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

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

MEMORANDUM IN SUPPORT PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMEN T

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Plaintiffs' Class and Class Representatives, Thomas Hootselle, Daniel Dicus, and Oliver Huff ("Class Plaintiffs"), and Plaintiff, Missouri Corrections Officers Association ("MOCOA") (collectively "Plaintiffs"), hereby move this Court pursuant to Rule 74.04(a) of the Missouri Rules of Civil Procedure for partial summary judgment in their favor on Counts III and VI of the Second Amended Petition (as amended by interlineation). For the reasons set forth below, there are no genuine issues of material fact regarding the terms of the contract governing the parties' employment relationship, whether Class Plaintiffs performed compensable work, whether Defendant violated the Labor Agreement, or whether Plaintiffs were damaged by Defendant's breach.

I. LEGAL STANDARD

The Missouri Supreme Court has summarized the standard for summary judgment as follows:

> Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party's motion are accepted "as true unless contradicted by the non-moving party's response to the summary judgment motion." Only genuine disputes as to material facts preclude summary judgment. A material fact in the context of summary judgment is one from which the right to judgment flows

Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC, 422 S.W.3d 312, 319 (Mo. 2014) (citations omitted). As claimants, Plaintiffs "must show the absence of any genuine dispute as to the material facts establishing each element of its claim, and, based upon those facts, that it is entitled to judgment as a matter of law." *Vantage Credit Union v. Chisholm*, 447 S.W.3d 740, 745 (Mo. App. E.D. 2014). They "must also establish that the affirmative defense[s] fail[] as a matter of law. Unlike the burden of establishing all of the facts necessary to [their] claim[s], however, the claimant[s] may defeat an

affirmative defense by establishing that any one of the facts necessary to support the defense is absent." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993) (en banc). Plaintiffs will not here repeat the Material Facts to which there is no genuine material dispute contemporaneously filed with the Court.

"'The interpretation of a contract is a question of law.'" *Nodaway Valley Bank v. E.L. Crawford Const., Inc.*, 126 S.W.3d 820, 825 (Mo. App. W.D. 2004) (citation omitted). "Where, as in this case, the contract consists of multiple documents, all of the documents 'must be read to capture what was intended.'" *Id.* "The essential elements of a breach of contract action include: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." Plaintiffs submit that there are no genuine issues of material fact surrounding each of these elements of their breach of contract claims and request summary judgment in their favor on the same.

II. ARGUMENT

A. The Existence and Terms of the Contract

1. The Labor Agreement and Procedure Manual control the parties' relationship.

It is undisputed here that Plaintiffs' relationship with Defendant is governed by the terms of the collective bargaining agreement (the "Labor Agreement"), which was originally entered into by MOCOA and Defendant on February 1, 2007 and renewed on October 1, 2014. SOF ⁋ 8. It is likewise undisputed that "[t]he definitions and terminology in [Defendant's] [Procedure] Manual are incorporated into the Labor Agreement," and "the [Procedure] Manual defines how state compensatory time and

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federal overtime are earned by correctional officers." *Missouri Corr. Officers Ass'n v. Missouri Dep't of Corr.* ("*MDOC I*"), 409 S.W.3d 499, 500 (Mo. App. W.D. 2013); SOF ⁋ 22. Finally, it is undisputed that "the Fair Labor Standards Act [FLSA] requires [Defendant] 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.'" *MDOC I* at 500; SOF ⁋ 21. Defendant acknowledged that the terms of the contract are not in dispute at the pretrial hearing held on June 5, 2018, with Defendant's lead trial counsel asserting that only two questions remain in this case: "Is It Work and Is It Compensable?". Defendants are therefore barred by collateral estoppel and judicial estoppel from arguing to the contrary.

2. Defendant is estopped from disputing the terms of the contract.

To invoke collateral estoppel, the following factors must be present:

> (1) [T]he issue decided in the prior adjudication is identical to the issue as to which collateral estoppel is sought in the present adjudication; (2) the prior adjudication was a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or is in privity with a party in the prior adjudication; and (4) the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior suit.

Bowers v. Hiland Dairy Co., 188 S.W.3d 79, 86 (Mo. App. S.D. 2006). When used offensively, four further elements are required:

> (1) [T]he same issue was present in both the present and the earlier litigation, (2) that issue was actually litigated in the earlier proceeding, (3) the issue was determined as a critical and necessary part of the prior judgment, and (4) the offensive use of collateral estoppel would not be unfair to the party being estopped.

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Consumer Fin. Corp. v. Reams, 158 S.W.3d 792, 797 (Mo. Ct. App. 2005). These four additional elements and the factors above are easily satisfied here, and any argument by Defendant to the contrary is at odds with its more recent argument in favor of *res judicata*:

> Here, MOCOA's claims arise out of the same contract as the Prior Lawsuit, the CBA. Here, the parties (MOCOA and MDOC) are the same as in the Prior Lawsuit. Even the subject matter (correct compensation) and evidence necessary to sustain the claims (interpretation of the CBA and personnel policies) are the same as in the Prior Lawsuit.

Memo. in Support of Def. 5th Mtn. in Limine at 4.

First, Plaintiff MOCOA and Defendant were parties in the prior adjudication, where MOCOA sued Defendant for breaching the Labor Agreement's provisions governing accrual and payment for "state compensatory time." *MDOC I*, 409 S.W.3d at 499. The Western District Court of Appeals was therefore interpreting the Labor Agreement and how it governs the accrual of pay. More specifically, the Western District was considering whether Defendant breached the terms of the Labor Agreement (and the incorporated Procedural Manual), and it ultimately found breach and ordered the lower court to enter summary judgment on behalf of Plaintiff MOCOA. *Id.* at 507. The corporate designees providing evidence in *MOCOA I* and this matter are also the same: Defendant's former director, Dwayne Kempker, and MOCOA's current director, Gary Gross. SOF ¶¶ 27-28

Second, the Plaintiffs are third-party beneficiaries of the Labor Agreement (including the terms of the Procedure Manual). *Allen v. Globe-Democrat Pub. Co.*, 368 S.W.2d 460, 463 (Mo. 1963); *see also Arbuckle v. Fruehauf Trailer Co.*, 372 S.W.2d 470, 473 (Mo. App. 1963) ("It is, of course, the basic law that an employee who has a union to bargain in his behalf and who agrees to work and does work under the contract

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adopts that contract, as his contract of employment and is entitled to its benefits as well as its obligations."). In fact, Section 1.2 of the Labor Agreement expressly states that it applies to "all eligible employees of [MDOC] who are employed only in the classifications of Corrections Officer I and Corrections Officer II." SOF ⁋ 11. It also assigns specific duties to Plaintiffs and binds them to certain policies and procedures. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 261 (Mo. 2002) (en banc); SOF ⁋⁋ 12-13. Plaintiffs must rely on the terms of the Labor Agreement, as agreed to by MOCOA and MDOC, and "the agreement is subject to the same rules of interpretation as other contracts." 368 S.W.2d at 463 (citation omitted).

As a result, Plaintiffs are entitled to enjoy the benefits of the Labor Agreement. They stand in MOCOA's shoes, with privity established. *See James v. Paul*, 49 S.W.3d 678, 683 (Mo. 2001) (en banc) ("Our courts have stated that privity exists where the party sought to be precluded has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court."). Because Plaintiffs are "beneficiar[ies] of the contract and ha[ve] a right to bring suit and recover," they are entitled to enforce against Defendant the Western District's prior holdings and Defendant's prior positions regarding the Labor Agreement's terms.

Third, in its *MOCOA I* ruling, the Western District Court of Appeals plainly stated, "The [FLSA] requires [M]DOC 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.'" *MDOC I*, 409 S.W.3d at 500; SOF ⁋ 21. This is not mere dicta, as Defendant has argued, but a clear statement of Defendant's obligations to its employees. In addition, the Court recognized that Defendant "[did] not dispute that the definitions and terminology in its

Department Manual are incorporated into the Labor Agreement" and "the Department Manual defines how state compensatory time and federal overtime are earned by correctional officers."[1] *MDOC I*, 409 S.W.3d at 500; SOF ⁋ 22. Whether the Procedure Manual was part of the Labor Agreement was therefore critical to the Court's finding that Defendant was violating the Procedure Manual and, therefore, the Labor Agreement. *See id.* at 500-07 (discussing "[Defendant]'s alleged violation of the Labor Agreement"). The Court found Defendant violated the same Procedure Manual at issue here (D2-8.4) and found that to be a violation of the Labor Agreement (which includes D2-8.4).

Fourth, the use of collateral estoppel would not be unfair to Defendant, whose counsel seem to be taking a position on the Labor Agreement that is wholly inconsistent with the position it took in *MDOC I* and is contrary to the evidence adduced in this case. SOF ⁋ 35. In *MDOC I*, Defendant could have denied that the Procedure Manual was part of the Labor Agreement. It chose not to, admitted the issue in deposition testimony and legal briefs presented to the trial and appellate courts, and litigated the matter fully before the 19th Circuit and the Western District. *MDOC I*, 409 S.W.3d at 500.

Defendant's responsive appellate brief, in reliance on the Procedure Manual, begins by acknowledging that the Procedure (or Department) Manual is intended "'to ensure departmental compliance with Federal Fair Labor Standards Act rules and state merit guidelines.'" SOF ⁋ 24. It further admits that "code 2 employees are eligible for 'federal' overtime, which is calculated at 'time and a one half' when a code 2 employee

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[1] Though the court in *MDOC I* refers to a Department Manual, it is in fact Procedure Manual D2-8.4, which Plaintiffs have relied on throughout this litigation. SOF ⁋ 23.

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'*physically* works in excess of 40 hours during a work week.'" SOF ⁋ 25. "The Department Manual designates employees who are exempt from the FLSA as 'code 1,' and those covered by the FLSA as 'code 2.'" SOF ⁋ 26. Wanting to be clear as to exactly how "federal" overtime is calculated, Defendant explicitly states, "If the total number of hours an officer physically works in a single week exceeds 40, the officer earns 'federal overtime' for every hour above 40 at one-and-a-half times her normal hourly rate." SOF ⁋ 27 (quoting the deposition testimony of former director Dwayne Kempker). Thus, if a correctional officer "'physically' work[s] 42 hours during the week, the two extra hours he worked . . . [is] considered 'federal overtime' and must be paid or banked at time and one half." SOF ⁋ 28. Defendant made these concessions because of Mr. Kempker's testimony and, more importantly, because the proposition is true: The Labor Agreement and Procedure Manual D2-8.4 are binding agreements and have a clear and plain meaning.

Defendant goes on to admit in its appellate brief, without equivocation, that code 2 employees (which include Class Plaintiffs) "[*are*] covered by the FLSA" and that Defendant "*must pay [them] federal overtime*, at time and a half, when [they] physically work[] more than 40 hours in a single week." SOF ⁋ 29. Finally, Defendant admits that "Missouri law requires the Department to 'pay all [FLSA-covered] state employees in full for any overtime hours accrued during the previous calendar year which have already been paid or used in the form of compensatory leave time.'" SOF ⁋ 30. "Federal overtime is 'calculated at time and one half when: [Class Plaintiffs] physically works in excess of 40 hours during a work week.'" SOF ⁋ 25. And perhaps most glaringly, Defendant admits in its brief that, "[a]gainst the backdrop of the FLSA,

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Missouri law, and the policies in the Department Manual, MOCOA and the Department entered into the Agreement to govern their labor relations in 2007." SOF ⁋ 34.

Even if collateral estoppel could not be applied, Defendant is judicially estopped from adopting a different position than the one it took *MOCOA I*. All of the above-quoted statements from Defendant's appellate brief are wholly inconsistent with its position, throughout this litigation, that Defendant is not bound by the FLSA and that the Procedure Manual does not require it to pay Plaintiffs overtime for hours physically worked. For example, Defendant made the following representation to this Court when seeking summary judgment on Count III in 2016:

> Plaintiffs also base their Breach of Contract claim on the contention that the MDOC promised them that it would "comply with all applicable provisions of the Fair Labor Standards Act". First Amend. Pet. ⁋ 55.a. That is not true, and Plaintiffs have no documents or evidence to show otherwise. Rather, as demonstrated above, the evidence in this case shows beyond dispute that Plaintiffs have no employment contract at all with the MDOC, *much less a contract that contains a private promise to comply with the FLSA*.

Memo. of Law in Support of Mtn. for Summary J'ment at 15 (emphasis added); SOF ⁋ 35. Quite simply, "parties are not allowed to take clearly inconsistent positions in differing lawsuits." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 145 (Mo. App. W.D. 2011). "Missouri courts in particular have consistently refused to allow litigants to take contrary positions in separate proceedings to ensure the integrity of the judicial process. *Id.* at 146. With these principals in mind, injustice will result *only* if Defendant is permitted to take a position different from the one adopted by it and the Western District in *MOCOA I*.

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3. Class Plaintiffs are third-party beneficiaries of the Labor Agreement

Though Class Plaintiffs are not signatories to the Labor Agreement, the contract was entered into for their benefit, and they therefore have standing to enforce its terms.

> "Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." A party to a contract or a third-party beneficiary has standing to enforce an agreement. A third-party beneficiary is "one who is not privy to a contract or its consideration but who may nonetheless maintain a cause of action for breach of the contract."

Goldring v. Franklin Equity Leasing Co., 195 S.W.3d 453, 456 (Mo. App. E.D. 2006). "'Only those third parties for whose primary benefit the parties contract may maintain an action.' '[I]t is not necessary for the parties to the contract to have as their 'primary object' the goal of benefiting the third parties, but only that the third parties be primary beneficiaries.'" *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co.*, L.P., 75 S.W.3d 247, 260 (Mo. 2002) (en banc) (citations omitted).

"It is, of course, the basic law that an employee who has a union to bargain in his behalf and who agrees to work and does work under the contract adopts that contract, as his contract of employment and is entitled to its benefits as well as its obligations." *Arbuckle v. Fruehauf Trailer Co.*, 372 S.W.2d 470, 473 (Mo. App. 1963); *see also Allen v. Globe-Democrat Pub. Co.*, 368 S.W.2d 460, 463 (Mo. 1963) (recognizing that "plaintiffs as third party beneficiaries are entitled to enforce the terms of the collective bargaining agreement inserted therein for their benefit"). To that end, the Labor Agreement applies to "all eligible employees of [Defendant] who are employed only in the classifications of Corrections Officer I and Corrections Officer II." SOF ⁋ 11. It assigns specific rights and duties to Plaintiffs and binds them to certain policies and

procedures. *L.A.C. ex rel. D.C.*, 75 S.W.3d at 261; SOF ¶¶ 12-13. As a result, Plaintiffs must rely on the terms of the Labor Agreement, as agreed to by MOCOA and MDOC, and there is no genuine issue of material fact regarding their standing to enforce the Labor Agreement

4. Defendant's affirmative defenses fail.

a. <u>Plaintiffs are excused from exhausting their administrative remedies.</u>

The grievance procedure invoked by Defendant is likewise not an impediment to standing. "The rule requiring exhaustion, however, is not absolute and inflexible. It may be relaxed under unusual and exceptional circumstances." *U.S. v. Williams*, 420 F.2d 288, 291 (10th Cir. 1970). *See also Glover v. United States*, 286 F.2d 84, 90 (8th Cir. 1961) (finding, under a reasonable person standard, that the plaintiff was "amply justified" in "feeling that nothing further could be accomplished" and that "the appellant might, as a reasonable person, assume and believe that nothing further was required or could be done, that an appeal would be meaningless, repetitious, fruitless and vain, and that the procedure therein involved and the manner of exercising his rights would be exactly the same as that which he had already experienced"). "In order for the futility doctrine to apply[,] the member must show that he was 'justified, as a reasonable person, in believing that nothing further could be accomplished.'" *Barks v. Bi-State 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) (holding that a state law remedy for retaliatory discharge is "independent" of a collective bargaining agreement).

Here, Class Plaintiffs' belief that their grievances will be rejected is not merely hypothetical. Defendant has, in fact, rejected grievances filed by members of Plaintiffs'

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Class regarding payment for pre- and post-shift activities. SOF ⁋ 38. It has also refused to pay the fine levied by the DOL for failure to pay for pre- and post-shift activity, which resulted from an investigation prompted by Class Plaintiff complaints. SOF ⁋⁋ 49-54. "This 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). Thus, when Defendant rejected the grievance of one class member and thumbed its nose at the DOL, "it in effect adopted a position rejecting the claims of the similarly situated plaintiffs." *Id.* at 512; *see also Ludwig v. NYNEX Service Co.*, 838 F.Supp. 769, 782 (S.D.N.Y. 1993) (on four separate occasions, an ERISA claimant directed inquiries to his employer seeking review of an adverse benefits determination, the employer failed to inform the claimant of his appeal rights at any time, and the employer did not respond to the claimant's counsel's letter requesting review of the decision). This is sufficient evidence of futility. *Schultz*, 696 F.2d at 512.

Testimony of Defendants' most senior executives adds weight to Plaintiffs' assertion that grievances would be futile. As the testimony of George Lombardi, the most recent head of the MDOC showed, the MDOC Defendant's director has **"no intention" of ever "changing the practice" of requiring pre and post shift activity and not paying plaintiff's for it, "unless there is a ruling in [plaintiffs'] favor in this case."** SOF ⁋ 37. Other evidence in the record adds even more weight to Plaintiffs' futility argument: there have been **complaints from officers about not paying for pre and post shift time for 30 years**. SOF ⁋ 46.

Other discovery responses only serve to reinforce the futility argument. For example, Defendant has also stated unequivocally and emphatically in response to

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requests for admissions that requests for overtime pay and related grievances were denied as a matter of course: "Consistent with its policy, **Defendant MDOC 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.**" SOF ⁋ 42. It further admitted "**that some class members requested compensation or comp time for doing pre and post shift activity" and that "such requests were denied.**" SOF ⁋ 43. Most importantly, Defendant admits that it has communicated this futility to Plaintiffs: "[M]embers of the plaintiff class of COIs and COIIs **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". SOF ⁋ 44. As a result, the grievance procedure is, by Defendant's own admissions, futile with respect to payment for pre- and post-shift activities, and that futility was explicitly communicated by Defendant to Class Plaintiffs.

In addition, the Labor Agreement grants MDOC Directors final authority to grant or deny grievances. SOF ⁋ 36. Yet George Lombardi, who was the Director when this suit was filed, and other officials have been crystal clear that they will always require pre- and post-shift activity and will never pay for it. SOF ⁋ 40. As a result, "in a case in which the internal remedies are clearly biased against plaintiffs [courts] do not believe they should be required to resort to those remedies before turning to the courts for help." *Geddes v. Chrysler Corp.*, 608 F.2d 261, 264 (6th Cir. 1979). "Such a requirement is indeed more likely to exhaust the plaintiffs than the remedies." *Id.*; *Lovely v. Aubrey*, 188 F.3d 508 (6th Cir. 1999) ("[T]he futility exception applies where

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those who would pass on a grievance are the same ones who are charged with violating an employee's rights.").

In sum, it is undisputed that (1) the MDOC Director has final authority over whether a grievance is granted, (2) the former MDOC Director testified that he would never pay for pre- and post-shift activities unless Defendant loses this case, (3) Defendant has refused to comply with a DOL directive to pay for pre- and post-shift activities, (4) the former MDOC Director has in fact denied at least one grievance seeking payment for pre- and post-shift activities, and (4) Defendant has admitted in discovery that it routinely denies requests for compensation and will never pay for pre- and post-shift activities. As a result, there are no genuine issues of fact regarding the futility of the Labor Agreement's grievance procedure, and Plaintiffs are excused from exhausting the administrative remedies set forth in the Labor Agreement.

b. Plaintiffs did not and cannot waive their rights to enforce the Labor Agreement.

i. Defendant is bound by federal wage and hour laws.

This Court's dismissal of Count I, which sought relief under the FLSA, does not mean Defendant is excused from complying with the FLSA. *See Alden v. Maine*, 527 U.S. 706, 755 (1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design."); *id.* at 757 (recognizing that employees may still seek injunctive or declaratory against state officers as well as money damages against state officers in their individual capacity). Rather, this Court's ruling, and the Supreme Court's holding in *Alden v. Maine*, decided only one narrow issue: that states enjoy sovereign immunity from suit by their employees under § 216 of the FLSA. The *Alden* decision did not excuse states

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from complying with the FLSA. In fact, the Department of Labor is still permitted to bring enforcement actions against states under the FLSA – and has done just that, investigating Defendant on multiple occasions regarding the conduct at issue here, including an investigation during the pendency of this litigation *Id.* at 759-60; 29 U.S.C. § 216(c); *see also U.S. v. Miss.*, 380 U.S. 128, 140-41 (1965) ("[N]othing in the [Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."); SOF ⁋⁋ 48-53.

In the most recent investigation, the DOL found that the very policy at issue here, *i.e.*, DOC's failure to compensate for pre- and post-shift activities, violated the FLSA. SOF ⁋ 48-53. These prior investigations (and findings) plainly demonstrate that Class Plaintiffs are still afforded the protections of the FLSA and that Defendant still must comply with its mandates. *See* 29 U.S.C. § 203(d) (defining the term "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."); *see also Mills v. State of Me.*, 118 F.3d 37, 48 (1st Cir. 1997) (recognizing "Congress' [*sic*] 'authority' to impose on the states the FLSA's wage and hour requirements"); *Moreau v. Klevenhagen*, 508 U.S. 22, 25 (1993) (recognizing extension of FLSA to public employees).

ii. Plaintiffs' rights under the FLSA and MMWL may not be altered.

The terms of the Labor Agreement that are at issue are Defendant's contractual promises to comply with the FLSA and the Missouri Minimum Wage Law (MMWL).[2] These laws "cannot be abridged by contract or otherwise waived because this would

[2] Defendant states in its opposition to Plaintiffs' separately filed Motion to Strike Affirmative Defenses that it "will not argue that Plaintiffs waived their rights to compensation." Def. Opp. at 8.

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'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."). 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); *see also 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*, 95 Mo. App. 516, 69 S.W. 484, 486 (1902) (finding that a laborer cannot waive or contract away rights conferred on him by statute). As a result, the affirmative defense of waiver fails as a matter of law.

c. Plaintiffs' claims are not preempted or controlled by the LMRA.

The Labor Management Relations Act ("LMRA") governs "[s]uits for violation of contracts between an employer and a labor organization representing employees." 29 U.S.C.A. § 185(a). "Public 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). The same is true of the LMRA's "uniquely personal" requirement, which only applies to a *private employee's* right to bring suit *under the LMRA*. *See Brown v. Sterling Aluminum Prod. Corp.*, 365 F.2d 651, 657 (8th Cir. 1966) (finding that, "*for an individual to bring an action under § 301* he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit") (emphasis added). As a consequence, the limits of § 185 on individual private employees' ability to sue for breach of a collective bargaining agreement do not control disputes between public employers and public employees, such as Defendant and Plaintiffs.

In fact, any attempt by Plaintiffs to bring suit under the LMRA would likely be dismissed as "insubstantial and frivolous because the NLRA does not apply to local governments or their employees." *Miles v. Yabuta*, No. 14-cv-00278 ACK, 2014 WL 6471370, at *1 (D. Haw. Nov. 18, 2014) (remanding breach of contract claims to state court upon finding that a police officer may not maintain an LMRA claim); *see also Rogers v. Amalgamated Transit Union Local 682*, No. 1:16-CV-284, 2017 WL 4539922, at *4-5 (N.D. Ind. Oct. 11, 2017) (slip op.) (collecting cases dismissing LMRA claims brought by public employees and their unions). Because the LMRA has no application here, there are no issues of fact surrounding Plaintiffs' standing to sue Defendant for breach of the Labor Agreement.

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d. The terms of the instant contract are undisputed and summary judgment on this issue is appropriate.

For all these reasons, there are no genuine issues of material fact regarding the terms of the contract, which are as follows:

- "The scope of this Unit is described to include all eligible employees of the Employer who are employed only in the classifications of Corrections Officer I and Corrections Officer II." SOF ⁋ 11.
- "The Employer [Defendant] will comply with the Fair Labor Standard Act (FLSA), RSMo 105.935 and 1 CSR 20-5 regarding the accrual and payment of overtime." SOF ⁋ 14.
- "Employees have the right to participate in the management of the Association and to act for the Association in the capacity of representatives including but not limited to, presentation of its views to elected official, the general public, or other appropriate authority." SOF ⁋ 13.
- "The purpose of this procedure is to ensure departmental compliance with Federal Fair Labor Standards Act rules and state merit guidelines." SOF ⁋ 15.
- "The Employer will comply with the Fair Labor Standard Act (FLSA), RSMo 105.935 and 1 CSR 20-5 regarding the accrual and payment of overtime." SOF ⁋ 16.
- "Overtime code 2 employees must be compensated for time worked." SOF ⁋ 17.

Nor are there any genuine issues of material fact surrounding Class Plaintiffs' standing to enforce the contract. Summary judgment on the first element of Plaintiffs' breach of contract claims is therefore required.

B. Defendant Breached Its Contract With Plaintiffs

Class Plaintiffs' are employed by Defendant as correctional officers. Their principal activity as correctional officers is undisputed. According to the sworn affidavit

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of Defendant's former director George Lombardi, Class Plaintiffs are hired "for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." SOF ⁋ 55. Their duties include:

- Supervising the movement of offenders, conducting periodic counts of offenders, and searching offenders and their living quarters for contraband;
- Escorting and/or transporting offenders to predetermined locations;
- Supervising offenders in housing units and during the performance of work activities and recreational and religious activities;
- Conducting inspections of housing units for health and safety hazards;
- Preparing and submitting reports on offender violations of divisional or correctional facility rules, unusual offender behaviors, and offender security breaches or failures; and
- Promoting offender rehabilitation by attempting to modify offender's social attitudes, discouraging undesirable behaviors, and encouraging worthwhile activities for offenders.

SOF ⁋ 57. Class Plaintiffs' "job is down inside watching offenders." SOF ⁋ 56.

The parties likewise agree on the nature of the pre- and post-shift activities that are at issue in this case:

- Electronically logging their arrival at or departure from the facility and passing through security gates/entry-egress points, including passing through a metal detector when arriving;
- Passing through security gates/entry-egress points, including passing through a metal detector on arrival;
- Presenting themselves before a custody supervisor who communicates to their daily post/duty assignments.
- Picking up equipment such as keys or radios at electronic key boxes or key/radio issue rooms.

- Walking from the entry/egress points to duty posts and standing in line when one has formed for any of the above activities.
- In the case of vehicle patrol officers, inventorying the vehicle patrol's issued weapons, ammunition, and equipment.
- Passing pertinent information from one shift to another, including incidents that have taken place on the previous shift and other information about inmate activities that could impact the oncoming shift.

SOF ¶¶ 58-63. It is undisputed that these are the tasks for which Class Plaintiffs are not compensated. SOF ¶¶ 64-65. Thus, defense counsel correctly summarized the issues in this case at the final pretrial hearing: "Is it work? and Is it compensable?". These are questions for the Court to decide.

1. Whether Class Plaintiffs performed compensable work is an issue of law.

Violations of the FLSA occur when "the plaintiff has performed compensable work" and "the plaintiff has not been properly paid." *Hertz v. Woodbury Cty., Iowa*, 566 F.3d 775, 783 (8th Cir. 2009). When, as in this case, the nature of the employees' duties are not in dispute, the application of the FLSA to those duties is a question of law for the Court to decide. *Helmert v. Butterball, LLC*, 805 F. Supp. 2d 655, 659-60. (E.D. Ark. 2011).

"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 v. Butterball*, LLC, 805 F. Supp. 2d 655, 658 (E.D. Ark. 2011) (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.* Moreover, "[a]ny work which an employee is required to perform while traveling must, of course, be

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counted as hours worked." 29 C.F.R. § 785.41. This is known as the "continuous workday," and all activities occurring during that time must be compensated. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 795-96 (8th Cir. 2014) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005)). "'[E]xertion [i]s not in fact necessary for an activity to constitute "work" under the FLSA.'" *Id.* at 795 (quoting *Alvarez*, 546 U.S. at 25).

"The 'principal' activities referred to in the statute are activities which the employee is "employed to perform." 29 C.F.R. § 790.8(a). The term "principal activity" also "'embrac[es] all activities which are an "integral and indispensable part of the principal activities."'" *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014) (quoting *Alvarez*, 546 U.S. at 29-30). "The integral and indispensable test is tied to the productive work that the employee is employed to perform." *Id.* at 519. "An activity is . . . integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 517. This means "an activity is 'indispensable' to another, principal activity only ***when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively***." *Id.* at 520 (emphasis added) (Sotomayor, J. concurring).

2. Class Plaintiffs' pre- and post-shift activities are compensable work.

In considering the compensability of Class Plaintiffs' pre- and post-shift activities, three significant, undisputed facts emerge:

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- Nearly all Class Plaintiffs pick up their keys and radio either immediately before or immediately after going through the airlock and entering the security envelope. SOF ⁋ 66.

- Class Plaintiffs are considered "on duty" the moment they enter the security envelope, and they are expected – by the MDOC Director and their supervisors – monitor offenders as they proceed to and from their duty stations. SOF ⁋⁋ 71-80.

- All of the pre- and post-shift activities are integral to maintaining the safety and security of Defendant's facilities, its inmates, their visitors, and its employees. SOF ⁋⁋ 85-97.

Under these set of facts, Class Plaintiffs' pre- and post-shift activities are, as a matter of law, compensable.

a. **The workday begins when Class Plaintiffs pick up their equipment.**

Although Plaintiffs' claims are not preempted by the LMRA as shown in section 4(c) *supra*, Defendant is still bound by the interpretation of the FLSA and its regulations by the Federal Labor Relations Authority. Defendant cannot thus escape the Authority's long held position that "[p]icking up equipment at the Control Center and walking from there to duty stations as well as returning the equipment to the Control Center are compensable activities." *U.S. Dep't of Justice Fed. Bureau of Prisons U.S. Penitentiary Leavenworth, Kan. (Agency) & Am. Fed'n of Gov't Employees Local 919 Council of Prison Locals, Council 33 (Union)*, 59 F.L.R.A. 593, 597 (Jan. 27, 2004). "The exchange of equipment, the inventory of equipment, and the exchange of information concerning operations at the post are clearly necessary to the job being performed at the post." *U.S. Dep't of Justice Fed. Bureau of Prisons U.S. Penitentiary Marion, Ill. (Agency) & Am. Fed'n of Gov't Employees Local 2343 Council of Prison Locals, Council 33 (Union)*, 61

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F.L.R.A. 765, 773 (Sept. 13, 2006). In fact, this holding is not limited to correctional officers or the F.L.R.A. jurisdiction.

Federal courts have found, in other professions, that an employee's workday begins when he picks up equipment. *See, e.g., Russano v. Premier Aerial & Fleet Inspections, LLC*, No. 14-CV-14937, 2016 WL 4138231, at *3 (E.D. Mich. Aug. 4, 2016) (citation omitted) (finding work compensable where employees "received instructions at the meeting place, and were regularly required to pick-up or drop-off essential equipment or paperwork before and after traveling"); *Gaytan v. G&G Landscaping Constr., Inc.*, 145 F. Supp. 3d 320, 325 (D.N.J. 2015) (finding that "'loading trucks with necessary tools and materials, checking the tire pressure, oil and other fluids in the truck, and greasing machines needed for that particular day'" is compensable); *Sandel v. Fairfield Indus. Inc.*, No. 13-CV-1596, 2015 WL 7709583, at *5 (S.D. Tex. June 25, 2015) (denying defendant's summary judgment motion where "required safety meetings were to ensure a safe workplace for the employees themselves and all other persons the[y] might encounter in the ordinary course of business"); *Perez*, 832 F.3d at 125-26 (overturning summary judgment for defendant as to whether donning and doffing of specialized equipment, including bulletproof vest, baton, mace, and handcuffs, was integral and indispensable and recognizing that they are "vital to 'the primary goal[s] of [the plaintiffs'] work' during a shift"). This is consistent with federal regulations. *See* 29 C.F.R. § 785.38 ("Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work.").

In the instant case, Defendant admits that nearly every Class Plaintiff either (1) picks up his keys and radio, passes through airlock, and then walks to his post or (2)

passes through the airlock, picks up his keys and radio, and then walks to his post. SOF ⁋ 66.[3] As a result, under the long-standing precedent discussed above, Class Plaintiffs' workdays begin when they pick up their equipment, which occurs **before they walk to their post**. SOF ⁋ 66. And under the same precedent, Class Plaintiffs' workdays end when they return their equipment, which occurs **after they leave their post**. SOF ⁋⁋ 60, 66.

Defendant emphasizes the importance of its equipment control procedures in the MDOC manual:

> **Key and lock control is an essential part of institutional security.** The system effectively manages any size network of locks by pinpointing the responsibility of each individual staff member and by providing quick information on all locks and keys. Without proper key control, locks provide little deterrent to illegal or unauthorized entry into a facility or secured areas within a facility. Therefore, it is mandatory that all keys and locking systems utilized within an institution be closely monitored and controlled.

SOF ⁋ 98. Class Plaintiffs "could not dispense with it without impairing [their] ability to perform the principal activity safely and effectively." *Busk*, 135 S. Ct. at 520 (emphasis added) (Sotomayor, J. concurring). Radios are likewise integral to Class Plaintiffs' principal activity: "Offender movement is the primary thing we're controlling with radios." SOF ⁋ 99. Thus, all activities occurring between the pick-up and drop-up of Class Plaintiffs' equipment must, as a matter of law, be compensated. 29 C.F.R. § 785.41; *Bouaphakeo*, 765 F.3d at 795-96. Defendant's refusal to pay Class Plaintiffs for this time is a violation of the FLSA and the Labor Agreement.

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[3] Deputy Division Director Prudden testified that some Class Plaintiffs' exchange equipment at their duty station. SOF ⁋ 66. For the reasons set forth in Section II.B.2.b *infra*, this does not affect the compensability of the time Class Plaintiffs spend walking between their posts and the facility airlocks.

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b. Class Plaintiffs are always "on duty" inside the security envelope.

Class Plaintiffs cannot bring any personal belongings – including cell phones – through the airlock and into the security envelope. SOF ⁋ 68. This rule is enforced with security screenings and searches. SOF ⁋ 69. As a result, Class Plaintiffs are effectively cut off from the outside world as soon as they enter the security envelope.[4]

When Class Plaintiffs enter the security envelope, they are in uniform and carrying a badge. SOF ⁋ 67. They do not begin walking to their posts until they have their equipment. SOF ⁋ 66. The uniform, badge, and equipment are necessary because they are in the presence of offenders. SOF ⁋ 70. And because Class Plaintiffs are in the presence of offenders, they are considered on duty, and Defendant's directors and wardens expect them to remain vigilant, monitor offender movement, and respond to any incidents they observe. SOF ⁋⁋ 71-80. Put more succinctly, Class Plaintiffs are – by Defendant's own admission – required to "monitor and pay attention to offenders walking to their post and walking back." SOF ⁋ 77. They are, as Director Dormire stated, "on duty and expected to respond." SOF ⁋ 71. This is part of Class Plaintiffs' training. SOF ⁋⁋ 75, 80.

Defendant cannot dispute that Class Plaintiffs are on duty when walking to their posts. It has admitted this fact through the testimony of its own directors. Each one

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[4] Even if Class Plaintiffs are not performing "principal activities" while walking to their posts, they are on call, within the meaning of 29 C.F.R. § 785.17, as they "cannot use the time effectively for [their] own purposes. 29 C.F.R. § 785.17. Their time is closely controlled by Defendants, they cannot use it effectively for their own purposes, and they are not completely relieved from duty until they have exited the security envelope. *See id.* §§ 785.15-16 (defining "on duty" and "off duty" time). Thus, the time is considered "work" under the FLSA and must be compensated. *Id.*

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acknowledged that Class Plaintiffs are "on duty" (Dormire), expected to act as guards (Kempker), must "pay attention to the offenders at all times" when inside (Kempker), and "have to monitor and pay attention to offenders walking to their post and walking back" (Lombardi). SOF ¶¶ 71, 72, 77. Defendant's wardens confirmed this at their depositions, testifying that Class Plaintiffs are expected to remain vigilant, are "responsible to observe offender behavior any time they are present inside the institution regardless of their bid posts," and are "expected to handle incidents that rise to the level of needing intervention" while walking from the airlock to their posts. SOF ¶¶ 73-75.

Defendant's expectation that Class Plaintiff's remain vigilant when walking to and from their posts is not merely incidental to their duties as correctional officers. It is their duty. Class Plaintiffs' primary responsibility – according to Defendant – is "supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." SOF ¶ 55. To that end, Class Plaintiffs must monitor offenders when walking to their post because that is when problems are most likely to arise. SOF ¶¶ 78-80. In fact, this is when incidents do arise, as Director Dormire and Class Representatives Hootselle and Dicus described at their depositions. SOF ¶¶ 81-84. Offenders use the distractions of shift changes to start fights, pass drugs, attempt escapes, and harm themselves. SOF ¶¶ 81-84. As Deputy Division Director Kempker 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." SOF ¶ 79. As a result, Class Plaintiffs are, in Defendant's own words, "on duty and expected to respond" when walking to and from their posts. SOF ¶ 71.

Because Class Plaintiffs are on duty when walking to and from their posts, monitoring offenders and expected to respond, they are not simply performing tasks "integral and indispensable" to their principal activity. They are engaged in the principal activity which they are "employed to perform" – supervising, guarding, watching, and monitoring offenders – from the moment they enter the security envelope until they exit. 29 C.F.R. § 790.8; SOF ⁋⁋ 71-80. This "whistle to whistle" work must, as a matter of law, be compensated. Defendant's refusal to do so is a violation of the Labor Agreement and its mandate to comply with the FLSA and MMWL.

c. <u>Class Plaintiffs' pre- and post-shift activities are integral and indispensable to their principal activities.</u>

Even if monitoring and guarding offenders in route to their posts is not a principal activity, that task is, along with the other pre- and post-shift activities described above, "integral and indispensable" to Plaintiffs' "principal activity." It is undisputed that each of these tasks is essential to maintaining the security of Defendant's facilities. Defendant has admitted this through deposition testimony of its directors and deputy directors.

Former Director Lombardi testified that the pre- and post-shift activities are required because of the nature of the job that the guards are doing." SOF ⁋ 91. He further admitted, when testifying on behalf of Defendant, that Class Plaintiffs cannot assume their posts without performing these tasks. SOF ⁋ 87. They are, according to Director Dormire and Deputy Division Director Kempker, necessary and exist "to operate and maintain a safe and secure facility." SOF ⁋⁋ 96-97. In short, as Lombardi, Dormire, and Kempker all admit, these pre- and post-shift activities are essential for Class Plaintiffs to perform their jobs. SOF ⁋⁋ 92-93.

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Deputy Division Director Kempker best summarized the integral and indispensable nature of Class Plaintiffs' pre- and post-shift activities at his deposition, testifying that these activities ensured safety and the facilities, prevented the flow of contraband, and were essential:

> They create for us a safe and secure facility where we properly identified staff and we properly equip them. We made sure contraband wasn't introduced in the facility which I guess by extension helps for safety and security.

SOF ⁋ 95.

> It's necessary to operate and maintain a safe facility, and you can only do so by knowing the identity of the people within to making sure unauthorized items aren't carried in and that people are properly equipped to protect themselves.

SOF ⁋ 95.

> [T]hese are all done in a relative to a level of security we can stand. Could we function for a little while without doing any of them? Sure, **but safety and security is going to be compromised in a very traumatic way. So we like to think they're essential.**
>
> ….
>
> We like to think we have standards about safety and security, and to insure those then we need to – **doing these things are essential to protecting that safety and security.**

SOF ⁋ 95. They are done, per Mr. Kempker, necessary and essential to safely keep and house criminals SOF ⁋ 97. They are required, as Mr. Dormire testified to keep criminals safely locked behind bars and serve the end of housing dangerous criminals. SOF ⁋⁋ 89-90.

Defendant's descriptions of the individual tasks discussed above likewise reveal their integral and indispensable characteristics. "Key and lock control is an essential part of institutional security." SOF ⁋ 98. "Offender movement is the primary thing

we're controlling with radios," and the ability to communicate with radios is integral to Class Plaintiffs' work. SOF ⁋⁋ 99-100. Briefings are "very important." And prison counts ensure that no offenders have escaped. SOF ⁋ 102.

In other words, according to Defendant's own Directors and Deputy Division Director, Class Plaintiffs' pre- and post-shift activities are ones they "cannot dispense if [they are] to perform [their] principal activities." *Busk*, 135 S. Ct. at 517. Doing so would "impair[] [their] ability to perform the principal activity safely and effectively." *Id.* at 520 (Sotomayor, J. concurring). This fact is not disputed. As a result, Class Plaintiffs' pre- and post-shift activities are, as a matter of law, integral and indispensable to Plaintiffs' principal activities and must be compensated. Once again, Defendant's refusal to pay Class Plaintiffs' for the time spent performing pre- and post-shift activities is a violation of the FLSA and the Labor Agreement.

3. Defendants' affirmative defenses fail.

a. <u>The time spent on pre- and post-shift activities is not de minimis.</u>

Federal regulations provide that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." 29 C.F.R. § 785.47. "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.*" *Id.* (emphasis added). 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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"'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) (emphasis added), *cited by Rikard*, 2013 WL 5671342, at *5.

In the instant case, the aggregate time needed for Class Plaintiffs to complete their pre- and post- shift activities averages a total of 30 minutes each day, for a total of 2.5 hours for each 5-day work week. SOF ⁋ 110. This well exceeds any threshold for the *de minimus* defense, and this defense fails on that ground alone. That Class Plaintiffs may engage in some other activity during this time – such as going to a locker – is largely irrelevant. The workday "includes all time within that period whether or not the employee engages in work throughout all of that period." § 790.6(b). And under this "continuous workday" rule, Defendant is prohibited from starting and stopping the clock as Plaintiffs proceed from the first security checkpoint to their posts. "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).

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Even if the time spent pre- and post-shift activities was small, Defendant could have easily tracked the time spent by Class Plaintiffs, on pre- and post-shift activities. Each facility already requires COs to log both their arrival and departure in either written or electronic form. SOF ¶¶ 105-06. That data has always been readily accessible and was, in fact, used by Plaintiffs' expert to precisely calculate the amount of overtime wages due. SOF ¶¶ 107-09. Nothing prevented Defendant from using the same data proactively to calculate the amount of overtime wages each employee is due at the end of each pay period.

In fact, Defendant could have easily installed time clocks at facility entrances and required Plaintiffs and the Class Members to use them, just as many other employers have required their employees to do. By doing so, Defendant would have precise data regarding when COs started and stopped their work. Defendant may not invoke the *de minimis* defense where it chose not to even make such a minimal effort, and this defense fails as a matter of law.

b. <u>The good faith is irrelevant and unsupported by the evidence.</u>

The good faith defense raised by Defendant only applies when liquidated damages are sought directly under the FLSA, which mandates that employers are "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages*." 29 U.S.C.A. § 216(b); *see also id.* § 260 (exempting employers from liability for liquidated damages upon a showing "that the act or omission giving rise to such action was in good faith and that [the employer] had reasonable grounds for believing that his act or omission was not a violation").

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Here, Plaintiffs' FLSA claim has been dismissed, and they are not seeking liquidated damages. Instead, they seek compensatory damages and a declaratory judgment at trial, pursuant to breach of contract and equitable claims. Second Amended Petition ¶¶ 74-85. Moreover, to the extent this defense might be available, it is negated by Defendant's knowing and intentional refusal to fully comply with the DOL's recent findings. SOF ⁋⁋ 53-54. As a result, the FLSA's good faith defense fails as a matter of law. [5]

C. Defendant's Sovereign Immunity Defense Fails.

The existence of an express contract, authorized by law, abrogates sovereign immunity. [6] *Missouri Corr. Officers Ass'n v. Missouri Dep't of Corr.* ("*MDOC I*"), 409 S.W.3d 499, 500 (Mo. Ct. App. 2013). As recognized by the Missouri Supreme Court, "'when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by contracting.'" *Kubley v. Brooks*, 141 S.W.3d 21, 30 (Mo. 2004) (en banc). The court in *Kubley* applied this doctrine to Plaintiffs' claims in contract an in equity. *Id.* at 28-29; *see also Palo v. Stangler*, 943 S.W.2d 683, 685 (Mo. App. E.D. 1997) (finding that "the doctrine of sovereign immunity is not applicable" where the action is not in tort); *Goines v. Mo. Dep't of Social Services, Family Support and Children's Div.*, 364 S.W.3d 684, 687 (Mo. App. W.D. 2012) ("In any case involving non-tort claims, 'an enabling statute's provision that the agency can 'sue or be sued' is

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[5] Defendant states in its opposition to Plaintiffs' separately filed Motion to Strike Affirmative Defenses that, "If Plaintiff is not seeking liquidated damages or going to claim bad acting by Defendants, good faith is not needed as a defense." Def. Opp. at 7.

[6] Defendant concedes in its opposition to Plaintiffs' separately filed Motion to Strike Affirmative Defenses that sovereign immunity has been waived with respect to the breach of contract claims. Def. Opp. at 3-4.

sufficient to constitute a consent to suit.'") (citing *Kubley*); *see also Gerken v. Sherman*, 351 S.W.3d 1, 12 (Mo. App. W.D. 2011) ("Because in section 207.020 the State consented to suit, the trial court's award of prejudgment interest was not barred by sovereign immunity."); *Wyman v. Mo. Dep't of Mental Health*, 376 S.W.3d 16, 23 (Mo. App. W.D. 2012) ("The phrasing of the waiver provision makes clear that the immunity restored by § 537.600 is immunity "from liability and suit for compensatory damages for negligent acts or omissions," *not* immunity from claims for equitable relief.") (citations omitted). As such, there is no basis for Defendant's invoking sovereign immunity from Plaintiffs' contractual, and the Third and Fifth affirmative defenses fail as a matter of law.

III. CONCLUSION

There are no genuine issues of material fact regarding the terms of the parties' contract, the nature of the work performed by Class Plaintiffs, or whether Defendant's refusal to compensate them for that work violated the FLSA and thus breached the Labor Agreement. The pre- and post-shift activities performed by Class Plaintiffs are, for the reasons set forth above, compensable work, and it is undisputed the Defendant failed to pay Class Plaintiffs for any their time spent on those activities. For all these reasons and those set forth above, the only issue that remains for trial is a computation of Class Plaintiffs' damages. Plaintiffs therefore respectfully request that this Court enter summary judgment on Counts III and VI of the Second Amended Petition (as amended by interlineation). Plaintiffs further ask this Court to enter a declaratory judgment on Plaintiffs' behalf requiring Defendant to compensate Class Plaintiffs in the future for the pre- and post-shift activities that have been the subject of this lawsuit.

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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 Defendant thereby as follows:

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