conditioned their representation on the expectation of a service award.

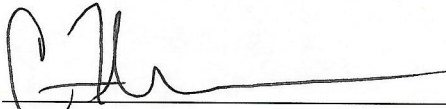
FURTHER AFFIANT SAYETH NOT



Gary K. Burger

STATE OF MISSOURI)
)SS
COUNTY OF JEFFERSON)

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this 1st day of June, 2022.



NOTARY PUBLIC

My Commission Expires:

