SC98252

IN THE SUPREME COURT OF MISSOURI

THOMAS HOOTSELLE, JR., *et al.*,

Respondents,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce

RESPONDENTS' SUBSTITUTE BRIEF

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INTRODUCTION

Respondents Thomas Hootselle, Daniel Dicus, and Oliver Huff and the class of over 13,000 correctional officers they represent (collectively, the "Officers") risk their lives every day maintaining safety and securityat Appellant Missouri Department of Corrections' ("MDOC") prisons. For more than a decade, MDOC has required its Officers to be on duty from when they enter its facilities until they leave. MDOC also requires Officers to perform pre- and post-shift activities that are critical to prison safety and security and intrinsic to the Officers' jobs. At the same time, MDOC has refused to pay its Officers for this mandatory pre- and post-shift activities and on duty time, which averages about 30 minutes per shift during the most dangerous part of their work day. (D424 ¶¶80-82, 95, 110.) The Officers' claim here is simple: MDOC must pay guards for guarding.

MDOC has flouted this basic premise for decades, so in 2012, the Officers, along with Respondent Missouri Corrections Officers Association ("MOCOA"), brought this class action for unpaid wages. (D1 at 33.) After six years of discovery, briefing, and hearings, the Circuit Court for Cole County correctly found that MDOC's refusal to compensate Officers for their critical work breached the parties' Contract (defined below) and granted summary judgment on liability in the Officers' favor. (D473; D493, Sub. App. A41.) The trial court also correctly exercised its discretion in: 1) striking the untimely,

unreliable, and irrelevant opinions of MDOC's experts; 2) refusing to decertify the Officers' class on the eve of trial; and 3) entering a declaratory judgment providing certainty in the parties' ongoing relationship. The Amended Judgment and the verdict, entered by a jury that heard witnesses from both parties over seven days, rightly recognized the importance and value of that work and the injustice of performing it without pay. (D535; D517; D552). The Amended Judgment deserves affirmance by this Court.

STATEMENT OF FACTS

A. The Contract and The Work Performed

MOCOA (the Officers' collective bargaining unit) and MDOC executed a collective bargaining agreement (the "Labor Agreement") in February 2007 and renewed it in October 2014. (D424 ¶8; Sub. App. A46). "The definitions and terminology in [MDOC's Procedure] Manual are incorporated into the [Labor Agreement]," and "the [Procedure] Manual defines how state compensatory time and federal overtime are earned by correctional officers." (*Id*. ¶22.) The Labor Agreement and Procedure Manual also "govern[] a wide array of [Officers'] rights and duties as [MDOC]'s employees" and form the Contract at issue here. (*Id*. ¶¶8-12.)

The Contract requires MDOC to "comply with the Fair Labor Standards Act (FLSA) … regarding the accrual and payment of overtime." (*Id*. ¶14; D399 at 18, Sub. App. A61). The Procedure Manual mandates that Officers are "compensated for time worked" and "ensure[s] departmental compliance with [FLSA] rules and state merit guidelines." (D424 ¶¶15, 17; D406 at 2, 7, Sub. App. A71, A76). It also requires MDOC to pay Officers overtime for time they "physically work[] in excess of 40 hours during a work week." (D424 ¶¶25, 31; D406 at 7, Sub. App. A76.) The Officers perform all pre- and post-shift activity where they physically work. (*Id*. ¶33.)

The parties agree that MDOC employs its Officers "for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." (D424 ¶55.) According to MDOC's former director of adult institutions, their "job is down inside watching offenders." (*Id*. ¶¶4, 56.) The Officers' principal 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.

(*Id*. ¶57.)

Before arriving at their posts, Officers must perform the following tasks: logging their arrival either electronically or manually, including scanning identification, manually signing paper entry/exit records and/or submitting to biometric identification; 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) (Tr. 540); reporting to a supervisor to obtain their post; picking up equipment such as keys and radios; walking to their posts; and receiving a "passdown" of important safety and security information. (D424 ¶58; Sub. App. A81, A82.) They perform these same tasks in reverse once they leave their posts. (D424 ¶58.) These are universally known as pre- and post-shift activities at MDOC. (D180 at 19, 20, Sub. App. A84, A85.)

These "[p]re- and post-shift activities all occur within the prison, *i.e.,* after the [O]fficer goes through the front door and before he leaves through that door at the end of his shift." (D424 ¶55.) In addition, because prisoners often choose to attack each other, confront Officers, try to escape, and try to smuggle contraband during shift changes, (*id.* ¶¶80-82, 84, 95), "[r]emaining vigilant and responding to fights and other incidents, even when not on post, is a job requirement," (*id.* ¶76). Officers "are expected to act as prison guards whenever they are inside [MDOC]'s prisons," (*id.* ¶72), and they "are on duty and expected to respond" when walking to and from their posts, (*id.* ¶71). Given these responsibilities, the Officers "are in uniform and carrying a badge the entire time they [are] within the security envelope."[1] (*Id.* ¶67.)

[1] The "security envelope" refers to the point where Officers sign in and out of MDOC facilities. (D417 at 3 n.2.)

MDOC also admits that Officers perform pre- and post-shift activities "to 'operate and maintain a safe and secure facility;'" they "are important to the end of housing dangerous criminals" and "are connected to keeping criminals safely locked behind bars." (*Id*. ¶¶88-90, 97.) "[P]re- and post-shift activities are 'important' and 'are required because of the nature of the job that the guards are doing.'" (*Id*. ¶91.) Officers "cannot assume their post without performing them." (*Id*. ¶87.) MDOC "like[s] to think they're essential." (*Id*. ¶95.) This evidence, that MDOC "requires" Officers to be "on duty" and perform "important" and "essential" pre- and post-shift activities, is the sworn testimony of MDOC's directors and wardens and was admitted in response to the Officers' motion for partial summary judgment. Yet MDOC does not pay the Officers for this time. (*Id*. ¶64.) Officers "are only compensated for time spent at their posts." (*Id*. ¶65.)

In 2004, MDOC determined that the yearly cost of adding "15 minutes to cover pre- and post-shift activity would be approximately $7,524,478." (D180 at 20, Sub. App. A85; Tr. 799-800, 802-06.) "[Officers] 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." (D424 ¶¶44, 64.) "MDOC has repeatedly and consistently denied, in writing and otherwise, requests for overtime pay for the time it takes to complete [these activities]." (*Id*. ¶42.) Some Officers requested payment for pre- and post-shift activity, and all "such

requests were denied." (*Id.* ¶43.) In 2014, the DOL found that MDOC's conduct violated the FLSA and directed future compliance and backpay. (*Id.* ¶53; D267 at 2-3, Sub. App. A90-A91; D182 at 11, Sub. App. A88.) Still, MDOC's former director admitted that MDOC would always require pre- and post-shift activity of the Officers and would never pay them for it absent a court order. (D424 ¶40.) This refusal to properly compensate the Officers for time worked breaches MDOC's contractual obligation to compensate its Officers for "time worked" and pay overtime for hours "physically worked." It was the impetus behind this lawsuit.

B. The Untimely Expert Opinions

Expert discovery began when Officers disclosed their expert, William Rogers, Ph.D., in August 2017. The next month, the trial court moved the trial date, at MDOC's request, to February 20, 2018. (D1 at 66, 69.) Still, MDOC did not retain its experts, Chester Hanvey and Elizabeth Arnold, until "around December, 2017," (D286 ¶6); those experts did not conduct site observations until January 17, 2018, (D274); and MDOC did not produce them for deposition until February 8, 2018, (D273).[2]

The night before their February depositions, Hanvey and Arnold produced their Summary of Opinions, marked "DRAFT". (D271 at 2.) Eight

[2] In January, the trial court *sua sponte* continued the February trial to March 5, 2018. (D1 at 72.)

days later, MDOC filed an emergency motion to continue the March 5 trial date. (D1 at 75.) The trial court again accommodated MDOC and continued the trial but ordered that "no further discovery is to be conducted." (D280.) The Officers then moved to exclude MDOC's experts and set the hearing for March 14, 2018. (D271.)

On the eve of that hearing, MDOC produced more than 1,000 pages from Hanvey's files and a 20-page "affidavit" by Hanvey setting forth previously undisclosed opinions related to class certification. (D278; Tr. 90-91, 92-93, 160.) The documents and affidavit came over a month after Hanvey's deposition and three weeks after the trial court ordered "no further discovery." (D280.) The Officers raised timeliness objections at the hearing, alerting the trial court to:

- the late disclosure of Hanvey's opinions and files, (Tr. 90, 91);
- the 20-page affidavit that was "really an expert report, way beyond the time of disclosure," (*id*. at 91);
- the unfairness of MDOC's untimely disclosure of "1,000 pages of [Hanvey's records] … includ[ing] 220 pages of emails with defense counsel," (*id*.); and
- MDOC's purposeful and improper "sandbagging," noting that MDOC possessed the documents for over three weeks before producing them, (*id*.).

The Officers objected about fundamental unfairness and dilatory compliance with discovery obligations: "I don't think it's fair. I want to have this hearing today because I don't want any more delay. But you can't not disclose an expert and kind of half-disclose him." (Tr. 92.)

After fully considering MDOC's excuses and the Officer's reasons to strike, the trial court ruled from the bench that Hanvey could not testify about decertification but reserved ruling on the remainder of the Officers' motion to exclude him and Arnold. The trial court entertained additional argument on May 3, 2018, giving MDOC another opportunity to fully explain its position. This time, the trial court excluded MDOC's experts from trial. (D329.)

C. The Uniformity of MDOC's Policies and The Officers' Work

The trial court certified a class of over 13,000 Officers in 2015. (D60; D85; Tr. 697.) Throughout this case, MDOC has admitted that these Officers perform nearly identical pre- and post-shift activities required by a uniform MDOC-wide policy. The Officers are all subject to the same Contract. (D424 ¶11.) Their job descriptions and duties are identical. (*Id.* ¶¶56-57.) MDOC subjected the Officers to a uniform policy of non-payment for pre- and post-shift activities throughout the class period. (*Id.* ¶44.) "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." (*Id.* ¶42.)

The Officers also presented a damages model directly tied to their theory of liability. Rogers, their expert economist, "estimate[ed] the economic losses for [O]fficers in all Missouri correctional centers within a reasonable degree of

statistical and economic certainty." (D417 at 1.) He relied on a substantial amount of both MDOC-produced and publicly available data, including: (1) the number of full time Officers working at each MDOC institution, (*id*. at 4-5; Sub. App. A83); (2) entry and exit data from MDOC facilities showing time spent for nearly 1.4 million shifts, (*id*. at 5-7); and (3) mean hourly wages from the Bureau of Labor Statistics, (*id*. at 3-4). Notably, Rogers did not simply add up the raw data generated by entry and exit logs. Instead, he used his professional judgment to calculate a different mean uncompensated time for each MDOC facility to calculate the total loss by facility. (*Id*. at 9-11.)

Rogers also took pains to ensure that his estimates were conservative, reducing his damages calculations to account for time off and other variables. (*Id*. at 4, 17; Tr. 710.) Rogers's model revealed patterns that "h[eld] true" and demonstrated that "[it] *is* common practice for [the Officers] to be in the security envelope for more than eight hours." (D417 at 7.) "[I]t is unreasonable to believe that the general patterns w[ould] significantly change." (*Id*. at 13.) Rogers used this method to calculate class damages because MDOC did not accurately track Officers' work time or have their shift data.

I. The Trial Court Properly Granted Officers' Motion for Partial Summary Judgment (Responds to Point I)

A. Standard of Review

"The purpose of summary judgment under Missouri's fact-pleading regime is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts *as admitted* show a legal right to judgment for the movant." *ITT Comm'l Fin. Corp. v. Mid-Am. Marine Supply Corp.* ("*ITT*"), 854 S.W.2d 371, 380 (Mo. banc 1993) (emphasis added). "Conclusory allegations are not sufficient to raise a question of fact in summary judgment proceedings." *Austin v. Trotter's Corp.*, 815 S.W.2d 951, 953 (Mo. App. S.D. 1991). "Where the 'genuine issues' raised by the non-movant are merely argumentative, imaginary or frivolous, summary judgment is proper." *ITT*, 854 S.W.2d at 382. For the reasons set forth below, the trial court's summary judgment ruling was proper under this framework. The Officers agree that the standard of review is *de novo*.

B. Rules of Statutory Interpretation Require Compensation

1. The Aguilar II Decision Weighs Heavily in the Officers' Favor and Is Highly Persuasive.

MDOC points this Court to "seven principles of statutory interpretation" to support its position that it has lawfully denied Officers compensation for mandatory, on duty, pre- and post-shift activities. (Sub. App. Br. at 35.) It then asks this Court to disregard the recent Tenth Circuit decision in *Aguilar v.*

Management & Training Corp. ("*Aguilar II*"), which rejected nearly identical arguments made by New Mexico private prison operators. 948 F.3d 1270 (10th Cir. 2020); (App. Sub. Br. at 49).

MDOC's argument feigns that it did not rely heavily on the lower court's decision in *Aguilar v. Management & Training Corp.* ("*Aguilar I*") throughout the proceedings below. No. 16-cv-00050, 2017 WL 4804361 (D.N.M. Oct. 24, 2017). In fact, MDOC advised the Western District that Aguilar "addressed virtually identical claims made by corrections officers and rejected them all," and it repeatedly argued that the precedential value of *Aguilar I* should not be ignored. (App. Br. at 26; App. Reply Br. at 15; *see also* App. Br. at 26-30, 35; App. Reply Br. at 10, 12, 14; D452 at 27 n.2, 34-35; App. for Transfer at 6; D498 at 15 n.14, 16; D529 at 10, n.5, 11, 30, 38.)

Now, MDOC claims that *Aguilar II* is unpersuasive in light of the defendant's petition for *en banc* consideration. (Sub. App. Br. at 48-49.) But the Tenth Circuit recently denied that *en banc* petition for rehearing, stating that "no member of the panel and no judge in regular active service on the court requested that the court be polled." *Aguilar II*, No. 17-2198, Order (10th Cir. Mar. 12, 2020), Sub. App. A43. This quick and forceful rejection of the rehearing petition reinforces the strength of the opinion's logic and persuasiveness and turns MDOC's argument on its head.

MDOC's rules of statutory interpretation ignore the most important one: "*stare decisis* in respect to statutory interpretation has 'special force.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008).[3] "[T]here is a strong presumption that judicial construction of a statute has continued validity," and "the burden borne by the party advocating abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Hinton v. Sigma-Aldrich Corp.*, 93 S.W.3d 755, 760 (Mo. App. E.D. 2002). And while this Court is not strictly bound by Tenth Circuit decisions, "lower federal court opinions construing a federal statute are examined respectfully for such aid and guidance as may be found therein." *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 910 (Mo. banc 2002); *Jackson v. Barton*, 548 S.W.3d 263, 267 n.4 (Mo. banc 2018); *accord Buemi v. Kerckhoff*, 359 S.W.3d 16, 23 (Mo. banc 2011).

Aguilar II and this appeal bear striking similarities. They both involve interpretations of the term "work" – in *Aguilar II* as defined in the FLSA and here as defined in the parties' Contract. 948 F.3d at 1276; *see infra* Section I.B.2. More importantly, both cases were brought by correctional officers seeking compensation for nearly identical pre- and post-shift activities. *Aguilar II*, 948 F.3d at 1274-75. Thus, "this is not an issue of first impression,"

[3] All citations and quotations are omitted unless otherwise indicated.

and this Court need not engage in the lengthy analysis of statutory history or policy advocated by MDOC. *Carter v. Dir. of Revenue*, 584 S.W.3d 811, 814 (Mo. App. S.D. 2019). The Tenth Circuit has conclusively decided the primary issue before it: "[T]hese activities constitute compensable work" under the FLSA and the continuous workday rule.[4] *Aguilar II*, 948 F.3d at 1274.

2. The Plain Meaning of "Work" Supports Compensability.

Putting *Aguilar II* aside for a moment, the undisputed facts here support summary standing on their own. The Officers sued MDOC because MDOC breached its contractual obligation to pay the Class for "time worked" and overtime for hours "physically worked." (D208 ¶¶56, 83; D406 at 7, Sub. App. A76.) Because the Contract incorporates the FLSA, the parties looked there to resolve their dispute. (D424 ¶14.)

> This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue. Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow this Court to ascertain the legislature's intended result.

Parktown Imports, Inc. v. Audi of Am., Inc., 278 S.W.3d 670, 672 (Mo. banc 2009).

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[4] The Tenth Circuit's ruling in *Aguilar II* is particularly powerful in light of its procedural posture. The Tenth Circuit did not simply reverse the finding of summary judgment for defendant. It effectively commanded judgment for the plaintiffs, who did not file a cross motion, by finding the disputed activities compensable. *Aguilar II*, 948 F.3d at 1274.

a. Courts have clearly defined all relevant terms.

Employers must compensate employees for performing their "principal activities." But the Portal-to-Portal Act excuses employers from compensating workers for time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1), Sub. App. A11. "The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform,'" 29 C.F.R. § 790.8(a), Sub. App. A38, and legislative history and decisions "make clear" that this should be "read liberally." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984).

To that end, principal activities also "embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'" *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30 (2005)) (alteration in original). The words "integral" and "indispensable" are used in their ordinary sense:

> [I]ntegral means [b]elonging to or making up an integral whole; constituent, component; *spec*[*ifically*] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage.' And, when used to describe a duty, 'indispensable' means a duty [t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected.

Busk, 574 U.S. at 33 (alterations in original). "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*. (emphasis added).

"Compensable [work] include[s] all of the time during which an employee is on duty on the employer's premises" and "all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity."[5] 29 C.F.R. § 553.221(b), Sub. App. A28; *see also* 5 C.F.R. § 551.401(a), Sub. App. A26 ("hours of work" include "[t]ime during which an employee is required to be on duty"). And under the continuous workday rule, "the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *Alvarez*, 546 U.S. at 28 (quoting 29 C.F.R. § 790.6(b), Sub. App. A31). All activities "that occur[] after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" must be compensated. *Id*. at 37. "During the continuous workday, the compensability of all activities that

[5] MDOC argues that this principle has been overturned by the Portal-to-Portal Act. (App. Supp. Br. at 60-61.) There is no support, in MDOC's brief or elsewhere, for such a broad reading of that statute.

otherwise satisfy the requirements of the FLSA is not affected by the Portal-to-Portal Act's exceptions." *Bouaphakeo v. Tyson Foods, Inc.* ("*Bouaphakeo I*"), 765 F.3d 791, 795 (8th Cir. 2014), *aff'd and remanded*, 136 S. Ct. 1036 (2016); *Helmert v. Butterball, LLC*, 805 F. Supp. 2d 655, 658 (E.D. Ark. 2011).

MDOC asks this Court to apply these standards to each pre- and post-shift activity in isolation, but the uncontroverted evidence and MDOC's admissions,[6] viewed through the lens of the continuous workday rule, make this task unnecessary.

b. <u>MDOC admits the Officers are on duty during pre- and post-shift activities.</u>

MDOC admits that the Officers are "hired 'for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons,'" (D424 ¶55); their responsibilities include "discouraging undesirable behaviors" and "encouraging worthwhile activities," (*id.* ¶57); their "job is down inside watching offenders," (*id.* ¶56); "pre- and post-shift activities are expected of [the Officers] in order 'to operate and maintain a safe and secure facility'";

[6] MDOC did not submit any material facts to the trial court under Rule 74.04(c)(2). It also improperly filed amended responses to paragraphs 71, 72, 73, and 77, without seeking leave, after realizing the ramifications of its admissions. (D460). The Officers immediately moved to strike, (D463), and MDOC is bound by its original admissions. Regardless, MDOC's amendments still admitted that Officers are on duty and expected to respond whenever they are inside MDOC's prisons and only sought to "clarify" that the admissions were not legal conclusions about compensability.

and the activities "are important to the end of housing dangerous criminals," (*Id*. ¶¶88-89).

This is true because the time between shift changes – when pre- and post-shift activities occur – are often when prisoners attack others, try to escape, or try to smuggle contraband. (*Id.* ¶¶80-83.) "Remaining vigilant and responding to fights and other incidents, even when not on post, *is a job requirement*." (*Id*. ¶76) (emphasis added). In short, MDOC admitted that the Officers "are expected to act as prison guards whenever they are inside Defendant's prisons" and that "[p]re- and post-shift activities all occur within the prison, *i.e.,* after the officer goes through the front door and before he leaves through that door at the end of his shift." (*Id*. ¶¶59, 72.)

MDOC's admissions consistently track the deposition testimony of MDOC's executive staff and supervisors. For example, David Dormire, the former Director of MDOC's Adult Institutions, testified that Officers are "on duty and expected to respond when walking to and from their posts." (*Id*. ¶71.) Former Deputy Director Dwayne Kempker testified that they "must 'pay attention to the offenders at all times, all staff. When you're inside, you're going to be mindful of their behavior.'" (*Id*.) One warden testified that Officers are "trained and expected to be vigilant whenever they are in the presence of often dangerous offenders." (*Id*. ¶75.) A second warden agreed, testifying that "Officers are responsible to observe offender behavior any time they are

present inside the institution regardless of their bid posts, including walking to/from their bid posts." (*Id.* ¶73.)

MDOC tries to escape these facts by relying on conclusory affidavits and deposition testimony that are "not sufficient to raise a question of fact in summary judgment proceedings." *Austin*, 815 S.W.2d at 953. The statements that the disputed activities are "far removed from" or "not part and parcel or directly related to offender supervision" are irrelevant to whether Officers are on duty, and they were abandoned when MDOC admitted, "for the purpose of summary judgment," that Officers are on duty. *See Carey v. Runde*, 886 S.W.2d 707, 710 (Mo. App. W.D. 1994) (conflicting versions of an event are irrelevant for summary judgment if party admits one version in response to a summary judgment motion). MDOC cannot reverse course now and attempt to create a factual issue where its admissions show there is none.

Because Officers' job duties and uncompensated activities are not in genuine dispute, the only summary judgment issue is whether those activities are compensable. This is a question of law, and MDOC's admissions on this issue are dispositive. *See Helmert*, 805 F. Supp. 2d at 660 ("when the nature of the duties is undisputed, summary judgment may be granted"). Here, Officers are always on duty inside MDOC's facilities, so they are, by definition, engaged in the principal activity which they are "employed to perform" – supervising and guarding offenders, discouraging undesirable behavior, and encouraging

worthwhile activities – the entire time they are inside MDOC's facilities, not simply when they are at their post. (D424 ¶¶55, 57, 71-80); 29 C.F.R. § 790.8, Sub. App. A38. This "whistle to whistle" work must, as a matter of law, be compensated, and MDOC's refusal to do so is in breach of the parties' Contract.

c. <u>Remaining alert and responding to emergencies is central to supervising and guarding offenders.</u>

MDOC tries to avoid this reality by arguing that only "respond[ing] to occasional emergencies" renders the time non-compensable. (App. Sub. Br. at 56.) The Court of Federal Claims in *Havrilla v. United States* rejected this argument.

> In this case, an integral part of [p]laintiffs' jobs is to "wait for something to happen," whether it be a threat to the RFI's security or a request for assistance from an officer or officers in need of weapons or equipment. A determination of whether [p]laintiffs are working during their ostensible "meal breaks" does not, therefore, depend upon how often that "something" actually does happen.

125 Fed. Cl. 454, 465 (2016). Similarly, a critical component of the Officers' jobs is supervising and guarding offenders, "discouraging undesirable behavior" and "encouraging worthwhile activities." (D424 ¶¶55, 57). They are "engaged to wait" while at their posts, and they are similarly "engaged to wait" during their pre- and post-shift duties. That is, Officers "are required to perform essentially the same duties that they perform for the rest of their shifts during their [pre- and post-shift activities]. Thus, [they] are not merely

'on call' during [this time]; they are on duty." *Havrilla*, 125 Fed. Cl. at 465. MDOC can no more fail to pay for on duty pre- and post-shift activity than they can refuse to pay for on duty shift activity.

DOL regulations support this conclusion and the holding in *Havrilla*. Where "the employee is unable to use the time effectively for his own purposes," that time "belongs to and is controlled by the employer." 29 C.F.R. § 785.15, Sub. App. A31. "The employee is engaged to wait." *Id*. By comparison, "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." *Id*. § 785.16(a), Sub. App. A32. But the employee must be "*completely relieved of duty*." *Id*. (emphasis added). "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call'." *Id*. § 785.17, Sub. App. A33.

Here, the Officers' unpaid time is tightly controlled, inside a prison, cut off from the outside world, guarding hardened criminals. Officers are thoroughly searched, prohibited from bringing any personal property (including cell phones) inside, and always in uniform. (D424 ¶¶67-69.) The Officers are not on break but are instead required to act as prison guards while doing MDOC-mandated "necessary" and "essential" pre- and post-shift tasks. (*Id*. ¶¶91, 95-98.) All of this time is work under the parties' Contract, and the

undisputed facts dictate that the entirety of the time is compensable. The frequency with which emergencies occur, either on post or getting there, is immaterial.

The Court of Federal Claims also recognized the importance of this distinction in the *Akpeneye v. United States* decision relied on by MDOC. 138 Fed. Cl. 512 (2018); (App. Sub. Br. at 57-58). There, the guards were on break and could use "public amenities or pursue their own interests in an employer-provided secluded space." *Id*. at 534. The court rejected the plaintiffs' reliance on *Havrilla* because it, like this case, "involved significantly tighter restrictions on where the employees could go during their breaks." *Id*. at 530. In *Akpeneye*, the plaintiffs "[we]re bound[] only by the sprawl of the Pentagon reservation." *Id*. This freedom was a critical factor that distinguished *Akpeneye* from *Havrilla* and the instant case, where the Officers are not even on a break but are picking up equipment, receiving assignments, traveling to and from post, and obtaining critical passdown information. (D424 ¶58.)

Though this Court is not faced with a mealtime case, "[c]onfinement to the worksite … is significant" in those decisions. *Roy v. County of Lexington, S.C.*, 141 F.3d 533, 545 (4th Cir. 1998); *see also id*. at 546 ("EMS personnel were not only free to leave their worksite, they were permitted to travel anywhere in the 82 square-mile area surrounding it"); *Babcock v. Butler Cty.*, 806 F.3d 153, 157 (3d Cir. 2015) (officers "could request authorization to leave

the prison for their meal period and could eat lunch away from their desks"); *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996) ("the only restriction on the civilian plaintiffs' meal period was that they had to remain in the police department building or in radio contact with the building in case of an emergency"); *Henson v. Pulaski Cty. Sheriff Dep't*, 6 F.3d 531, 536 (8th Cir. 1993) (officers could change into civilian clothes and go "wherever they please" during breaks); *Agner v. United States*, 8 Cl. Ct. 635, 638 (1985), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986) (employees were off duty and could "eat, rest, or engage in any other appropriate personal activity"); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1137 (5th Cir. 1984) ("guards were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music during their off-duty time"); *Joiner v. Bd. of Trustees of Flavius J. Witham Mem'l Hosp.*, No. 13-cv-555, 2014 WL 3543481, at *6 (S.D. Ind. July 17, 2014) (employees permitted "to eat, socialize, listen to the radio, eat off-site with a spouse, and leave the hospital with permission"); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1068 (S.D. Iowa 2010) (security guards could "enjoy their meal periods…in an environment conducive to reading, studying, or relaxing, and with virtually unlimited access to every form of electronic entertainment and communication"); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 140 (D. Mass. 2003) (officers permitted to leave vehicle for meal). And the court in *Baylor v. United States* actually found

similar pre- and post-shift activity – picking up firearms, traveling to and from post, and exchanging instructions at shift change – compensable. 198 Ct. Cl. 331, 340, 358-60 (1972), *vacated on other grounds by Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004).

The Officers' "on duty" status, including their duty to remain vigilant and at the ready, is not a "semantics debate." (App. Sub. Br. at 60.) It is the result of the highly restricted and dangerous environment where they work. Shift changes – when pre- and post-shift activities occur – are often when prisoners engage in violent conduct and illicit activity. (D424 ¶¶80-82, 95). As MDOC's former director testified, the "pre- and post-shift activities are 'important" and "are required because of the nature of the job that the guards are doing." (*Id.* ¶91.) Any infrequency in responding to emergencies during pre- and post-shift work only reinforces the importance and efficacy of requiring Officers to be on duty during that time. Clearly, remaining vigilant is not just "incidental" to the Officers' jobs. It is, by MDOC's own admissions, the principal activity they are employed to perform, and the trial court properly entered summary judgment finding it compensable.

3. The Pre- and Post-Shift Activities Are Integral and Indispensable to the Officers' Jobs.

a. **MDOC admits these tasks are integral and indispensable.**

Alternatively, even if time spent "on duty" is not "work," the disputed time would still be compensable under *Aguilar II* and the "integral and indispensable" test. 948 F.3d at 1274. The testimony of MDOC's former deputy division director and corporate designee makes this clear:

> 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.
>
> 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.
>
> [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.

(*Id*. ¶95; D397 at 31:6-12, 158:9-13, 158:19-23, 160:1-11). The pre- and post-shift activities "are necessary and essential to safely keep and house criminals" and "are required because of the nature of the job that the guards are doing." (*Id*. ¶¶91, 97.)

This testimony places every pre- and post-shift activity squarely within the meaning given by the U.S. Supreme Court to "integral and indispensable." The pre- and post-shift activities are "necessary to the completeness or integrity of the whole" and "cannot be dispensed with, remitted, set aside, disregarded, or neglected." *Busk*, 574 U.S. at 33; *see also Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007) ("when work is done in a lethal atmosphere, the measures that allow entry and immersion into the destructive element may be integral to all work done there"). In short, MDOC "could not dispense with [pre- and post-shift activities] without impairing [Officers'] ability to perform [their] principal activity safely and effectively." *Busk*, 574 U.S. at 37-38 (Sotomayor, J. concurring). Because MDOC admits these facts, time spent on these activities must be compensated.

b. *Aguilar II* confirms that these tasks are integral and indispensable.

As in *Aguilar II*, the inquiry here begins with the first task of the day. 948 F.3d at 1277. Officers begin their day with either security screenings or equipment retrieval.[7] (D424 ¶66.) The security screening procedures occur in tandem with the Officers electronically or manually logging their arrival.

[7] In response to interrogatories, MDOC defined security screenings to "includ[e] passing through a metal detector in arrival and through and airlock when entering and exiting the security envelope." (D424 ¶58; D412 at 4, 7-8, 12-13, 16, 19-20, 23, 26-27, 29-30, 33, 36-37, 39-40, 43, 46-47, 50, 53, 56-57, 60, 63-64, 67, 70-71.)

(D424 ¶¶58, 66, 106.) MDOC contends, just as the defendant in *Aguilar II* did, that these screenings can never be compensated under *Busk* and its progeny. (App. Sub. Br. at 44-49.) But none of the screenings in those cases were as closely tied to the employees' jobs, or addressed the serious and unique concerns of prisons, as those the Officers' undergo every day at MDOC facilities. The trial court here, and the Tenth Circuit in *Aguilar II*, rightly rejected the comparisons. 948 F.3d at 1278.

i. Security Screenings

Neither *Busk* nor the cases preceding it held that security screenings are never compensable. *Id.* at 1277. "Instead, the [*Busk*] Court explained that whether an activity is compensable depends on 'the productive work that the employee is employed to perform.'" *Id.* The *Busk* plaintiffs were "warehouse workers who retrieved inventory and packaged it for shipment" and were required to "undergo an antitheft security screening before leaving the warehouse each day." 574 U.S. at 29. Their post-shift screenings were not tied to retrieving and packaging products and could be eliminated without impairing the employees' work. *Id.* at 35.

Here, the security screenings MDOC requires are directly tied to its Officers' work of supervising and guarding offenders and interdicting contraband. (D424 ¶¶57, 95.) "Indeed, the security screening and the [O]fficers' work share the same purpose." *Aguilar II*, 948 F.3d at 1278. "Moreover, unlike

the employer in *Busk*, [MDOC] [can]not … eliminate[] the screenings altogether without impairing the employees' ability to complete their work.'" *Id*. This would permit [O]fficers to "inadvertently or intentionally bring weapons or other contraband into the prison," and "an officer cannot safely and effectively maintain 'custody and discipline of inmates' and 'provid[e] security' while also bringing weapons or contraband into the prison." *Id*. at 1279 (alteration in original). "[U]nder these factual circumstances, … the screening is both integral and indispensable to the officers' principal activities." *Id*.

Other authorities relied on by MDOC do not yield a different result. For example, the DOL letter regarding rocket-powder plant employees involved post-shift screening for theft prevention, and the pre-shift screening was for employee safety only. *Id*. at 1278. As the Tenth Circuit explained last month:

> [T]he officers' principal duties include "searching for contraband and providing security." So even if this security screening relates in part to overall prison safety, what matters is that the screening is "tied to" the productive work that [MDOC] employs the officers to perform, rendering it integral and indispensable to those duties.

Id.; (D424 ¶57). In *Gorman v. Consolidated Edison Corp*., the security screenings were, though indispensable, "not integral to their principal activities." 488 F.3d at 593. Just as the rocket-powder plant employees' did not have jobs tied to security, there simply was no intrinsic connection between the *Gorman* employees' preliminary activities – waiting in traffic; submitting to

badge and vehicle inspection; parking and walking; waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector; and swiping a badge – and their jobs in chemical applications, radiology, maintenance, and the control room. *Id*. at 592.

And unlike the remainder of the cases MDOC cites, the screenings that Officers undergo have no relationship to theft. *Compare Aguilar II*, 948 F.3d at 1278 *and In re Amazon.com, Inc., Fulfillment Ctr. FLSA & Wage & Hour Litig.*, No. 14-cv-204, 2018 WL 4148856, at *2-3 (W.D. Ky. Aug. 30, 2018) (applying *Busk* to Amazon warehouse employees' state wage and hour claims); *Jones v. Best Buy Co., Inc.*, No. 12-cv-95, 2012 WL 13054831, at *1 (D. Minn. Apr. 12, 2012) (Best Buy employees undergoing post-shift theft screenings); *Haight v. The Wackenhut Corp.*, 692 F. Supp. 2d 339, 344 (S.D.N.Y. 2010) (security guards day began when they obtained their gun); *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (chicken processing plant employees "walk through a gate in a chain link fence and display their Perdue identification cards to a security guard"); *Sleiman v. DHL Express*, No. 09-cv-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) (DHL mail sorters are not "required to show up for [random] screening at a particular time, the employer is not ready for him to commence work, and there is insufficient work").

MDOC argues that these cases are more relevant than the more recent decision in *Aguilar II*. But compensability decisions are factually driven, *Helmert*, 805 F. Supp. 2d at 659, and require courts to examine how closely the activity "is tied to the productive work that the employee is *employed to perform*." *Aguilar II*, 948 F.3d at 1283 (quoting *Busk*, 574 U.S. at 36). The security issues here are factually distinct from those discussed above but factually indistinguishable from *Aguilar II*. "[P]reventing weapons or other contraband from entering the prison, by way of the security screening, is 'an intrinsic element of' the officers' security work." *Id*. at 1279. It is, as *Aguilar II* and *Busk* require, "'tied to' the productive work that [MDOC] employs the [Officers] to perform." *Id*. at 1278 (quoting 574 U.S. at 36), and it must be compensated under the Contract.

ii. Picking Up Keys and Equipment

For Officers who pick up keys and other equipment before going through security, this activity is likewise integral and indispensable and starts their workday. Indeed, MDOC emphasizes the importance of its equipment control procedures in its 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.

(D424 ¶98; D415) (emphasis added) (alteration in original). MDOC also admits that radios are integral to the Officers' principal activity. "Offender movement is the primary thing we're controlling with radios," (D424 ¶99); and "[h]aving radios and the ability to communicate for relief in shift is integral to [Officers'] work," (*Id*. ¶100). Thus, placing this procedure near the beginning and end of the Officers' shifts enables them to be "fully equipped the entire time they are within the security envelope." (D424 ¶66.)

Once again, as in *Aguilar II*:

> If [MDOC] were to eliminate the keys and equipment (or the corresponding inventory-control systems), the [O]fficers' ability to maintain custody and discipline of inmates and provide security in the prison would be "impair[ed]." Indeed, an officer "cannot dispense" with the keys and equipment "if [the officer] is to perform his [or her] principal activities" of maintaining custody and discipline of inmates and providing security.

948 F.3d at 1280 (quoting *Busk*, 574 at 35, 37). It is, per MDOC's admissions, indispensable work.

The Federal Labor Relations Authority agrees with this analysis and has taken the 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.*, 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.*, 61 F.L.R.A. 765, 773 (Sept. 13, 2006).

Federal courts have also found, in other professions, that employees perform compensable work when they pick up equipment and perform other similar tasks. *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) (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"). This is consistent with federal regulations. *See* 29 C.F.R. § 785.38, Sub. App. A34 ("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.").

MDOC analogizes picking up keys and equipment to "'changing clothes' and 'washing up'." (App. Sub. Br. at 50.) This case does not, of course, involve donning and doffing as the Officers arrive at work in uniform. (D424 ¶67.) MDOC then pivots to the argument that Officers' keys and radios are "ordinary equipment," relying on a series of older cases where security was not intrinsic to the employees' job functions. (App. Sub. Br. at 50-51.) Even the most closely analogous opinion, involving security officers, fails. *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010). There, police officers sought compensation for time spent donning and doffing uniforms and gear, but their employer gave them the option of changing at home or on premises. *Id.* at 1231-32. Nevertheless, the Ninth Circuit expressly refused to "adopt [the] conclusion" that "generic protective gear is never compensable." *Id.* at 1232. It found only that, because the officers were allowed to don such gear at home, it was not compensable under the FLSA's "context-specific" framework. *Id.* at 1232-33.

Both the Tenth Circuit in *Aguilar II* and the Second Circuit have recognized the importance of the Officers' equipment. *See Perez v. City of New York*, 832 F.3d 120, 125 (2d Cir. 2016) (uniforms, including baton, mace, handcuffs, radio, and flashlight, are "vital to 'the primary goal[s] of [park

rangers]'"); *Aguilar II*, 948 F.3d at 1283 ("items like handcuffs, pepper spray, and prison-door keys are closely connected to the work of providing prison security"). Here, too, the Officers' keys and equipment are an intrinsic element of supervising, guarding, searching, escorting, transporting offenders and inspecting housing units, (D424 ¶¶57, 98, 100), so both the equipment and "the act of picking them up and returning them [is tied] more closely to the [O]fficers' productive work," *Aguilar II*, 948 F.3d at 1281.

"It seems obvious that an officer could not effectively complete these 'essential functions' if the officer had not checked out the keys needed to move a detainee, the handcuffs needed to restrain or secure a detainee, or the pepper spray used to control a detainee." *Id.* at 1283. Moreover, "the inventory-control system from which the [O]fficers obtain the keys and equipment is essential to the [O]fficers' principal activities of providing prison security because it prevents inmates' access to the keys and equipment." *Id.* "[B]ecause of the specialized nature of the keys and equipment, the inventory-control systems, and the [O]fficers' principal activities in the prison environment, … checking keys and equipment in and out of the prison's inventory-control systems is integral and indispensable to the [O]fficers' principal activities of maintaining custody and discipline of the inmates and providing security." *Id.* This logic applies equally to vehicle patrol officers who must "inventory[] the vehicle patrol's issued weapons, ammunition, and equipment prior to and at the end

of each shift." (D424 ¶58.) These key and equipment protocols must therefore be compensated under the Contract.

Having established that the first pre-shift activities performed by the Officers – either security screenings or equipment pick up – are compensable and mark the beginning of the Officers' workday, these same tasks mark the end. "Most of the activities are similarly required on the way out," including showing some proof of ID and passing through an airlock. (D397 at 91:18-92:4, 93:5-6.) Hence, all activities between those tasks – including "picking up keys and equipment, walking to post, and conducting the pre-shift passdown briefing" – are compensable under the continuous workday rule and the parties' Contract. *Aguilar II*, 948 F.3d at 1279-80, 1283; accord Bouaphakeo I, 765 F.3d at 795-96.

4. The Right to Compensation for Work Cannot Be Abridged by Custom or Practice.

MDOC argues that its longstanding failure to properly compensate its Officers should be excused by the Portal-to-Portal Act's protections against "unexpected liabilities". (App. Sub. Br. at 39-41) (quoting 29 U.S.C. § 251).

First, MDOC did not argue in the Western District that the Officers' claims were barred by some custom or practice. Its Point Relied On stated only:

> The trial court erred in granting summary judgment in favor of Plaintiffs on their breach-of-contract claims, because the class members' pre-shift and post-shift activities are not compensable under the [FLSA] as amended by the Portal-to-

> Portal Act or under state laws or contracts that incorporate FLSA standards, *in that these activities constitute 'preliminary' and 'postliminary' activities, and the time spent on them is de minimis*.

(App. Br. at 24) (emphasis added). The issue of whether a custom or practice insulated MDOC from liability is absent and, in any event, would need to be raised in a separate Point Relied On. *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 630 n.10 (Mo. banc 2014). More importantly, "[a] party may not raise claims for the first time in this Court and 'shall not alter the basis of any claim that was raised in the brief filed in the court of appeals.'" *Id*. at 629 (quoting Mo. Sup. Ct. R. 83.08(b), Sub. App. A19). "Because [MDOC] did not raise this claim in [its] brief to the court of appeals, the claim is not preserved for review in this Court." *Id*. at 630.

Second, employees cannot contract away their rights to compensation for time worked, even by custom or practice. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 761 (Mo. banc 2014). "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." *Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 680 (8th Cir. 1996). Thus, "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). MDOC admits as much, arguing that, "[u]nder both the Labor Agreements and the Procedure Manual, when it comes to pre-shift and post-shift activities, FLSA standards provide the sole guidance for what constitutes compensable overtime or 'hours physically worked.'" (App. Sub. Br. at 25.) Otherwise, wage and hour laws "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, 10 (Ky. App. Ct. 2009).

The preamble to the FLSA that MDOC relies on does not change this. MDOC's "isolated focus" on 29 U.S.C. § 251 "obscure[s] proper analysis." *Lett v. St.* Louis, 948 S.W.2d 614, 616-17 (Mo. App. E.D. 1996). True, "a preamble may be helpful in determining legislative intent." *Id.* at 617. However, "where the enacting part of the statute is clear, the preamble will not be considered for the purpose of contradicting the enacting portion of the statute." *Id.* at 618. More importantly, consideration of legislative intent is less important when courts have already construed that statute's language. *Hinton*, 93 S.W.3d at 760. The U.S. Supreme Court long ago considered the meaning of the Portal-to-Portal Act, including its preamble, and gave us the meaning it still employs today: Congress "did not intend to deprive employees of the benefits of the [FLSA] where they are an integral part of and indispensable to their principal

activities." *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956); *see supra* Section B.2, B.3.

Regardless, the liabilities that resulted from MDOC's practices are not unexpected. Officers have grieved, complained about, and objected to MDOC's policy of not compensating them for this work for 30 years. (D424 ¶46; D147.) In response to one complaint in 2004, MDOC determined that the yearly cost of adding "15 minutes to cover pre- and post-shift activity would be approximately $7,524,478." (D180 at 20, Sub. App. A85.) In 2006, responding to an Officer grievance, then-Director Crawford discussed going to the Missouri legislature to request Officers be paid 10 minutes for pre- and 10 minutes for post-shift activity. (D408 at 1; Tr. 1366-67.) In 2007, the Missouri Division of Labor investigated MDOC's "custom and practice," (Tr. 1283, 1713), and in 2013, the U.S. DOL again investigated MDOC, just a year after this action was initiated, (D424 ¶49). It determined that MDOC's practice violated the FLSA and directed both back pay and future compliance. (*Id*. ¶53; D182 at 11, Sub. App. A88; D267 at 2-3, Sub. App. A90-A91.) But MDOC ignored that directive and the potential liabilities it created, citing this lawsuit as its justification. (*Id*. ¶54; D267 at 4, Sub. App. A92.) Its former director confirmed this, testifying that MDOC "will not pay for these activities unless there is a change in the law or a ruling in [the Officers'] favor." (*Id*. ¶¶37, 40.)

The Officers have presented ample evidence that they objected to MDOC's "custom and practice." MDOC admits it "rejected multiple grievances … seeking payment as early as 2004." (D424 ¶43.) And MDOC executives were aware of the issue for 30 years before this lawsuit was filed. (*Id.* ¶46.) Thus, while the Officers continued to show up and maintain safety and security at MDOC's prisons, their complaints in this lawsuit were not new or unexpected.[8]

C. MDOC Offered No Evidence Supporting a *De Minimis* Defense

The *de minimis* rule "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 C.F.R. § 785.47, Sub. App. A35. Courts "apply a three-factor test to determine whether work time is de minimis and therefore not compensable: '(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the [employees] performed the work on a regular basis.'" *Aguilar II*, 948 F.3d at

[8] Laws and regulations governing "time spent in changing clothes or washing at the beginning or end of each workday" are also wholly irrelevant. 29 U.S.C. § 203(o); *see also Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 582 (8th Cir. 2018) (interpreting the same). MDOC's Officers arrive in uniform because they are "are expected to act as prison guards whenever they are inside [MDOC]'s prisons." (D424 ¶72.)

1270 (alteration in original). Each of these factors supports rejection of MDOC's *de minimis* defense.

1. The Amount of Time at Issue.

"Before applying the three factors, we must first estimate the amount of time at issue." *Id*. MDOC improperly dissects the duration of the Officers' pre- and post-shift activity into the time needed to accomplish each task. This analysis fails because, under the continuous workday rule, compensable time "includes all time within that period whether or not the employee engages in work throughout all of that period." 29 C.F.R. § 790.6(b), Sub. App. A31. Neither *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008), nor any other opinion cited by MDOC alter this rule. "[T]hose cases involved situations where that task was the only task potentially eligible for compensation, as opposed to the situation here, where multiple tasks are at issue." *Butler v. DirectSAT USA, LLC*, 55 F. Supp. 3d 793, 812 (D. Md. 2014). MDOC may not start and stop the clock every time an Officer moves to a different activity. Instead, "the court is to consider the aggregate time spent allegedly working off-the-clock that is compensable." *Id*.; *Aguilar II*, 948 F.3d at 1284. "There is no precise amount of time that may be denied compensation as de minimis," *Aguilar II*, 948 F.3d at 1284, but even "$1 of additional compensation a week is 'not a trivial matter to a workingman.'" 29 C.F.R. § 785.47, Sub. App. A35.

The Officers presented substantial evidence that they spend an average of 30 minutes each day, or 2.5 hours each 5-day workweek, on mandatory pre- and post-shift activities. (D424 ¶110; D417 at 10.) And the DOL independently determined that the pre-shift tasks alone take 15 minutes and that the total unpaid time amounted to 2.5 hours per week. (D424 ¶51; D267 at 2-3, Sub. App. A90-A91; D182 at 11, Sub. App. A88.) This time well exceeds any threshold for the *de minimis* defense. *See Aguilar II*, 948 F.3d at 1284 (showing of at least eight minutes was sufficient).

2. The Practical Administrative Difficulty of Recording the Additional Time.

In *Aguilar II*, "[t]he first de minimis factor, 'the practical administrative difficulty of recording the additional time,' weigh[ed] in the officers' favor—the time clock already track[ed] most of the time at issue." *Id.* at 1284-85. Likewise, MDOC admits that it "maintains entry and exit logs … at each facility," which can be used to track time. (*Id.* ¶105; D417 at 17-20.) *See also Serna v. Bd. of Cty. Comm'rs of Rio Arriba Cty.*, No. 17-cv-00196, 2018 WL 3849878, at *6 (D.N.M. Aug. 13, 2018) ("it is not administratively difficult to record when [w]orkers check in for pre-shift briefing"). In fact, MDOC has already contracted to install timeclocks at each facility. (App. Ren. Mot. To Stay, Ex. C ¶11 (Mar. 18, 2019)). MDOC can also estimate the average time Officers spend on these activities, given that they are performed each day. *Aguilar II*, 948

F.3d at 1285. "Thus, because [MDOC] already records the majority of the time at issue and could reasonably estimate the time that it does not record, this factor weighs in the [O]fficers' favor." *Id*.

3. The Size of the Claim in the Aggregate.

This factor "considers both the aggregate claim for each individual officer as well as the aggregate claim for all the officers combined." *Id*. A jury has already determined that this number equals $113.7 million. (D517.) MDOC "cites no cases in which a court weighed a claim of this size in the employer's favor." *Aguilar II*, 948 F.3d at 1285. It "is substantial and weighs in [the Officers'] favor." *See id*. (finding $355,478 sufficient).

4. Whether the Officers Performed the Work on a Regular Basis.

The record establishes that "most [O]fficers perform most of these activities during most shifts." *Id*. at 1286. MDOC admitted this in its interrogatory responses, deposition testimony, and its response to the Officers' summary judgment motion. (D412 at 4, 7-8, 12-13, 16, 19-20, 23, 26-27, 29-30, 33, 36-37, 39-40, 43, 46-47, 50, 53, 56-57, 60, 63-64, 67, 70-71; D397 at 89:17-90:1; D398 at 32:12-33:2; D424 ¶58.) This factor also weighs in the Officers' favor. *Aguilar II*, 948 F.3d at 1286.

"In sum, … [MDOC] already records most of the time at issue, the aggregate claim is substantial, and the officers regularly engage in these activities. As such, … the time at issue is not *de minimis*." *Id.*

D. Retransfer May Be Appropriate

MDOC's chief argument supporting transfer to this Court was that the pre- and post-shift activities were not compensable under the FLSA. The *Aguilar II* decision reaffirms that the trial court and Western District reached the proper conclusion. And because the Tenth Circuit issued *Aguilar II* just one day after this Court granted transfer, this Court need not revisit the legal landscape so soon after a federal appellate court comprehensively did so with indistinguishable facts. This Court may retransfer the appeal to the Western District under Rule 83.09.

In conclusion, the order granting summary judgment is supported by a record replete with admissions – by MDOC's executive staff and wardens – that its Officers are on duty, expected to remain vigilant and respond to emergencies, and perform tasks crucial to the safety and security of its prisons for the length of the disputed activities. (D493, Sub. App. A41); *see supra* Section I.B.3. MDOC does not challenge the truth of these admissions. It instead asserts that these are the equivalent of meal breaks, falling outside the Officers' job description of "supervising" and "guarding" inmates. Such a result is plainly illogical and contrary to the undisputed evidence. The record

well supports the trial court's conclusion that the time Officers spend performing their pre- and post-shift activities is compensable under the Contract's mandate to pay for "time worked" and overtime for hours "physically worked," and it should be affirmed.

II. The Trial Court Properly Denied MDOC's Motion for Summary Judgment (Responds to Point II)

For the reasons discussed in Section I, the trial court properly denied MDOC's motion for summary judgment.

III. The Trial Court Properly Allowed Officers to Pursue a Breach of Contract Claim (Responds to Point III)

A. Standard of Review

The Officers agree that the standard of review is *de novo*.

B. MDOC Did Not Preserve This Point

On appeal, MDOC argues that this case fails because: (1) the Officers cannot recraft a statutory duty into a breach of contract claim if the underlying statute did not provide a private cause of action, (App. Sub. Br. at 68-76); and (2) the preexisting duty rule bars a breach of contract claim because the Contract simply restates preexisting FLSA obligations, (App. Sub. Br. at 76-77.) MDOC failed to preserve either argument.

This Court often reminds us that "[i]t is a settled principle of Missouri trial practice that to preserve trial court error it is necessary to give the trial court the first opportunity to correct the error, without the delay, expense, and hardship of appeal and retrial." *Howard v. City of Kansas City*, 332 S.W.3d 772, 791 (Mo. banc 2011). After all, "[appellate courts] will not convict a trial court of error on an issue that it had no chance to decide." *Clark v. Ruark*, 529 S.W.3d 878, 885 (Mo. App. W.D. 2017). Furthermore, those issues must also be raised in the new trial motion to preserve them for appellate review. Mo. Sup. Ct. R. 78.07(a), Sub. App. A17; *Heifetz v. Apex Clayton, Inc.*, 554 S.W.3d 389, 397 n.10 (Mo. banc 2018). And the appellate brief cannot cure preservation

deficiencies. *Stewart v. Partamian*, 465 S.W.3d 51, 55 (Mo. banc 2015). In fact, the appellate brief can waive an issue if not raised in the Points Relied On. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 774 n.4 (Mo. banc 2010).

Giving MDOC's trial court briefing its broadest interpretation, neither MDOC's memoranda supporting its motion for summary judgment, (D118, D190), nor its opposition to the Officers' motion for partial summary judgment, (D452), nor its Rule 78 motion for new trial, (D531), used the phrase "pre-existing duty" much less argued the point raised in this appeal.

And while a very generous interpretation of the summary judgment briefing may conclude that MDOC argued that the FLSA provides no private cause of action, no reasonable interpretation of the new trial motion would conclude that MDOC raised this issue there. At most, the new trial motion raised whether the Officers' pre- and post-shift activity was compensable under the FLSA. (D531). But it did not mention, even obliquely, whether the FLSA provides a private cause of action or bars a breach of contract action for unpaid wages.

The consequences of failing to preserve issues are well known. This Court makes "it clear what is required to be in a motion for JNOV and motion for new trial and this Court should not now decide a case on a claim of error that is not properly preserved and briefed." *City of Harrisonville v. McCall Serv. Stations,* 495 S.W.3d 738, 756 (Mo. banc 2016). In fact, this Court

routinely refuses to address issues not properly preserved in post-trial motions. *See*, *e.g.*, *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 290 (Mo. banc 2009).

Compounding its preservation mistakes at trial, MDOC's failure to present the pre-existing duty issue in its "Points Relied On" on appeal independently waived and abandoned this argument. *Lang v. Goldsworthy*, 470 S.W.3d 748, 751 n.5 (Mo. banc 2015).

C. The Officers May Sue MDOC For Breach of Contract For Failing to Pay Their Full Wages

1. The Officers' Breach of Contract Claim is Not Barred by Sovereign Immunity, Preemption, or Implied Causes of Action Principles.

MDOC conflates two distinct legal concepts (sovereign immunity and preemption) to try to show that the Officers cannot sue MDOC for breach of contract based on its failure to pay for "time worked." This seemingly complex argument is easily rejected when we keep sight of the well-known core principles governing each concept:

- While sovereign immunity bars FLSA claims (absent consent) against State entities like MDOC, it does not bar contractual claims;[9] and
- Most courts (including all Missouri federal courts) have found that the FLSA does not preempt lawsuits alleging breach of contract for failure to properly pay wages, i.e., contract claims

[9] *See V. S. DiCarlo Constr. Co., Inc. v. State*, 485 S.W.2d 52, 54 (Mo. 1972) ("[W]hen 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. banc 2004) (same).

> can redress wage and hour grievances even if governed by the FLSA.

The Officers sued MDOC for breach of contract because MDOC breached its obligation to pay the Class for "time worked" and overtime for hours "physically worked." (D71 ¶55; D208 ¶¶56, 83; D406 at 7, Sub. App. A76; D424 ¶¶25, 31.) Because the Contract also provides that MDOC must "comply with the [FLSA]," the parties looked there to interpret "time worked" and "physically worked." (D399 at 18, Sub. App. A61.) But that does not convert a non-FLSA claim into a FLSA claim. *See Bowler v. AlliedBarton Sec. Servs., LLC*, 123 F. Supp. 3d 1152, 1156 (E.D. Mo. 2015) ("it is well established within this [Eighth] Circuit that the FLSA does not have the requisite preemptive force to convert a plaintiff's State claims to a claim under the FLSA"). In other words, a FLSA claim is a FLSA claim, and a breach of contract claim is a breach of contract claim. The FLSA claim does not preempt the contract claim. Each survives on its own merits.

With this in mind, many courts have "rejected as 'incorrect' the [] assumption that 'FLSA is the exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA.'" *Wang v. Chinese Daily News*, 623 F.3d 743, 759 (9th Cir. 2010), *vacated on other grounds by* 565 U.S. 801 (2011). While there is no controlling Missouri state authority, the "district courts within the Eighth Circuit … adopt[] the view that that the FLSA does not

preempt [Officers'] state law claims." *Tinsley v. Covenant Care Servs. LLC*, No. 14-cv-00026, 2016 WL 393577, at *5 (E.D. Mo. Feb. 2, 2016); *see also Perez-Benites v. Candy Brand, LLC*, 267 F.R.D. 242, 246 (W.D. Ark. 2010) ("Most district courts in the Eighth Circuit agree that the FLSA's savings clause … indicates that the FLSA does not provide an exclusive remedy for its violations.") (collecting cases). In the face of this avalanche of cases, MDOC cites no Missouri state or Missouri federal decision to the contrary.

Instead, MDOC relies heavily on *Alden v. Maine*, 527 U.S. 706 (1999), and its progeny. But those cases dealt with an issue not in dispute and not relevant to this appeal. *Alden* found that sovereign immunity barred suits against state entities in *state* court for FLSA violations, absent the state's consent. *Id.* at 759. This was a natural extension of *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), which had previously found that sovereign immunity barred suits against state entities in *federal* court for FLSA violations, absent the State's consent. Their progeny, including all cases MDOC cites, dealt with whether particular contracts constituted waiver of that sovereign immunity and thus consent to FLSA lawsuits, not whether contract claims themselves (which have no sovereign immunity protection in Missouri) are independently cognizable. In these cases, the plaintiffs did not assert breach of contract claims. Rather they argued that a particular contract waived sovereign immunity against a FLSA claim.

For example, MDOC mischaracterizes *Allen v. Fauver*, 768 A.2d 1055 (N.J. 2001). This was not a case where plaintiffs filed a breach of contract claim that the court rejected. Rather, the cause of action alleged was a straight-forward FLSA claim against a state entity that, unsurprisingly given *Alden*, the court rejected. On appeal, plaintiffs pointed to a contract between them and the state entity to argue that the state had waived its sovereign immunity and consented to a FLSA lawsuit. *Id*. at 1059-60. Based on the facts of that case, the court rejected the argument that the contract waived immunity. *Id*. But it did not address (much less reject) an attempt to redress a wage and hour violation in a breach of contract claim because, to state the obvious again, plaintiffs did not sue for breach of contract. *See id*. at 1059 ("Their cause of action is singularly statutory.").

MDOC repeatedly makes this same mistake. *Norris v. Missouri Department of Corrections* addressed whether a contract waived FLSA sovereign immunity (an issue not relevant here), not whether plaintiffs could state an independent contractual claim. No. 13-cv-392, 2014 WL 1056906, at *3 (E.D. Mo. Mar. 19, 2014). Likewise, *Nunez v. Indiana Department of Child Services* involved whether the state waived its sovereign immunity to FLSA lawsuits, not whether a breach of contract claim for wage and hour disputes was cognizable. 817 F.3d 1042, 1043 (7th Cir. 2016). These are all cases where

the court dismissed FLSA claims based on sovereign immunity. They are not ones where the courts dismissed breach of contract claims.

Rather, the Officers' case is most similar to *Avery v. City of Talladega, Ala.*, where employees sued for breach of contract, claiming that they had not been paid for "hours worked" because of uncompensated post-shift activities as required by the employee handbook. 24 F.3d 1337, 1348 (11th Cir. 1994). The Eleventh Circuit "reinstat[ed] the plaintiffs' contract claim … [noting that] if a violation of the FLSA has occurred, then a violation of the contract, which incorporates the FLSA, will have occurred as well." *Id.* at 1348. Similarly, a Missouri federal district court found cognizable "a breach of contract claim based on a written document that purportedly provide[d] for payment of a specified rate of pay for each hour worked." *Uwaeke v. Swope Cmty. Enters., Inc.*, No. 12-cv-1415, 2013 WL 12129948, at *3 (W.D. Mo. Oct. 25, 2013). These "viable theories of liability [did] not depend on the FLSA." *Id.* Finally, an appellate court affirmed partial summary judgment for firefighters on a breach of contract claim seeking lost wages where "the City agreed with the firefighters that their contract would be subject to federal and state statutes, which would of course include the FLSA." *Abma*, 326 S.W.3d at 8.

MDOC improperly conflates sovereign immunity issues (which have no relevance to this appeal) and preemption issues dealing with whether breach of contract claims are cognizable in wage and hour disputes (which all Eighth

Circuit and Missouri federal courts agree are cognizable). But keeping the two issues separate demonstrates the futility of the argument.

2. The Officers Are Not Manufacturing a Private Cause of Action.

MDOC's reliance on a series of cases starting with *Astra USA, Inc. v. Santa Clara County,* 563 U.S. 110 (2011), is likewise misplaced. (App. Sub. Br. at 72-73.) None of these cases involved FLSA or wage and hour disputes. More importantly, their holdings and rationale are easily distinguished. In each one, Congress passed a statute whose enforcement was entrusted to administrative agencies, but it did not grant beneficiaries the right to redress alleged violations in court. When beneficiaries filed breach of contract cases to redress violations of those statutes, the courts struck them as incompatible with the enforcement mechanism that Congress explicitly adopted when it created the protection in the first place.

For example, the *Astra* court found that private lawsuits "would undermine the agency's efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis." 563 U.S. at 120. In other words, the private lawsuits would thwart the very enforcement scheme that Congress established when creating the protection. *Id.*; *see also NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 313-14 (Pa. 2012) (refusing to imply a private right of action for SEC rules violations where Congress entrusted

enforcement with SEC); *Dixon v. Wells Fargo Bank, N.A.*, No. 12-cv-10174, 2012 WL 4450502, at *6 (E.D. Mich. Sept. 25, 2012) (no private right of action exists under the HUD regulations governing its conduct with federal government).

This concern is wholly absent in the FLSA context. Congress explicitly allowed private lawsuits to enforce FLSA violations. 29 U.S.C. § 216(b), Sub. App. A7. It is only the Eleventh Amendment's sovereign immunity concerns (not Congress's statutory scheme) that prevent direct FLSA lawsuits against state agencies. The *Astra* Court's concern about private litigants doing an end run around Congress's enforcement scheme and disrupting the delicate balances it created when passing the law simply does not exist here. Absent the Eleventh Amendment, there would be no bar to direct FLSA claims against state entities. A private lawsuit against a state entity does not, in any way, shape or form, thwart Congressional intent concerning FLSA enforcement.

D. The Pre-Existing Duty Rule Does Not Apply.

The pre-existing duty rule is one of contract formation. There is no contract absent mutuality of consideration. *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646, 652 (Mo. App. W.D. 2014). And a promise to do something which is already a pre-existing duty "does not constitute consideration." *W.E. Koehler Constr. Co. v. Med. Ctr. of Blue Springs,* 670 S.W.2d 558, 561 (Mo. App. W.D. 1984). That is, it negates the existence of a contract for failure of consideration.

But this rule does not nullify contractual provisions simply because the agreement restates *any* preexisting obligations. *Id.* "[I]f the subsequent contract imposes new or different obligations, *i.e.*, it is not identical to the preexisting duties, this constitutes sufficient consideration," and the rule does not apply. *Harris v. A.G. Edwards & Sons, Inc.*, 273 S.W.3d 540, 544-45 (Mo. App. E.D. 2008). Even a "slight difference" removes the contract from the pre-existing duty doctrine. *Id.* MDOC, which undertook significant and new obligations under the Contract, cannot avail itself of this doctrine.

MDOC does not deny the existence of a binding contract with MOCOA and the Officers. In fact, MDOC's prior conduct affirms a binding contract, and Missouri appellate courts have, *sub silentio*, rejected that the Contract is unenforceable. First, MDOC admitted in response to the Officers' partial summary judgment motion that "the Labor Agreement constitutes a contract between MOCOA and the MDOC." (D452 at 2.) Second, MOCOA successfully enforced, in prior litigation, MDOC's obligations under the very Contract at issue here, and MDOC "[did] not dispute that the definitions and terminology in its [Procedure] Manual are incorporated into the Labor Agreement." *Mo. Corrections Officers Ass'n v. Mo. Dep't of Corrections* ("*MDOC I*"), 409 S.W.3d 499, 500 (Mo. App. W.D. 2013); (D424 ¶¶22, 24-29).

In that appeal, MDOC told the Western District the Procedure Manual "[wa]s intended 'to ensure departmental compliance with [FLSA] rules'" and

provided a detailed outline of how Officers earn overtime under the Contract. (D424 ¶24-28.) The Western District held that MDOC breached the 2007 Labor Agreement by unilaterally changing its personnel policies. *MDOC I*, 409 S.W.3d at 507. Put another way, MDOC voluntarily "gave up the right to require corrections officers to 'use' compensatory time as paid leave on less than fourteen days' notice." *Id.* MOCOA prevailed because the Labor Agreement barred MDOC from doing something that, absent the enforceable Contract, it would have been allowed to do. It is estopped from taking a contrary position here. *See Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 797 (Mo. App. W.D. 2005) (outlining elements of offensive collateral estoppel).

Indeed, it strains credulity to think that the 21-page February 2007 Labor Agreement, the subsequent 26-page October 2014 Labor Agreement, and the 12-page Procedural Manual incorporated into the Contract were not supported by adequate consideration. The differences between MDOC's FLSA duties and its voluntary contractual obligations are legion:

- personnel file security, §§ 7.1-7.2;
- position assignment, §§ 8.1-8.7;
- performance evaluations, §§ 9.1-9.2;
- employee discipline, §§ 10.1-10.7;
- employee leave and attendance, §§11.1-11.10.

(D399, Sub. App. A52-A61). These obligations were not preexisting or mandated by the FLSA but were undertaken as part of voluntary negotiations between MDOC and MOCOA.

In contrast, the contracts in cases cited by MDOC were not independently enforceable because they were entered into by force of law, were not the subject of negotiations, and imposed no duties beyond those created by statute. For example, in *Egan v. St. Anthony's Medical Center*, a hospital adopted bylaws for physician credentialing. 244 S.W.3d 169, 173 (Mo. banc 2008). A physician sued for injunctive relief, arguing that the hospital violated its contract (bylaws) with him. *Id*. This Court permitted him to proceed but noted in dicta that the bylaws did not create "an enforceable contract between doctors and hospitals" because "a hospital's duty to adopt and conform its actions to medical staff bylaws as required by the regulation is a preexisting duty, and a preexisting duty cannot furnish consideration for a contract." *Id. at* 174. The hospital did not assume any obligations that the regulation did not already require. *Id*.

Likewise, in *Pressman v. United States*, the plaintiff sued for breach of contract to enforce regulations governing the confidentiality of bids submitted to the government by private contractors. 33 Fed. Cl. 438, 442 (1995) *aff'd*, 78 F.3d 604 (Fed. Cir. 1996). The court found that these regulations did not bind the agency against the plaintiff because it had made no offer to him regarding

confidentiality. *Id*. at 444. And even if such an offer were made, "[a] promise by a government employee to comply with the law does not transform statutory or regulatory obligations to contractual ones. The violation of the statute or regulation will not be enforceable through a contract remedy." *Id*. Again, unlike here, the agency did not assume any obligations that the regulation did not already require.

Here, MDOC's contractual obligations to pay for "time worked" and to comply with the FLSA are not nullities. They are components of a larger mosaic of mutual obligations, duties, and protections that governed most all facets of the parties' employment relationship. The Officers have properly sought to enforce those obligations through a breach of contract claim, based on a contract that the Missouri appellate courts have already enforced against MDOC. Point III should therefore be rejected.

IV. The Trial Court Properly Excluded MDOC'S Expert Witnesses (Responds to Point IV)

A. Standard of Review

The Officers agree that abuse of discretion is the proper standard of review. A ruling constitutes an abuse of discretion when it is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2007).

A trial court "enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Moore v. Ford Motor Co.,* 332 S.W.3d 749, 756 (Mo. banc 2011). "By both statute and rule, an appellate court is not to reverse a judgment unless it believes the error committed by the trial court against the appellant materially affected the merits of the action," *Lozano*, 421 S.W.3d at 451-52, or "that the improperly excluded evidence would have changed the outcome of the trial," *Am. Family Mut. Ins. v. Coke*, 413 S.W.3d 362, 372 (Mo. App. E.D. 2013). MDOC, as the appellant, bears the burden of proving this abuse of discretion

and prejudice. *Jones v. City of Kansas City*, 569 S.W.3d 42, 53 (Mo. App. W.D. 2019) (citation omitted).

B. The Admissibility of Rogers's Opinion Is Not At Issue

It is critically important to remember what MDOC is alleging as error and what it is not. On appeal, MDOC alleges only that the trial court erred in excluding its experts, Chester Hanvey and Elizabeth Arnold, from testifying at the damages trial. It is not challenging the trial court's denial of its own motion to strike the Officers' expert, William Rogers, Ph.D. Yet MDOC broadly challenges Rogers's methodology with eleven attacks on his opinions. (App. Sub. Br. at 89-99.) These criticisms were only relevant when the trial court was considering MDOC's motion to strike Rogers, an issue exclusively within the trial court's purview.

The trial court serves as the gatekeeper concerning expert testimony. *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. App. E.D. 2018). If an expert fails the admissibility standards established by § 490.065, RSMo, the testimony is inadmissible and the jury never hears it. By extension, "[a]lthough calculation of the amount of damages is a factual determination [for the jury], the formula used in making that calculation is a question of law [for the court]." *Childress v. Ozark Delivery of Missouri L.L.C.*, No. 09-cv-03133, 2014 WL 7181038, at *5 (W.D. Mo. Dec. 16, 2014). Here, the trial court held, as a matter of law, that Rogers's methodology met all requirements for admissibility.

(D329.) Therefore, any criticism by Hanvey and Arnold as to whether Rogers used or applied the correct methodology has become irrelevant and moot because MDOC chose not to appeal Rogers's admissibility. Only those opinions that went towards measuring damages (*e.g.*, time taken for pre- and post-shift activity, wage rates for Officers, and discount rates applied) are before this Court.

This distinction is critical because (as shown below) most of Hanvey and Arnold's opinions that MDOC claims the jury should have heard concern whether Rogers's testimony was admissible as a threshold matter. For example, the debate over whether Rogers used a 40-hour workweek or an 8-hour workday go directly to the propriety of the formula Rogers employed.[10] (App. Sub. Br. at 94-95.) That testimony obviously challenges the formula Rogers used, and MDOC raised the issue in its motion to strike Rogers. (D294 at 23-24.) The trial court considered and rejected this challenge, allowing Rogers to testify at trial, but whether the trial court erred in making that decision is not before this Court because MDOC chose not to appeal that order. *See Boyer v. Grandview Manor Care Ctr., Inc.*, 793 S.W.2d 346, 347 (Mo. banc 1990) (issues not preserved on appeal "are abandoned and will not be considered"). And the jury should not have heard any evidence concerning

[10] As explained in Section IV.G *infra*, Rogers complied with the 40-hour workweek requirement.

whether Rogers adequately addressed the 40-hour workweek rule because it was a question of law. *Childress*, 2014 WL 7181038, at *5.

Nevertheless, MDOC engages in a broadside attack on Rogers, using its experts as weapons. But most of these attacks go towards whether the trial court should have allowed Rogers to testify in the first place. Therefore, it is important to keep in mind whether Hanvey and Arnold's criticisms go towards Rogers's admissibility (an abandoned and moot issue) or towards helping the jury measure damages (the only remaining relevant issue). Employing this distinction reveals that most of MDOC's complaints about the exclusion of Hanvey and Arnold fall into the former category.

As MDOC spends countless pages attacking Rogers in Points IV and V of its substitute brief, the Officers feel compelled to respond, even though MDOC's attacks are irrelevant. The Officers defense of Rogers is in Section IV.G *infra*, but at this time, they turn to the real issue preserved on appeal: whether the trial court erred in excluding Hanvey and Arnold from the damages trial – not whether Hanvey's opinions should have been considered as part of the liability, certification. or Rogers admissibility determinations.[11]

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[11] Arnold did not offer separate opinions or affidavits, and her opinions duplicated Hanvey's. MDOC withdrew Arnold as a witness and advised the trial court: "We're not gonna bring Miss Arnold." (Tr. 255) She did not testify at the hearings on admissibility of MDOC's expert witnesses or provide an offer of proof. MDOC's allegation of error concerning Arnold is not preserved. (continued on following page)

C. The Trial Court Excluded MDOC's Experts On A Robust Record

Although this case was pending for six years with large potential damages obviously at stake, MDOC waited until two months before trial to retain Hanvey and Arnold. Its efforts were belated, incomplete, and flawed – based on inaccurate facts and data, bad assumptions, and unreliable methodologies – and the trial court properly excluded them after careful consideration, extensive briefing, and a detailed review of MDOC's late and incomplete expert disclosures.

After the Officers moved to exclude Hanvey and Arnold, the trial court held detailed hearings in March 2018 (where Hanvey testified) and May 2018, (Tr. 68-104, 160-170); entertained a motion to reconsider Hanvey's exclusion in June 2018, (Tr. 254-266; D331); and heard MDOC's offer of proof at trial, where Hanvey testified a second time and MDOC again moved for reconsideration, (Tr. 1801-80). The trial court's original ruling, and subsequent decisions affirming that ruling, were based on a fulsome consideration of Hanvey and Arnold's opinions and multiple rounds of briefing, including MDOC's late-filed memoranda and affidavits. (D278; D281-D289.) MDOC received notice and ample opportunities to defend and rehabilitate Hanvey and

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Huelster v. St. Anthony's Med. Ctr., 755 S.W.2d 16, 17 (Mo. App. E.D. 1988); *Terry v. Mossie*, 59 S.W.3d 611, 612 (Mo. App. W.D. 2001).

Arnold, eliminating any notion that the proceedings below lacked fundamental fairness.

D. MDOC's Untimely and Incomplete Disclosures Alone Justify Exclusion

MDOC argues that the record does not support the trial court's exclusion of its experts as a discovery sanction primarily because the Officers' motion was not framed as one for sanctions. (App. Sub. Br. at 100-02.) This ignores the broad discretion a trial enjoys in evidentiary matters:

> [I]t is well settled that if the action of the trial court was proper on any ground, although not asserted, such action will be upheld. The admission, exclusion, striking, or refusal to strike evidence is not reversible error where it is proper on any ground, even though not proper on the ground stated in the objection or ruling. In such case it is immaterial on what ground the objection or ruling was made or whether such ground is good; and the sufficiency of the reason need not be considered.'

Franklin v. Friedrich, 470 S.W.2d 474, 476 (Mo. 1971); *accord Lozano*, 421 S.W.3d at 451. Moreover, "Missouri caselaw has consistently held that courts have broad discretion to strike expert witnesses who are not timely filed," *Scheck Indus. Corp. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 718 (Mo. App. E.D. 2014), or for whom "new or different facts not previously disclosed" and relied upon are untimely disclosed, *Beaty v. St. Luke's Hosp. of Kansas City*, 298 S.W.3d 554, 560 (Mo. App. W.D. 2009). "[U]ntimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that *prejudice may be inferred*." *Wilkerson v. Prelutsky*, 943 S.W.2d 643,

649 (Mo. banc 1997) (emphasis added). Exclusion of experts based on their untimely disclosure is therefore routinely upheld. *See*, *e.g.*, *id.*; *Hancock v. Shook*, 100 S.W.3d 786, 798 (Mo. banc 2003) (trial court properly tailored remedy "to the harm it perceived"); *Jones*, 569 S.W.3d at 61 (upholding exclusion of expert not disclosed in interrogatories or other communications with counsel); *Beaty*, 298 S.W.3d at 560 (trial court properly excluded expert testimony based on examination performed on eve of scheduled trial testimony); *State ex rel. Mo. Hwy. and Transp. Comm'n v. Pully*, 737 S.W.2d 241, 245 (Mo. App. W.D 1987) (supplemental expert disclosures four months before trial were properly excluded as unseasonable).

> Because the trial court has considerable discretion over discovery and the admissibility of evidence…, the question before this Court is not whether it necessarily agrees with the course taken by the trial court. Rather, it must be determined if there was a reasonable basis for the action taken.

Hancock, 100 S.W.3d at 798.

Here, Rule 56.01(b)(6) "provides a 'bright line' rule that all material given to and reviewed by a testifying expert must, if requested, be disclosed." *Edwards v. Mo. State Bd. of Chiropractic Exam'r*, 85 S.W.3d 10, 27 (Mo. App. W.D. 2002). "Missouri cases require an expert to produce at deposition the materials that the expert has reviewed in order that the opposing attorney be able to 'intelligently cross-examine the expert concerning what facts he used to formulate his opinion.'" *Id.* (quotations omitted). This "includes both trial

preparation materials and opinion work product that is given to and reviewed by the expert." *Id*.

On the eve of the hearing on the motions to exclude MDOC's experts and to decertify the class, MDOC produced more than 1,000 pages from Hanvey's files (including 220 pages of emails with counsel) and a 20-page "affidavit" by Hanvey supporting decertification. (D278; Tr. 90-93, 160). This production came over a month after Officers deposed Hanvey and Arnold and three weeks after the trial court ordered "no further discovery." (D280). The Officers repeatedly objected to the untimely disclosure of Hanvey's opinions and files. (Tr. 90, 91, 92.)

Officers complained of MDOC's "sandbagging technique," noting that MDOC possessed the documents for over three weeks before producing them but did not provide them at Hanvey's deposition. (*Id*.) The 20-page affidavit was "really an expert report, way beyond the time of disclosure." (Tr. 91.) The Officers argued that "you can't not disclose an expert and kind of half-disclose him." (Tr. 92.) Counsel for the Officers informed the trial court that he "repeatedly e-mailed and requested these documents," and MDOC admitted that it was "material that should have been provided earlier." (Tr. 98-99.)

The trial court expressed incredulity that Hanvey and Arnold had conducted their study six years after the case was filed and just a few weeks before trial. It asked MDOC why it had not "bother[ed] to get an expert until

two months before trial?". (Tr. 95-96.) The trial court did "not understand that strategy" to "not have their own expert on line ready to go." (Tr. 96-97). Finally, the trial court expressed frustration with MDOC's untimely disclosures, noting that "[y]ou can't be pulling stuff out at the last minute." (Tr. 101.) Even after this admonition, Hanvey continued to revise his opinions, offering entirely new and previously undisclosed damage calculations at an offer of proof conducted the day before the verdict and three months after he was excluded. (Tr. 1845).

MDOC'S defense of Hanvey offers almost no justification for the paltry studies and belated reports it submitted. This record supports the trial court's decision to exercise its broad discretion to exclude Hanvey and Arnold. The Officers' objections to MDOC's untimely production of those experts' files were made orally during the March 14, 2018 hearing, (Tr. 90-91), because the disclosures were made only 24 hours earlier.[12] MDOC has failed to meet its burden of showing that the trial court abused its discretion in excluding Hanvey and Arnold and, as the Western District concluded, the exclusion can and should be affirmed based on the untimely disclosures alone. *Hootselle v. Mo. Dep't of Corrections*, No. WD82229, 2019 WL 4935933, at *6 (Mo. App. W.D. Oct. 8, 2019).

[12] MDOC argues that the Officers' counsel conceded during oral argument before the Western District that Hanvey and Arnold were not struck as a sanction. (App. Sub. Br. at 100.) In fact, counsel expressly stated that MDOC's conduct informed the trial court's decision on admissibility.

E. MDOC's Experts Do Not Meet the Criteria of § 490.065

Missouri has adopted provisions of Federal Rules of Evidence 702 through 705, with courts looking to the factors announced in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), for admission of expert testimony. § 490.065, RSMo, Sub. App. A2; *Jones*, 569 S.W.3d at 53-54. "[F]ederal precedent construing those rules is strong persuasive authority for how we should view admissibility." *Gardner*, 562 S.W.3d at 317. Under *Daubert*, the trial judge is the gatekeeper tasked with screening out "any and all scientific testimony or evidence" unless it is "relevant" and "reliable." 509 U.S. at 589; *Gardner*, 562 S.W.3d at 318-19. "[T]he objective of the trial court's gatekeeping function under *Daubert* is 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Gardner*, 562 S.W.3d at 318 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)).

1. Hanvey and Arnold 's Testimony on Damages Was Not Reliable.

Section 490.065 permits expert testimony "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." § 490.065.2(1)(a), RSMo, Sub. App. A2. "The adjective 'scientific' implies a grounding in the methods and procedures of

science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. The test is "flexible," and "the law grants a [trial] court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co.*, 526 U.S. at 141-42.

a. <u>Hanvey's opinions lacked a sufficient factual foundation.</u>

"A witness … may testify in the form of an opinion or otherwise if … the testimony is based on sufficient facts or data." § 490.065.2(1)(b), RSMo, Sub. App. A2. "[W]here the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *Sterling v. Redevelopment Auth. of Philadelphia*, 836 F. Supp. 2d 251, 272 (E.D. Pa. 2011). Courts must independently evaluate whether the expert's reliance is reasonable, and "the standard is equivalent to Rule 702's reliability requirement–there must be good grounds on which to find the data reliable." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 748 (3rd Cir. 1994); *see also Carrelo v. Advanced Neuromodulation Sys., Inc.*, 777 F. Supp. 2d 315, 319-20

(D.P.R. 2011) (excluding preliminary report where expert failed to review relevant documentation).

MDOC argues that Hanvey's inability to extrapolate his data to all Officers is irrelevant because he was a rebuttal witness. However, "rebuttal experts must meet *Daubert's* threshold standards regarding the qualifications of the expert, sufficiency of the data, reliability of the methodology, and relevance of the testimony." *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 44 (S.D.N.Y. 2016); *see also Kumho Tire Co.,* 526 U.S. at 147 ("The initial question before us is whether this basic gatekeeping obligation applies only to 'scientific' testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.")*; Lucky Brand Dungarees, Inc. v. Ally Apparel Res. LLC*, No. 05-cv-6757, 2010 WL 167948, at *1 (S.D.N.Y. Jan. 13, 2010) (excluding expert who "fail[ed] to identify pertinent facts, data, principles, and methods or to demonstrate that [he] ha[d] applied reliably pertinent principles and methods to the facts of this case"). So, while Hanvey was not obligated to provide his own damages calculations, his critique of Rogers must have been based on sufficient facts and data. It was not.

i. The study was preliminary and incomplete.

"In order to draw reliable conclusions about a population based on a statistical sample, the sample size must be large enough to support those conclusions." *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 984 F.

Supp. 2d 1021, 1033 (C.D. Cal. 2013); *see also Hostetler v. Johnson Controls, Inc.*, No. 15-cv-226, 2016 WL 3662263, at *12-13 (N.D. Ind. July 11, 2016) (excluding as unreliable an expert survey whose results could not be reliably extrapolated from the sample to the class as a whole). Hanvey and Arnold never completed a full analysis (likely because of their late retention). They spent only 3 hours at 10 prisons in 3 days, interviewing only 1 to 2 people at each site. (D274.) Hanvey himself only interviewed 6 to 8 people at 6 institutions over 2 days. (Tr. 1853-54.) The subjects were almost exclusively wardens, whose interviews were scheduled by MDOC's counsel. (Tr. 1856, 1861.) And as Hanvey testified at the offer of proof, "None of what [he] did, the documents [he] showed, [his] site visits – [he] and [Arnold] only talked to less than 30 people. – none of that could be extrapolated to the class as a whole." (Tr. 1855.)

MDOC's experts, collectively, only observed one to two shift changes at each facility, (D275); they failed to investigate whether the activities they observed were consistent with the activities for which Officers seek compensation, (D272 at 95:16-23); and they failed to ascertain whether they were observing Officers, visitors, volunteers, or food service personnel, (D275). Arnold even testified that "[t]he interview and site visits were just preliminary. They were not intended to be a representative sample … It was not intended to be a complete study." (D272 at 125:2-8; *see also id*. at 139:11-13) (admitting

that it would be "inappropriate" to extrapolate any information from their "preliminary observation[s]"). Hanvey admitted that he "can't extrapolate the information you got here to the class as a whole" or "to anywhere at all." (D273 at 70:24-71:1; *id.* at 70:17-21; Tr. 1855.) He could only testify to what he saw at the facilities. (Tr. 1856.)

ii. Hanvey and Arnold cherry-picked "facts and data."

Hanvey and Arnold ignored most of the discovery that was developed in this matter over six years, involving dozens of witnesses, thousands of documents, and multiple sworn responses to interrogatories and requests for admission. (Tr. 1850-51, 1864-65; D273 at 49:1-50:1; D272 at 123:16-124:24.). They limited their requests for information to what Hanvey "thought was necessary to support my opinions and didn't ask for anything beyond that." (Tr. 1861-62.) Hanvey interviewed the wardens for the express purpose of highlighting allegedly non-compensable work (an irrelevant issue at trial given the summary judgment ruling). (Tr. 1859-60, 1866.) Moreover, the opinion that none of the pre- and post-shift activity was consistently performed by all Officers contradicts MDOCs sworn responses to interrogatories and requests for admission. (D424 ¶¶44, 58-63, 71-80.) This alone warrants exclusion. *See United States v. Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004) ("Expert testimony should not be admitted when … facts of the case contradict or

otherwise render the opinion unreasonable."); *cf. PODS Enters., Inc. v. U-Haul Int'l, Inc.*, No. 12-cv-01479, 2014 WL 12628664, at *4 (M.D. Fla. June 27, 2014) (reliance on one-sided data from employer and failure to apply any analytical methodology renders opinions unreliable and inadmissible); *Barber v. United Airlines, Inc.*, 17 Fed. App'x 433, 437 (7th Cir. 2001) (excluding expert who cherry-picked facts and "did not adequately explain why he ignored certain facts and data, while accepting others").

"Trained experts commonly extrapolate from existing data," but "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Hurt v. Commerce Energy, Inc.*, the court excluded the expert's survey in an FLSA case noting that, "[f]or the survey's results to be accurate, it must use a sampling method that ensures the sample is representative of the entire population." No. 12-cv-00756, 2015 WL 410703, at *5 (N.D. Ohio Jan. 29, 2015). Hanvey likewise admitted that he could not extrapolate ""to anywhere at all" because his study was only preliminary, despite the litigation entering its sixth year. (Tr. 1855.) His and Arnold's meager, hurried, and incomplete study thus fails to meet this basic requirement of representative evidence or the "sufficient facts and data" prong of § 490.065.

b. Hanvey and Arnold's methodology was unreliable.

"[N]othing … requires a [trial] court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. An expert must have "reliably applied the principles and methods to the facts of the case." § 490.065.2(1)(d), RSMo, Sub. App. A3. "The expert's assurances that he has utilized generally accepted scientific methodology is insufficient." *SJB Group, LLC v. TBE Group, Inc.*, No. 12-cv-181, 2013 WL 7894677, at *1 (M.D. La. Sept. 6, 2013).

Hanvey based his opinions, in part, on interviews of six wardens. (Tr. 1853; D274.) When those wardens faced cross-examination at trial, they were shown to be wholly unreliable, providing testimony inconsistent with MDOC's sworn discovery responses and their own interviews with Hanvey. For example, Warden Stanley Payne testified that he never timed or measured pre- and post-shift activity, (Tr. 1745, 1747); that his estimates were for him and not class members, (Tr. 1746-47); and that these estimates were a "guess" that could be wrong, (Tr. 1747.) After lengthy questioning, Payne finally admitted that the Officers performed at least 20 minutes of pre- and post-shift activity per shift. (Tr. 1749-56.) Worse still, Warden Richard Stepanek's trial testimony contradicted MDOC's sworn interrogatory answers and requests for admissions, (Tr. 1587-1592), and given the surprise and prejudice that

resulted, the trial court struck his testimony, (Tr. 1598-1603). Hanvey and Arnold's methodology, employing unreliable interviews, in turn renders their opinions unreliable.

c. <u>Hanvey and Arnold's opinions were based on incorrect assumptions.</u>

Hanvey and Arnold's opinions started from the incorrect premise that "Rogers' analysis assumed that all officers across all 21 facilities spent similar amounts of time engaged in pre- and post-shift activities." (App. Sub. Br. at 47.) But MDOC "maintains entry and exit logs, either using electronic swipe cards or handwritten logs, *at each facility*," (D424 ¶105 (emphasis added)), and Officers "are required to use the electronic or handwritten logs to record their entry and exit from [MDOC]'s facilities," (*Id.* ¶106). Thus, Rogers did not assume all time was the same. Quite the opposite, he used MDOCs data to calculate, *by facility*, the time Officers spent on pre- and post-shift activity specifically because "the distribution of hours work[ed] varie[d] by site." (D417 at 6; D263; D264.)

Rogers computed damages using a commonly accepted methodology, "multiply[ing] one and one-half times the regular rate of pay by the number of hours worked in excess of forty [hours]." *Childress*, 2014 WL 7181038, at *5. MDOC kept imperfect records, so hours and wages had to "be estimated with the available information." (D417 at 3.) In the absence of timeclocks, the entry

and exit logs were "'the only practicable means to collect and present relevant data' establishing [MDOC]'s liability," but they were incomplete. *Tyson Food, Inc. v. Bouaphakeo* ("*Bouaphakeo II*"), 136 S. Ct. 1036, 1046 (2016). (*See also* D417 at 17-19) (discussing available records and how Rogers filled the gaps); (D315 at 2) (noting that "security records, while not intended to record time for pay, are nonetheless the only direct record of correction officers' work hours"). Recognizing these limitations, Rogers used his professional judgment to calculate overall mean time spent inside the security envelope, using a different mean *for each facility* to calculate the total loss by facility. (*Id*. at 9-10.)

These calculations satisfied the relaxed burden of proof required in cases where the employer failed to keep comprehensive records established in *Bouaphakeo II*, 136 S. Ct. at 1047. *See also infra* Section V.C.2. Rogers made reasonable inferences using available data following the same formulas used in other wage and hour cases. *See infra* Section IV.G. This sort of representative evidence is widely accepted in these types of wage and hour cases, where employers have breached their duty to keep proper records. *See infra* Section V.C.2. And Hanvey and Arnold's assumptions that Rogers assumed all officers at all facilities spent similar amounts of time on the disputed tasks was wrong.

2. Hanvey and Arnold's Testimony Was Not Legally Relevant.

MDOC argues that their experts' exclusion prejudiced it only at the damages trial, not during any other stage of the proceedings. (App. Sub. Br. at 89.) But once the trial court entered summary judgment, the bulk of those experts' opinions became irrelevant.

Hanvey's affidavit "focused only on findings related to the degree of variability … between COIs and COIIs with respect to the pre-shift and post-shift activities they may perform and factors which may influence these activities," which Officers had already admitted. (D278 ¶5.) His observations "[we]re meant to address the assumption that all time spent by all employees within the security envelope is compensable." (*Id.* at 19.) These variability conclusions were legally irrelevant at trial because the trial court, through summary judgment, had already determined that all pre- and post-shift activity was compensable. The only portions of Hanvey and Arnold's opinions that remained relevant were those regarding distance and time. These topics were well covered by other witnesses at trial, and their opinions would have been cumulative of the testimony of numerous trial witnesses.

"[E]xpert testimony is appropriate when the witness has knowledge or skill in an area about which the jury lacks common knowledge or experience." *State v. Ford*, 454 S.W.3d 407, 414 (Mo. App. E.D. 2015). Hanvey and Arnold's

opinions fail this criterion. They used a cell phone stop watch to time people walking between points in the prisons and asked a few wardens how long the disputed activities took. (D272 at 6; D274.) This only echoed the testimony of Officers and wardens at trial and would not have helped the jury. (Tr. 553-61, 1311-23, 1526-34, 1646-48, 1765-66.) *See also State v. Carter*, 889 S.W.2d 106, 110 (Mo. App. E.D. 1994) (cautioning against identifying lay witnesses as experts because they are given more weight by the jury).

The jury heard multiple witnesses testify that there were variations in the order and duration of the Officers' pre- and post-shift activity. MDOC asked Officers, wardens, and executive staff *ad infinitum* about the specific pre- and post-shift activities they performed, how long each activity took, and how long they spent inside their facilities each day. (Tr. 534-38, 1094-98, 1308-23, 1526-34, 1645-48, 1763-80.) The jury was therefore well aware of variations Hanvey and Arnold identified, and "a challenge to the thoroughness of [Rogers's] report was already before the jury." *Coke*, 413 S.W.3d at 373.

MDOC's attempt to offer Hanvey's testimony on these subjects was tantamount to an "effort to 'launder' the facts through an 'expert' in order to provide undeserved substantiation for [MDOC's] views." *Claflin v. Shaw*, No. 13-cv-5023, 2013 WL 6579698, at *2 (W.D. Mo. Dec. 13, 2013). "Expert testimony is not designed to provide an 'imprimatur of officialness' or endorsement to ordinary facts; it is designed to help a jury understand facts of

a technical, scientific or specialized nature." *Id*. It is not permissible for Hanvey to "parrot a witness's prior statement without use of that statement to support a larger point." *Scott*, 315 F.R.D. at 47; *cf. Davolt v. Highland*, 119 S.W.3d 118, 133 (Mo. App. W.D. 2003) (hearsay may be used "only as a background for [expert] opinion and [may] not [be] offered as independent substantive evidence"). As in *Scott*, Hanvey "offers no independent analysis or conclusion" as to whether the "data" he gathered was extrapolatable to the class, and his repetition of witness interviews would not help a jury understand the information. 315 F.R.D. at 47. Moreover, Payne and Stepanek's trial testimony shows the danger of permitting testimony parroted by experts, as Payne's testimony was so limited as to not be helpful and the trial court struck Stepanek's testimony. (Tr. 1602.) As a result, Hanvey and Arnold's testimony is not admissible under § 490.065. *Claflin*, 2013 WL 6579698, at *2.

F. MDOC Was Not Prejudiced By the Exclusion of Its Experts

"Exclusion of evidence does not result in reversible error unless it would have changed the outcome." *State ex rel. Mo. Highway & Transp. Comm'n v. Buys*, 909 S.W.2d 735, 739 (Mo. App. W.D. 1995). The trial court's exclusion of Hanvey "did not create a substantial and glaring miscarriage of justice" because his testimony was cumulative of the challenges that others made to Rogers at trial. *Cok*e, 413 S.W.3d at 373.

1. MDOC Challenged Rogers's Opinions at Trial.

MDOC first asserts prejudice by claiming that Hanvey's testimony would have shown that Rogers was an economist inexperienced in calculating wage and hour losses. (App. Sub. Br. at 89-90.) But the jury heard that this was Rogers's first time testifying at trial, first time offering an opinion on unpaid overtime, that he did not speak to any Officers or visit any facilities, and that he relied entirely on information provided by class counsel. (Tr. 662, 829-33.) The trial court also gave MDOC wide latitude in its cross-examination, and Rogers was questioned at length about 7-hour, 10-hour, and 12-hour shifts and his methodology for calculating time spent outside the security envelope. (Tr. 838-45) As a result, Hanvey and Arnold's testimony on these subjects would have been cumulative. *Cok*e, 413 S.W.3d at 373.

2. Evidence of Personal Activities was Legally Irrelevant.

MDOC next complains that Hanvey and Arnold could have rebutted Rogers's incorrect assumption that all pre- and post-shift activity was compensable. (App. Sub. Br. at 90-91.) But whether Officers' time was compensable was already decided as a matter of law, and the jury was only tasked with calculating damages. (D493, Sub. App. A41.) As a result, Hanvey and Arnold's opinions on this subject were rendered irrelevant by the continuous workday rules.

"Under the FLSA, the 'workday' is 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *Helmert*, 805 F. Supp. 2d at 658 (quoting 29 C.F.R. § 790.6(b), Sub. App. A36). MDOC's argument attempts to circumvent this principle by arguing that Hanvey and Arnold should have been permitted to testify that "numerous non-compensable activities were performed inside the security envelope, including using a weight room." (App. Sub. Br. at 90.) "Although this is a legitimate concern, it is not a basis for avoiding the [continuous] workday doctrine." *Helmert*, 805 F. Supp. 2d at 668.

> [I]t is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13, Sub. App. A30. Thus, as in *Helmert*, MDOC "has the authority to manage its employees' continuous workday so as to avoid idle wait time. [It] can control when its employees arrive to and leave from the [prisons] and the activities they engage in while at the [prisons]." 805 F. Supp. 2d at 668. Quite simply, the fact that Officers might get a cup of coffee or engage in other personal time does not excuse MDOC's compliance with the continuous workday rule. Evidence of such conduct, through Hanvey and Arnold, to rebut Rogers's report was not legally relevant, and was properly excluded.

Regardless, the jury heard such testimony. Plaintiff Dicus, admitted the non-controversial point that Officers used a weight room. (Tr. 530-31, 535-36.) MDOC Director Cindy Griffith testified at trial that she "went to the training room and watched TV and drank coffee with everybody else while [she] was waiting for the shift to start." (Tr. 1689.) More importantly, MDOC cross-examined Rogers about including this time in his calculations, and he countered that he did not include any shifts longer than 8.75 hours, which avoided including weight room time and the like. (Tr. 723, 837; D417 at 6.)

3. Alleged Variations in Activities Would Relate Only to Legal Issues

MDOC next complains that Rogers "overlooked wide variations in pre-shift and post-shift activities." (App. Sub. Br. at 93.) This is the sort of issue that had no relevance at the damages trial. It is also contrary to MDOC's interrogatory responses, which conclusively established that the Officers perform nearly identical activities. (D412 at 4, 7-8, 12-13, 16, 19-20, 23, 26-27, 29-30, 33, 36-37, 39-40, 43, 46-47, 50, 53, 56-57, 60, 63-64, 67, 70-71.) Based at least in part on these admissions, the trial court certified the Class and entered summary judgment for the Officers. (D473.) As a result, Hanvey and Arnold's "opinions" that Rogers should have considered these variations, which we have seen cannot be extrapolated to anything, had no relevance to the sole issue at trial, damages.

4. Criticisms of Rogers's Methodology Were Untimely and Irrelevant

As previously noted, Hanvey and Arnold's criticisms of Rogers's methodology relating to the 40-hour workweek raised legal issues that were decided by the trial court and were appropriately not before the jury at trial. *See supra* Section IV.B. Even if these criticisms were somehow relevant, MDOC failed to disclose Hanvey's analysis of Rogers's R script code, or the calculations Hanvey made using that code, until the first day of trial, months after discovery was closed and Hanvey was excluded. (App. Sub. Br. at 95-96, 98; Tr. 745-48, 752, 1846-47.) The trial court's exclusion of this evidence was well within its discretion. (Tr. 754.)

G. Rogers Correctly Computed Damages

The Officers addressed MDOC's arguments concerning Rogers' report at length in opposing MDOC's motion to strike Rogers's opinions. (D312.) Rogers's analysis is sound. So much so that MDOC chose not to challenge the trial court's order allowing him to testify.

To calculate damages, Rogers followed standard practices and had to "multiply one and one-half times the regular rate of pay by the number of hours worked in excess of forty [hours]." *Childress*, 2014 WL 7181038, at *5. Determining the regular rate of pay was straight-forward: "Earnings data were collected from the Missouri Accountability Portal and the Bureau of

Labor Statistics' Occupational Employment Statistics summaries … for all available years on and after 2007." (D417 at 3, 4.) Rogers adjusted the mean wages for inflation per year for Officers. (*Id.* at 4.)

Next, Rogers had to calculate the "hours worked in excess of forty [hours]." MDOC made this difficult because it did not keep accurate time records, did not have their hourly employees clock in and out, and did not track pre- and post-shift time. (D315 at 1-2; *see also* D349 at 3) (outlining MDOC's failure to keep or produce these records). Hanvey agreed that this data did not exist. (Tr. 1873-74.) But MDOC's violation of its "duty to keep proper records" cannot make the Officers' burden of proving damages "an impossible hurdle." *Bouaphakeo II*, 136 S. Ct. at 1047 (quoting *Anderson v. Mt. Clemens Pottery Co.* ("*Mt. Clemens*"), 328 U.S. 680, 687 (1946) *superseded on other grounds by statut*e, Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, *as recognized in Alvarez*, 546 U.S. 21) (alterations in original); *accord Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 100 (Mo. App. E.D. 2014). Thus, Rogers appropriately used the best available information to show "the amount and extent of [Officers'] work as a matter of just and reasonable inference." (D315 at 1.)

To determine the number of hours worked in excess of 40, Rogers first determined the amount of uncompensated time per shift. (D417 at 5-8.) Entry and exit logs were "the only practicable means to collect and present relevant

data" establishing this. *Bouaphakeo II*, 136 S. Ct. at 1046; (D315 at 1-2); (*see also* D417 at 17-19) (discussing available records and how Rogers filled the gaps); (D315 at 2) (noting that "security records, while not intended to record time for pay, are nonetheless the only direct record of correction officers' work hours"). Using nearly 1.4 million data points gleaned from these security records, Rogers determined the average time spent on pre- and post-shift activities. (Tr. 902; D417 at 5-9.) Because Rogers had data from each facility, he was able to calculate a different average for each facility. (D417 at 7-8.)

With the amount of uncompensated time per shift in hand, Rogers needed to determine total days worked.

> Employment data were collected from the BLS's Occupational Employment Statistics summaries (Source 56) for the State of Missouri and Department of Corrections list of sites (Source 4). Total weeks worked was estimated using the full-time equivalent (FTE) employment as provided by the Department of Corrections list of sites (Source 4), and adjustments were made to account for regular time off including all forms of absences.

(D417 at 4.) Rogers did not create the concept of FTEs for this litigation. Rather, MDOC uses FTEs to track the full time equivalent correctional officer positions budgeted each year. (Tr. 708, 902; Sub. App. A83.)

Rogers adjusted these budgeted FTEs because MDOC employed some unbudgeted Officers every year. (D417 at 4 n.3). He also reduced the number of FTEs at each institution by 19 percent to ensure that he only accounted for

Officers working full time, to account for time off and underfilled positions, and to provide a conservative damage figure.[13] (D417 at 4, 16; Tr. 710.) The use of FTEs, coupled with this reduction, ensured no extra time was included in Rogers's calculations and resolved issues with 10- and 12-hour shifts.[14] Rogers then converted the FTEs to weeks and shifts to account for the 40-hour workweek:

Table 2: FTEs to Annual Week and Annual Shift Conversion

Year	FTEs	Annual Weeks	Annual Shifts
2007	5,433	237,284	1,186,421
2008	5,433	237,284	1,186,421
2009	5,433	237,284	1,186,421
2010	5,402	235,966	1,179,832
2011	5,314	232,083	1,160,413
2012	5,346	233,512	1,167,561
2013	5,345	233,468	1,167,342
2014	5,359	234,065	1,170,326
2015	5,263	229,876	1,149,380
2016	5,244	229,046	1,145,231

(D417 at 5.) Finally, Rogers multiplied these variables to calculate the wage losses at each MDOC institution:

[13] Rogers's 19 percent reduction of FTEs likely underestimated the damages as evidence indicated understaffing was probably between 7 and 10 percent. (Tr. 1605, 1627, 1785).

[14] Appellant's designees testified that most shifts were 8-hour shifts. (Tr. 1477.) Hanvey also admitted on cross-examination in the offer of proof that most of the Officers worked 8-hour shifts. (Tr. 1872.)

Table 8: Total Real Losses with Five Additional Minutes (Measured In Dollars)

Center Name	+15 Min.	+30 Min.	+45 Min.	Total
Algoa Correctional Center	965,500	1,866,120	1,475,198	4,306,818
Boonville Correctional Center	761,801	2,007,903	1,477,114	4,246,818
Central Missouri Correctional Center	24,754	26,254	12,530	63,538
Chillicothe Correctional Center	1,716,835	2,396,061	1,187,726	5,300,621
Crossroads Correctional Center	2,321,144	850,380	141,996	3,313,520
Eastern Rcp & Dgn Correctional Center	3,042,879	3,014,141	715,412	6,772,432
Farmington Correctional Center	1,980,813	3,368,040	2,194,766	7,543,619
Fulton Rcp & Dgn Correctional Center	2,268,990	1,969,330	323,852	4,562,172
Jefferson City Correctional Center	2,340,642	3,136,461	650,734	6,127,837
Maryville Treatment Center	629,915	879,126	435,782	1,944,823
Missouri Eastern Correctional Center	1,162,284	2,091,485	1,239,621	4,493,389
Moberly Correctional Center	1,545,315	2,156,683	1,069,066	4,771,065
Northeast Correctional Center	1,499,342	4,006,484	2,601,606	8,107,432
Ozark Correctional Center	624,000	453,096	51,201	1,128,297
Potosi Correctional Center	842,589	2,108,825	2,459,838	5,411,252
South Central Correctional Center	1,906,342	2,242,755	762,537	4,911,633
South East Correctional Center	1,668,159	2,328,128	1,154,052	5,150,339
Tipton Correctional Center	512,977	2,997,672	1,351,922	4,862,572
Western Mo Correctional Center	1,225,847	3,544,165	2,487,294	7,257,305
Western Rcp & Dgn Correctional Center	1,019,728	1,704,485	1,110,539	3,834,752
Womens East Rcp & Dgn Correctional Center	951,970	3,019,019	2,514,861	6,485,850
Total	29,011,825	46,166,615	25,417,645	100,596,086

(*Id*. at 11.)

After reaching his conclusions, Rogers cross-checked them with other estimates of time and damages to ensure that his method were sound. (D417 at 13.) For example, his calculations were in line with MDOC's own estimate in 2004 that compensating Officers for the disputed time would cost $7.5 million per year. (D417 at 13; D180 at 20, Sub. App. A85; Tr. 799-812.) They were also consistent with the DOL investigation finding a half hour per shift of unpaid time. (D417 at 13; Tr. 907; D267 at 2-3, Sub. App. A90-A91; D182 at 11, Sub. App. A88.)

In the end, Rogers's reasonable assumptions and his use of "a representative sample to fill an evidentiary gap created by [MDOC]'s failure to keep adequate records" are well accepted. *Bouaphakeo II*, 136 S. Ct. at 1047. They were also well challenged by MDOC in its motion to strike, (D294), and at trial. Hanvey and Arnold's critique of those calculations was unreliable, irrelevant, and cumulative of other evidence MDOC offered at trial. It came far too late in the litigation, and the trial court properly exercised its discretion and employed its gatekeeping function by excluding them. MDOC fails to show that this ruling changed the outcome at trial or was "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *McGraw v. Andes*, 978 S.W.2d 794, 801 (Mo. App. W.D. 1998). Moreover, as, at minimum, reasonable minds can differ on the exclusion of this testimony, the trial court did not abuse its discretion. The order granting the Officers' motion to exclude Hanvey and Arnold's testimony should be affirmed.

V. The Trial Court Properly Refused to Decertify the Officers' Class (Responds to Point V)

A. Standard of Review

The Officers agree that the standard of review for reviewing a refusal to decertify a class is abuse of discretion. "Determination of whether an action should proceed as a class action under Rule 52.08 ultimately rests within the sound discretion of the trial court." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003).

B. The Burden of Proof Lies With The Movant

Though the Western District has previously held that the party seeking certification bears the burden of proof when facing decertification, *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116 (Mo. App. W.D. 2012), it is an issue of first impression for this Court. Federal courts disagree on the question, and the Eighth Circuit weighed in four years after *Ogg*, holding that the burden is on the movant.[15] *See Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 831 n.5, 832 (8th Cir. 2016) (collecting cases). In *Day*, several years after the class was certified, notice was sent, classwide discovery was completed, and partial summary judgment was granted, the defendant moved to decertify the class. *Id.* at 831-32. Considering these circumstances, the Eighth Circuit found that

[15] The *Ogg* court did not have the benefit of the Eighth Circuit's opinion in *Day*. 382 S.W.3d at 116. However, it recognized that, "because Rule 52.08 is essentially identical to its federal counterpart, … Missouri courts frequently look to interpretations of Federal Rule 23 when interpreting Rule 52.08." *Id.*

"the proponent of a motion bears the initial burden of showing that the motion should be granted" and a "court maintains an independent duty to assure that a class continues to be certifiable." *Id.* at 832. It further noted that "law of the case" principles still apply. *Id.* Thus, placing the burden on the plaintiff in the context of decertification would "skew" incentives where notice was sent, discovery was taken, and summary judgment was entered. *Id.* "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Id. See also Vogt v. State Farm Life Insurance Co.*, 2018 WL 4937069, at *1 (W.D. Mo. October 11, 2018) (following *Day* and denying a motion for decertification).

Other courts have agreed with *Day*, recognizing that "[d]ecertification is a drastic step, not to be taken lightly." *Jammal v. Am. Family Ins. Group*, No. 13-cv-437, 2017 WL 3268031, at *2 (N.D. Ohio Aug. 1, 2017); *but see Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011) (party opposing decertification "bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met"). Decertification "is an 'extreme step,' *particularly at a late stage in the litigation*, 'where a potentially proper class exists and can easily be created.'" *Zimmerman v. Portfolio Recovery Assocs., LLC*, No. 09-cv-4602, 2013 WL 1245552, at *2 (S.D.N.Y. Mar. 27, 2013) (emphasis added).

"At a minimum, in such circumstances the [c]ourt must take into consideration that an eve-of-trial decertification could adversely and unfairly

prejudice class members, who may be unable to protect their own interests." *Langley v. Coughlin*, 715 F. Supp. 522, 552 (S.D.N.Y. 1989); *see also Woe by Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984) (expressing "concern[] about possible prejudice to members of a class who failed or were unable to take independent steps to protect their rights precisely because they were members of the class"). Accordingly, decertification should be denied "absent some significant intervening event, or a showing of compelling reasons to reexamine the question." *Brooks v. GAF Materials Corp.*, 301 F.R.D. 229, 230 (D.S.C. 2014). "Compelling reasons include 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Zimmerman*, 2013 WL 1245552, at 2.

Just as in *Day*, MDOC "had a full and fair opportunity to contest class certification." 827 F.3d at 832. The trial court certified the Officers' Class on February 11, 2015, and amended the class definition on September 29, 2015, only after extensive briefing, discovery, and a full hearing. (D60; D85.) MDOC raised all arguments in its original opposition that it does here: namely that individual issues relating to the time Officers spent performing pre- and post-shift activity defeats predominance and superiority. (D39.)

MDOC filed its first motion for decertification on February 9, 2018, less than a month before the March 5th trial date. (D220; D1 at 72.) The trial court denied the motion, (D325), and repeated motions for reconsideration and

decertification followed: on the eve of the June 2018 trial date, (D333); at the start and end of the August 2018 trial, (D501; D521; Tr. 1469); and as part of MDOC's post-trial motion for judgment notwithstanding the verdict, (D531). The trial court held four hearings and denied MDOC's motions on full discovery, briefing, and the trial record. (D14-34; D39-49; D56-57; D60; D66-68; D76-80; D82-85; D85; D220-51; D255-70; D277-79; D325; D333-39; D381; Tr. 68-145, 156-59, 1898-1901; Tr. – Hrg. on Mtn. for New Trial at 9-11 (Sept. 27, 2018).)

Each motion for decertification repeated the arguments in MDOC's original class certification opposition. (App. Sub. Br. at 106-115). MDOC argued in 2014 that differences in the order of operations, the time those activities take, individual issues surrounding damages, and the *de minimis* defense defeated certification. (D39 at 4-5, 10-19, 21-26.) It also successfully argued for a narrower statute of limitations in 2015. (*Id*. at 29-31; D85). These arguments were based on substantially similar evidence, and each subsequent motion for decertification echoed the first. (D220; D333; D501; D521; D531). The trial court recognized this, stating "[t]hose were issues that were brought up at the first time when I certified the class." (Tr. 156-159.)

MDOC's inability to identify a single compelling reason or intervening event justifying decertification, coupled with the motions' timing on the eve of trial three years after certification, justify the trial court's refusal to decertify

the Class. *Day*, 827 F.3d at 832; *see also In re Apple iPod iTunes Antitrust Litig.*, No. 05-cv-0037, 2014 WL 6783763, at *6 (N.D. Cal. Nov. 25, 2014) ("declin[ing] to revisit this previously resolved issue so soon before trial especially where no intervening events have led to changed circumstances"). MDOC failed to meet its burden, and the trial court appropriately exercised its discretion in denying its decertification motions. *Day*, 827 F.3d at 832.

C. The Trial Court Properly Certified a Damages Class and Held a Damages Trial

The Officers discussed damages issues at length in their original motion for class certification, asserting that they "w[ould] rely on [MDOC]'s electronic entry and exit logs … [and] sampling of work time data and expert testimony to prove up their damages," (D15 at 8-10), and MDOC opposed this by arguing that the Officers "failed to demonstrate any common method for measuring damages," (D39 at 25). From the very beginning, the question of damages was squarely before the trial court. MDOC also repeatedly raised damages issues in its subsequent decertification motions, launching lengthy attacks on Rogers and the Officers' ability to prove classwide damages. (D220 at 12-15, 17-19; D333 at 1; D501 at 2-3, 4; D521 at 2-3, 4; D531 at 5-6.) The trial court denied these when it was deeply immersed in motions challenging the parties' damages experts. As such, MDOC's assertion that "the circuit court erred by only weighing liability questions and not damages questions when considering

whether classwide questions predominated over individual questions" is objectively false and plainly mischaracterizes the record below. (App. Sub. Br. at 104.)

The trial court properly exercised its discretion, after carefully considering this record, to find that common issues, including classwide damages, predominated. (D85); *see infra* Section V.D. The order denying MDOC's motion for decertification reaffirmed that decision, finding that "common issues predominate in this litigation." (D325 at 2.) It provided a non-exhaustive list of those common issues, "*including*…whether [MDOC]'s refusal to compensate [Officers] … is a breach of its [C]ontract," and gave no indication that it was modifying its original class certification order. (*Id*. at 2-3) (emphasis added). MDOC's assertion that the trial court "compounded that error by going to trial *only on damages*" is equally meritless. (App. Sub. Br. at 104.) The damages trial was simply the natural result of the Officers prevailing on their motion for partial summary judgment as to liability. Arguing otherwise is both a distortion of the record below and a fundamental misunderstanding of the class certification inquiry.

D. The Officers' Class Satisfies the Predominance Requirement of Rule 52.08(b)(3)

MDOC only appeals the issues it raised in its motions for decertification – predominance and superiority prongs of Rule 52.08(b)(3). Mo. Sup. Ct. R.

52.08, Sub. App. A14. MDOC's arguments fail, and the trial court's order denying decertification should be affirmed.

1. Common Issues Predominate in This Litigation.

Rule 52.08(b)(3)'s predominance requirement "does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues." *Clark*, 106 S.W.3d at 488; *see also Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 688 (Mo. App. W.D. 2009) ("The predominance requirement 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'"). The predominant issue "need not be 'dispositive of the controversy or even be determinative of the liability issues involved,'" and predominance exists even when individual damages issues remain. *Clark*, 106 S.W.3d at 488. Indeed, a single common issue can be the predominant issue of the lawsuit, "despite the fact that the suit also entails numerous remaining individual questions." *Id.* "[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." *Smith*, 289 S.W.3d at 688.

From the Officers' original motion to MDOC's last decertification request, common issues concerning the breach of contract claim predominated, *e.g.*, whether the Officers could enforce the Contract; whether MDOC was estopped from disputing the Contract's terms; whether time spent on pre- and

post-shift activities was compensable; whether the Officers were on duty during pre- and post-shift activities; what was the proper measure of damages; and whether a *de minimis* defense applied. Throughout this litigation, the Officers offered substantial common evidence, gathered before and after the Class was certified, supporting the predominance of these inquiries. And as this evidence was gather, it only became more obvious that common issues prevailed in this litigation.

First, MDOC admitted in sworn interrogatory responses and depositions that its Officers performed nearly identical pre- and post-shift activities at its facilities. (D255 at 4-6; D256 at 89-90; D258 at 4, 7-8, 12-13, 16, 19-20, 23, 26-27, 29-30, 33, 36-37, 39-40, 43, 46-47, 50, 53, 56-57, 60, 63-64, 67, 70-71; D31, Sub. App. A86; D260, Sub. App. A87.) Second, the parties agreed that the Officers start their days with either security screenings or key and equipment exchange and that they are all on duty during the disputed time. *See supra* Section I.B.3. Third, MDOC agrees that these activities were universally unpaid and subject to a uniform policy, averring that, "[c]onsistent 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." (D257 at 11.) Fourth, the Officers are all subject to the same Contract. (D399 at 3, § 1.2, Sub. App. A46) (the Labor Agreement applies to "all eligible employees of [MDOC] who are employed only in the

classifications of Corrections Officer I and Corrections Officer II"); (D406 at 2, Sub. App. A71) (the Procedure Manual "applies to all [MDOC] employees"). Fifth, MDOC admitted all Officers "are on duty and expected to respond," "are expected to act as prison guards," "are responsible to observe offender behavior," and "are expected to be vigilant" during pre- and post-shift activity. (D424 ¶¶71-75). Sixth, the Officers offered expert testimony showing that the duration of these activities was consistent and uniform. (D417 at 6-8) (analyzing MDOC's entry and exit log data and showing consistent pre- and post-shift activity duration across MDOC institutions); (*id*. at 6) ("it is the norm for corrections officers to be in the correctional facility for more than eight hours"); (*id*. at 7) ("This fact holds true across shifts and across time for more than one million shifts."). The record clearly proves that MDOC does not treat any Officer differently on any relevant matter. Based on these facts, the trial court correctly found that common issues predominated in this case.

MDOC's case law is not to the contrary. In *Comcast Corp. v. Behrend*, the Supreme Court reversed a lower court's class certification order because the plaintiffs' damages and liability theories were not linked. 569 U.S. 27, 35-36 (2013). Instead, here, "liability and damages intertwine." *Day*, 827 F.3d at 833. Under the Contract, MDOC is liable to all Officers who performed compensable work without compensation. The trial court determined, as a matter of law, that all of the disputed time was compensable. (D473; D493,

Sub. App. A41.) All Officers therefore suffered similar economic damages, and Rogers properly developed a model to calculate those losses. *Bouaphakeo I*, 765 F.3d at 799-800. That the apportionment of those damages varies is irrelevant.[16] *Day*, 827 F.3d at 833-34. *Espenscheid v. DirectSat USA* is similarly unpersuasive, as the Seventh Circuit affirmed decertification where the plaintiffs presented "no genuinely representative evidence" and only offered the testimony of individual class members. 705 F.3d 770, 775 (7th Cir. 2013). In sharp contrast, the Officers here offered the extensive testimony and report of Dr. Rogers, which was precisely the sort of representative evidence lacking in *Espenscheid*.

2. The Officers May Rely on Representative Evidence.

MDOC's rehashed attacks on Rogers and its arguments regarding variances in the amount of time Officers spend on pre- and post-shift activities misapprehend the relevant inquiry: do "necessarily person-specific inquiries into individual work time predominate over the common questions raised by [Officers'] claims, making class certification improper." *Bouaphakeo II*, 136 S. Ct. at 1046.

[16] In fact, the Officers provided a plan of distribution after the verdict. (D525.) It received no objections and was approved as part of the Amended Judgment. (D552 at 2-4.)

At trial, the Officers bore "the burden of proving that [they] performed work for which [they] w[ere] not properly compensated." *Stanbrough*, 445 S.W.3d at 100 (citing *Mt. Clemens*, 328 U.S. at 686-87). However, "[i]t is the duty of the employer to keep proper records of employee wages and hours." *Id.* This duty is non-delegable. *Id.*

"[I]f the employer's records are inaccurate and prevent the employee from proving the precise extent of uncompensated work, the solution is not to penalize the employee, as such a result would run contrary to the 'remedial nature' of the FLSA." *Id.*; *see also Bouaphakeo II*, 136 S. Ct. at 1047 (reaffirming burden shifting framework of *Mt. Clemens*). Instead,

> [i]t is well established that where the employer's records are unreliable or inaccurate, a relaxed evidentiary standard as to the measure of the employee's damages applies. In this situation, "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

Stanbrough, 445 S.W.3d at 100 (quoting *Mt. Clemens*, 328 U.S. at 687); *accord Bouaphakeo II*, 136 S. Ct. at 1040; *Childress*, 2014 WL 7181038, at *2. "[T]he burden then shifts to the employer to produce evidence of the precise amount of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence." *Stanbrough*, 445 S.W.3d at 100-01; *accord Bouaphakeo II*, 136 S. Ct. at 1047; *Childress*, 2014 WL 7181038, at *2 n.4. "If

the employer fails to meet that burden, a court may award damages *even though they are approximate*." *Stanbrough*, 445 S.W.3d at 1001 (emphasis added).

Bouaphakeo II explicitly applied this burden shifting rule to wage and hour class actions. 136 S. Ct. at 1047. The Supreme Court considered whether "the class should not have been certified because the primary method of proving injury assumed each employee spent the same time donning and doffing protective gear, even though differences … may have meant that, in fact, employees took different amounts of time to don and doff." *Id*. at 1041. Just as MDOC did here, the defendant failed to keep complete records of the disputed pre- and post-shift activities. *Id*. at 1043. And just as Rogers did here, the plaintiffs' expert relied on employee testimony, data, recordings from the facilities, and a study that averaged the time taken to perform the pre- and post-shift activities. *Id*. Because "[e]ach employee must prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week," the primary question for the Court was whether "it c[ould] be assumed each employee donned and doffed for the same average time observed in [the expert]'s sample." *Id*. at 1046. The Supreme Court said "yes". *Id*. at 1048-49. The same assumptions can be made here, where Roger found that (1) "it [wa]s common practice for [Officers] to be in the security envelope for more than eight hours" and (2) "[t]his fact h[eld]

true across shifts and across time for more than one millions shifts." (D417 at 7.)

Bouaphakeo II recognized that, "[i]n many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability." 136 S. Ct. at 1046 (quoting Manual of Complex Litigation § 11.493, p. 102 (4th ed. 2004)).

> [I]n this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.

Id. at 1048; *see also Childress*, 2014 WL 7181038, at *4 (permitting testimony of expert who "used the overtime hours reported by 49 employees to deduce the average number of overtime hours worked by 9 other employees").

> If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [Rogers]'s study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.

Bouaphakeo II, 136 S. Ct. at 1047. "Reasonable minds may differ as to whether the average time [Rogers] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury." *Id*. at 1049.

MDOC did not keep accurate records of the Officers' time.

> The administrative strategy is to pay employees for their pre-assigned shift hours, including scheduled overtime, and make adjustments to account for unusual circumstances (e.g. less pay for correction officers who were late to work, or more pay for correctional officers who had to stay late because someone was late for work, etc.). Hourly employees must fill out paperwork and receive permission from their supervisors for any deviations in work time beyond scheduled hours. Those records are not kept in a way that can be accessed and reported. Department administrators are also unable to produce records of aggregate overtime hours or pay.

(D315 at 1.) Nor did MDOC "produce[] an alternative comprehensive review of corrections officers' work hours" or wage rates. (*Id*. at 2, 3.)

MDOC does not and cannot dispute their lack of records. To that end, the Officers were not, as MDOC argues, required to offer precise evidence of damages, and Rogers did what he was required to do under *Bouaphakeo II* and *Stanbrough* – "estimate the economic losses for unpaid wages for officers in all Missouri correctional centers within a reasonable degree of statistical and economic certainty." (D417 at 1.) And "[b]ecause of [MDOC]'s record-keeping strategy[,] the best course of action was to calculate the typical time spent during an eight-hour shift." (D315 at 1.) "The security records, while not intended to record time for pay, [we]re nonetheless the only direct record of correction officers' work hours." (*Id*. at 2.)

MDOC's arguments to the contrary demonstrate a misunderstanding of Rogers's methodology. (App. Sub. Br. at 113.) There was significant evidence in the trial record regarding each facility. Rogers "relied on each site's security

procedures" to calculate the unpaid hours at that site. (D417 at 5.) These calculations acknowledged variances between facilities, and Rogers specifically "report[ed], for each prison, the percent of shifts where the corrections officer was in the security envelope for eight hours or less, or more than eight hours." (*Id*. at 6; D315 at 6.) He then used those calculations to determine the "Total Loss *By Prison*." (D417 at 9-12) (emphasis added). Rogers's use of "[s]ecurity records ha[d] the advantage of being both more accurate and more comprehensive compared to a survey of corrections officers" or "directly measuring the pre- and post-shift time." (D417 at 5; D315 at 1.) Officers from multiple facilities also testified at trial to buttress these calculations. (Tr. 503-611, 617-55, 951-83, 1004-1213, 1237-81, 1285-1335, 1391-1463.)

MDOC's reliance on the dissenting opinion in *Monroe v. FTS USA, LLC*, rather than the majority, ignores the fundamental holding in that case, which approved a damages methodology where the employer failed to keep adequate records. *See* 860 F.3d 389, 413 (6th Cir. 2017) (finding that "the average number of unpaid hours worked by testifying and nontestifying technicians, based on the jury findings and the estimated-average approach, resulted from a just and reasonable inference supported by sufficient evidence"). The *Monroe* court affirmed the certification of a collective action, finding that *Bouaphakeo II* "ratifi[ed] [] the *Mt. Clemens* legal framework and validat[ed] [] the use of representative evidence." *Id*. at 393. And the variances identified by the

dissent do not exist here. MDOC admits that the Officers perform nearly identical tasks, all of which were found compensable, and the variances it identifies are rare in light of the consistent time found across nearly 1.4 million shifts. (Tr. 902; D417 at 6-8.)

In short, Rogers used sufficient facts and data, relying on his extensive experience in the field of statistical analysis, to calculate classwide damages by facility. There was no enlargement of Officers' substantive rights. And contrary to MDOC's assertions, Rogers's methodology and conclusions can and will be used to apportion each individual Officer's damages should the Amended Judgment be affirmed. (D525) (outlining plan of distribution); (D552 at 2-4) (approving plan of distribution). The U.S. Supreme Court and Missouri courts have approved this use of representative evidence in class actions involving wage and hour disputes; MDOC offers no authority supporting a different result here.

3. Minor Variations in Officers' Damages Do Not Defeat Class Certification.

The allegedly varying times Officers spent inside MDOC's prisons relate only to damages computations, and it is well settled that varying damages do not defeat class certification. *Green v. Fred Webber, Inc.*, 254 S.W.3d 874, 882 n.8 (Mo. banc. 2008); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 228 (Mo. App. W.D. 2007); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 39 (W.D. Mo. 1979).

See also Smith v. MCI Telecomm. Corp., 124 F.R.D. 665, 677-78 (D. Kan. 1989) (working under different compensation plans does not result in individual damages question predominating over common issues); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00-cv-5755, 2000 WL 1774091, at *7 (N.D. Ill. Dec. 1, 2000) ("questions of defendants' liability for back wages and overtime predominate[] over any individualized questions of defenses or damages"). Thus, MDOC's alleged "significant variation" falls flat. The only variances that MDOC identifies are in Officers' attempts to estimate the time to complete pre- and post-shift activities, (App. Sub. Br. at 109-110), which goes to their credibility. *See Plubell v. Merck and Co. Inc.*, No. 04-cv-235817-01, 2008 WL 4771525 (Mo. Cir. Ct. June 12, 2008) (finding that whether the class representative actually suffered a loss went to credibility and would not "swamp" the litigation).[17] This evidence did not negate the fundamental conclusion that a class action was the appropriate vehicle for deciding these claims. *See Hale*, 231 S.W.3d at 228 ("The predominance of the common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses.").

[17] MDOC's citation to the testimony of Gary Gross adds nothing to the analysis, as he merely confirmed the unremarkable proposition that there could be minor variations among Officers' damages.

MDOC's cases are easily distinguishable. In *Collins v. ITT Educational Services*, the court refused to certify a class for overtime and off-the-clock work because plaintiffs did not show "[d]efendant's policies [we]re uniform across the campuses" and because "no substantial evidence point[ed] to a uniform, companywide policy." No. 12-cv-1395, 2013 WL 6925827, at *5-6 (S.D. Cal. July 30, 2013). In *Cornn v. United Parcel Service, Inc.,* the "[p]laintiffs … failed to present sufficient evidence of a class-wide practice that g[ave] rise to liability," including that, for part of their claim, they "cited to no evidence whatsoever." No. 03-cv-2001, 2005 WL 2072091, at *2-5 (N.D. Cal. Aug. 26, 2005). In *Freeman v. Wal-Mart Stores,* the court concluded that class treatment was not warranted because the defendant submitted affidavits asserting "material differences" in duties and responsibilities among the 7,000 class members which "[p]laintiff does not dispute." 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003). In *Martin v. Citizens Fin. Group, Inc.*, the court decertified a class because of a "multitude of differences in the factual and employment settings of the Plaintiffs, [and] Plaintiffs' inability to provide evidence of an overarching illegal policy." No. 10-cv-260, 2013 WL 1234081, at *8 (E.D. Pa. 2013); *See also Pacheco v. Boar's Head Provisions Co., Inc.*, 671 F. Supp. 2d 957, 964 (W.D. Mich. 2009) (refusing to certify an FLSA collective action because plaintiffs had no direct evidence of a "uniform, across-the-board company practice of not paying for donning and doffing activities").

In comparison, MDOC's uniformly applies its policies to its Officers, who adduced a wealth of evidence that they all must perform the pre- and post-shift activities at issue, including admissions that there are no material differences in the pre- and post-shift activities among them. *See supra* Section V.C.1.

E. The Officers' Expert Offered Common Evidence Supporting the Verdict

MDOC's attack on the Officers' trial evidence focuses entirely on the entry and exit logs and how they "were not a reasonable proxy for compensable work." (App. Sub. Br. at 115.) But MDOC did not keep proper time records, and the testimony from Rogers was "sufficient evidence to show the amount and extent of that work *as a matter of just and reasonable inference*." *Bouaphakeo II*, 136 S. Ct. at 1047 (quoting *Mt. Clemens*, 328 U.S. at 687) (emphasis added). MDOC's citation to *Nobles v. State Farm Mut. Auto. Ins. Co.* is not persuasive. No. 10-cv-04175, 2013 WL 12153518 (W.D. Mo. July 8, 2013). There, the court confronted widely varying uses of flextime and a challenge to the employer's "exception-based timekeeping policy." *Id.* at *1, 4. While recognizing the *Mt. Clemens* burden shifting, the court found it irrelevant because the plaintiffs could not establish on a classwide basis that they actually performed uncompensated work. *Id.* at *5. Here, there is overwhelming evidence that the pre- and post-shift activities are uniformly performed and uniformly uncompensated. Rogers's report and testimony – which carefully analyzed the

entry and exit data using appropriate statistical principles to establish classwide damages – buttressed the trial court's predominance finding.

F. MDOC's Individual Defenses Do Not Defeat Predominance.

1. "Offset" of Damages

MDOC erroneously asserts that it was prevented from offering evidence that would "offset" some Officers' compensation. (App. Sub. Br. at 119.) Just as *Bouaphakeo II* rejects MDOC's argument against representative evidence, it also refutes the claim that MDOC was prevented from offsetting damages:

> Reliance on [an expert's] study did not deprive [MDOC] of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, [MDOC]'s primary defense was to show that [the expert's] study was unrepresentative or inaccurate. That defense is itself common to the claims made by all class members.

136 S. Ct. at 1047. MDOC presented such evidence at trial. It repeatedly challenged Rogers's testimony and presented their offset defense by cross-examining both him and other witnesses using their individual daily entry and exit logs and payroll records and presenting the testimony of wardens regarding the time spent on pre- and post-shift activities. (Tr. 1094-98, 1311-23, 1526-34, 1646-48, 1704-05.) MDOC also undertook an extensive cross-examination of Rogers at trial about the rounding rules MDOC employs. (Tr. 850, 861-81, 891.) These cross-examinations resulted in the exact individual testimony regarding "overcompensation" that MDOC claims it could not

present. (App. Sub. Br. at 119.) MDOC suffered no prejudice, and this defense does not defeat certification. *Clark*, 106 S.W.3d at 488.

The cases on which MDOC relies do not address class certification and hold only that, when an employee is wrongfully discharged, back pay awarded for wrongful termination must be offset "by such sums the employee has earned or could have earned from other employment or which he has received as unemployment benefits during the period he has been deprived of his employment." *Schulze v. Erickson*, 17 S.W.3d 588, 591-92 (Mo. App. W.D. 2000); *Lewis v. Bellefontaine Habilitation Ctr.*, 122 S.W.3d 105, 110 (Mo. App. W.D. 2003). These irrelevant citations tell us nothing about whether the court properly certified the class, and they have no relationship to the rule announced in *Bouaphakeo II*, that representative evidence is proper in wage and hour cases where employers failed to keep proper records. In any event, MDOC extensively cross-examined Officers at trial regarding the actual time they worked and the actual time they were paid for, demonstrating ample opportunity to present this defense at trial.

2. De Minimis Activities

As set forth in Section I.C *supra*, common uncontroverted evidence uniformly established that the *de minimis* defense was simply unavailable to MDOC, as a matter of law, on a classwide basis. This ruling "did not deprive [MDOC] of its ability to litigate individual defenses." *Bouaphakeo II*, 136 S. Ct.

at 1047. As with offset, this "defense is itself common to the claims made by all class members." *Id.* However, MDOC failed to offer evidence establishing the elements of the *de minimis* defense. Thus, this was not "some fatal dissimilarity but, rather, a fatal similarity" to MDOC's available defense, and the trial court properly "engage[d] that question as a matter of summary judgment, not class certification." *Id.*

Cases cited by MDOC do not support a different result. In *Zivali v. AT&T Mobility*, the court only decertified the class because of the "extremely wide variety of factual and employment settings among the individual plaintiffs." 784 F. Supp. 2d 456, 459 (S.D.N.Y. 2011). It considered the *de minimis* defense because of the "absence of a company-wide policy or practice." *Id.* at 467-68. And in *Hawkins v. Securitas Security Services USA*, the court did not consider the continuous workday rule and did not certify a class because there was no evidence that the company knew employees were performing pre- and post-shift activity. 280 F.R.D. 388, 399-400 (M.D. Pa. 2013).

G. A Class Action Was Superior.

MDOC's superiority argument fails. As discussed in detail above, Officers presented overwhelming common evidence of their damages, plainly outweighing any individual issues. And the trial itself proved that were no manageability issues. MDOC surprisingly relies on a collective action case that is entirely inapposite. In *White v. 14051 Manchester Inc.*, the employees did

not show they were "subject to a homogeneous or systemic policy throughout the Hotshot stores, or that such a policy existed with respect to any individual Hotshots store." 301 F.R.D. 368, 382 (E.D. Mo. 2014). Moreover, only 10 percent of the class members opted in, and "at least some members of the putative class d[id] not support the class resolution of the state wage and hour claims." *Id*. at 384. Here, as discussed above, the Officers offered overwhelming evidence that MDOC implemented a uniform, system-wide policy of requiring nearly identical pre- and post-shift activities and refusing to pay for that work. In addition, as demonstrated by the participation of numerous Officers at every stage of this case, this case has widespread support from MDOC's employees, with only 200 of over 13,000 class members opting out. (Tr. 739; D526 ¶ 18). A class action was and is clearly superior to individual litigation by thousands of Officers.

The trial court properly exercised its discretion in refusing to decertify the Officers' class on the eve of, during, and after trial, and that decision should be affirmed.

VI. The Trial Court Properly Issued a Declaratory Judgment (Responds to Point VI)

A. Standard of Review

When reviewing a declaratory judgment, "the trial court will be affirmed 'unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.'" *Ramirez v. Mo. Dep't of Soc. Servs.*, 501 S.W.3d 473, 479 (Mo. App. W.D. 2016) (internal citation and quotation omitted). Though questions of law surrounding the declaratory judgment are reviewed *de novo*, *id.*, procedural grounds are reviewed for abuse of discretion. *Int'l Minerals & Chem. Corp. v. Avon Prods., Inc.*, 817 S.W.2d 903, 908 (Mo. banc 1991).

B. MDOC Has a Duty to Track Time

Because the Officers' pre- and post-shift activities are compensable, MDOC's duty to track their time spent on those activities is well established under state and federal law. *Stanbrough*, 445 S.W.3d at 100; *Mt. Clemens*, 328 U.S. at 687; 29 C.F.R. § 516.2, Sub. App. A23; § 290.520, RSMo, Sub. App. A1. That statutory duty exists independent of any contractual obligation to do so and forms a proper basis for the declaratory judgment that requires implementation of a system, such as timeclocks, that accurately records the Officers hours of compensable work.

The Procedure Manual likewise mandates that MDOC "shall maintain and preserve … payroll and other records containing … hours worked per day

and per week; … total earnings exclusive of overtime pay; … [and] total overtime premium earnings," (D406 at 11-12; Sub. App. A80-A81), and Procedure Manual D2-8.1 also requires MDOC to keep time records, (Tr. 1273-74). The DOL has also demanded future compliance by MDOC, (D267 at 3, Sub. App. A91; D182 at 11, Sub. App. A88; D424 ¶53.) Yet MDOC continues to ignore the DOL's findings, admitting that it "refused to pay back wages or consent to future compliance because of the pending instant case." (D424 ¶54.) MDOC also denied Officers' grievances seeking compensation as a matter of routine, and its former director "testified that he has 'no intention' of ever 'changing the practice' of requiring pre[-] and post[-]shift activity and not paying [Officers] for it, 'unless there is a ruling in [Officers'] favor in this case.'" (*Id*. ¶¶37-44.) This recalcitrance demanded the declaratory judgment entered by the trial court.

C. The Declaratory Judgment is Not Duplicative

The monetary verdict for MDOC's breach of contract compensates Officers for damages previously suffered, so the declaration judgment, which provides future relief is, on its face, non-duplicative. *NTD I, LLC v. Alliant Asset Mgmt. Co.*, No. 16-cv-1246, 2017 WL 605324, at *7 (E.D. Mo. Feb. 15, 2017). "[T]he purpose of the Declaratory Judgment Act is to 'settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.'" *Lake Ozark Const. Indus., Inc. v. N. Port Assocs.* (*"Lake*

Ozark"), 859 S.W.2d 710, 714 (Mo. App. W.D. 1993). To that end, it grants trial courts the "power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*." § 527.010, RSMo, Sub. App. A4 (emphasis added). Thus, "[a] contract may be construed either before or after there has been a breach thereof." § 527.030, RSMo, Sub. App. A5.

The declaratory judgment here properly "dispel[s] uncertainty before actual loss occurs." *Lake Ozark*, 859 S.W.2d at 714. Every currently employed Officer is performing 2.5 hours of work each day, before and after each shift, without compensation. MDOC's continued failure to keep accurate records would therefore force Officers to rely on a conservative estimate of minimum "lower-bound" losses in another future suit for damages. (D417 at 4, 7, 13, 16.) The trial court's declaratory judgment eliminates this future uncertainty and effectuates the Declaratory Judgment Act's goals with non-duplicative relief meant to cure MDOC's intransigence. It is necessary for the parties to know where they stand because they are in a continuous employment relationship, where MDOC will always need to employ correctional officers and will always require them to perform this work. *Int'l Minerals*, 817 S.W.2d at 908-09. The declaratory judgment recognizes this and therefore clarifies the rights and obligations of the parties going forward in accordance with the powers vested in the trial court by § 527.010.

D. The Trial Court Properly Exercised Its Powers Under the Declaratory Judgment Act

The Labor Agreement's expiration did not extinguish the trial court's powers under the Declaratory Judgment Act. "The law is well settled that … a court of equity can properly undertake to do full, adequate and complete justice between the parties when justified by the evidence." *Kopp v. Franks*, 792 S.W.2d 413, 425 (Mo. App. S.D. 1990). Moreover, the Declaratory Judgment Act is "to be liberally construed,' and administered to 'terminate the controversy or remove an uncertainty." *Mo. Ass'n of Nurse Anesthetists, Inc. v. State Bd. of Registration for Healing Arts*, 343 S.W.3d 348, 353 (Mo. banc 2011) (internal citations omitted). Thus, "a court generally has the inherent power to make such proper orders as are necessary to effectuate its decrees." *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 639 (Mo. banc 2019). "[A]nyone may obtain such relief in any instance in which it will terminate a controversy or remove an uncertainty." Mo. Sup. Ct. R. 87.02(d), Sub. App. A21. The trial court properly exercised this authority in entering the declaratory judgment (before the Labor Agreement expired).

A continuing relationship exists here, regardless of when the Labor Agreement expires, as MDOC continues to employ thousands of Officers, and their pre- and post-shift activities are still integral and indispensable to their duties. MDOC and MOCOA have been parties to a labor agreement for many

years and likely will again. (D399; D400.) The trial court acted appropriately to forestall significant controversies and uncertainty that remain in light of MDOC's admissions that it will not compensate Officers for the disputed time, even in the face of a federal directive and continuing obligations under the FLSA. The declaratory judgment's mandates protect the Officers' rights, eliminate uncertainties, and terminate all controversies in accordance with the Declaratory Judgment Act and Rule 87. *See* Mo. Sup. Ct. R. 87.02(d), Sub. App. A21; § 527.060, RSMo, Sub. App. A6 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree … would not terminate the uncertainty or controversy giving rise to the proceeding.").

Finally, the declaratory judgment does not "order the State to withdraw funds for a purpose that the legislature did not authorize." (App. Sub. Br. at 125.) It requires MDOC to "implement a system that…maintains comprehensive, accurate, and reliable records of all time worked by [the Officers." (D535 ¶7(b).) This is wholly achievable, as evidenced by MDOC's disclosure last year of its contract with TimeClock Plus to implement the court's order, for which money has presumably been appropriated. (App. Ren. Mot. To Stay, Ex. C ¶11 (Mar. 18, 2019)). In addition, Article 5 of the Constitution vests this Court with authority to "issue and determine original remedial writs." MO. CONST. art. V, § 4, Sub. App. A13. MDOC's claim to the contrary challenges this Court's constitutional authority and obliquely asserts

that MDOC has some sovereign immunity from equitable relief. It does not: "a plaintiff may seek equitable relief against the State." *State Conference of Nat'l Ass'n for Advancement of Colored People v. State*, 563 S.W.3d 138, 147 (Mo. App. W.D. 2018). Here, MDOC must record time worked by Officers to properly compensate them, and the declaratory judgment properly enforces this obligation and ensures future certainty between the parties.

CONCLUSION

For the foregoing reasons, the Officers and MOCOA respectfully request that this Court affirm the trial court's judgment or retransfer to the court below.

Dated: April 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system, Missouri CaseNet, on April 2, 2020, on all counsel of record. I further certify that Respondents' Brief (1) complies with the limitations in Missouri Supreme Court Rule 84.06(b) and 84.06(c)(1)-(4) and (2) contains the information that is required by Rule 55.03. There are 26,769 words in Respondents' Substitute Brief, exclusive of the portions exempted from Rule 84.06's word count requirement.

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