WD82229

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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

BRIEF OF RESPONDENTS

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INTRODUCTION

Respondents Thomas Hootselle, Daniel Dicus, and Oliver Huff and the class they represent ("Officers") risk their lives as corrections officers at Appellant Missouri Department of Corrections' ("MDOC") prisons. They brought this case seven years ago and, along with Respondent Missouri Corrections Officers Association ("MOCOA"), seek wages for the critical pre- and post-shift work they perform. MDOC admits that this work is essential to the safety and security of MDOC's prisons and every person working, visiting, and incarcerated there. MDOC also admits that it has not and will not pay the Officers for this work, despite its contractual promise to do so.

After six years, the trial court correctly found that MDOC's refusal to compensate Officers for this work breached the parties' Contract and granted partial summary judgment to the Officers. It also correctly exercised its discretion in striking the dilatory, unreliable, and irrelevant opinions of MDOC's experts; refusing to decertify the Officers' class on the eve of trial; and entering a declaratory judgment providing certainty in the parties' ongoing relationship.

The trial court's judgment deserves this Court's affirmance.

STATEMENT OF FACTS

In 2012, the Officers brought a class action against MDOC for unpaid wages. (D1 at 33). The court certified a class of over 13,000 current and former Officers in February 2015 and amended the class definition in September 2015 to comply with the statute of limitations. (D60; D85; D526 ¶21; Tr. 697). MDOC employs these Officers "for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." (D424 ¶55).

Before each shift, Officers must perform the following tasks: logging their arrival either electronically or manually; passing through security gates and entry-egress points, including a metal detector and an airlock (a set of doors where one is always closed that accommodates less than ten Officers at a time) (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 "pass down" of pertinent information. (D424 ¶58; App. A45-46). At the end of each shift, they perform these same tasks in reverse. (D424 ¶58). These are universally known as pre- and post-shift activities at MDOC. (D180 at 19, 20)

Because shift changes are often when prisoners choose to attack each other, confront Officers, try to escape, and try to smuggle contraband, (D424 ¶¶80-82, 95), "[r]emaining vigilant and responding to fights and other incidents, even when not on post, is a job requirement," (*id*. ¶76). Officers therefore 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). They "are expected to act as prison guards whenever they are inside [MDOC]'s prisons," and "[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). Officers "'are on duty and expected to respond'" when walking to and from their posts. (*Id*. ₱71).

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; Tr. 799-802, 806; App. A44). "[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). The U.S. Department of Labor found this violated the Fair Labor Standards Act ("FLSA") and ordered future compliance and backpay in 2014. (*Id*. ₱53; D267 at 2-3). But MDOC's former director admitted that MDOC would always require pre- and post-shift activity of the Officers and would never pay for it absent a court order. (D267 at 4; D424 ₱40).

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. (*Id*. ₱8). "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; *Mo. Corr. Officers Ass'n v. Mo. Dep't of Corr.* ("*MDOC I*"), 409 S.W.3d 499, 500 (Mo. App. W.D. 2013)). The Labor Agreement and Procedure Manual "govern[] a wide array of [Officers'] rights and duties as [MDOC]'s employees" and form the Contract that is the subject of this case. (D424 ¶¶8-12).

The Contract requires MDOC to "comply with the [FLSA]…regarding the accrual and payment of overtime." (*Id*. ¶14; App. A28). The Procedure Manual "'ensure[s] departmental compliance with [FLSA] rules and state merit guidelines'" and that Officers are "compensated for time worked." (D424 ¶¶15, 17; App. A30; App. A35). 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; App. A35). All pre- and post-shift activity is done where Class members physically work. (*Id*. ¶33).

The court granted Officers' motion for partial summary judgment on their breach of contract claim. (D493). A damages trial followed, and the jury returned a verdict against MDOC for $113,714,632. (D517). The court entered an Amended Judgment memorializing the verdict and declaring certain of the Officers' rights surrounding their continued employment. (D535; D552).

I. The Trial Court Properly Granted Officers' Motion for Partial Summary Judgment. (Responds To Points I and II).

A. Standard of Review

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

B. The Officers' Time is Compensable as a Matter of Law.

1. MDOC Admitted That Officers Are on Duty at All Relevant Times.

"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). MDOC's admissions in its Response to the Officers' Statement of Uncontroverted Material Facts demand summary judgment.[1] (D424). These admissions – namely that Officers are on duty and performing tasks essential to the safety and security of MDOC's prisons from when they enter the prisons until they leave – require that MDOC compensate its Officers for time spent on pre- and post-shift activities under their Contract.

MDOC admitted that Officers "are expected to act as prison guards whenever they are inside [its] 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). Shift changes – when pre- and post-shift

[1] MDOC did not add any material facts under Rule 74.04(c)(2). Instead, it 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.

activities occur – are often when prisoners engage in violent conduct and illicit activity. (*Id.* ¶¶80-82, 95). MDOC admitted that "that pre- and post-shift activities are expected of [Officers] in order 'to operate and maintain a safe and secure facility'" and "are important to the end of housing dangerous criminals." (*Id*. ¶¶88-89). "Remaining vigilant and responding to fights and other incidents, even when not on post, *is a job requirement*." (*Id*. ¶76) (emphasis added).

MDOC executive staff and supervisors universally admitted these facts. 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 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). A second warden testified that Officers are "trained and expected to be vigilant whenever they are in the presence of often dangerous offenders." (*Id*. ¶75). These admissions resolve the central issue in this case, whether Officers' pre- and post-shift activity is compensable, in the Officers' favor. *See infra* Section I.B.2.

MDOC cannot create a factual issue where its admissions show there is none. The statements that the disputed activities are "far removed from" or "not part and parcel or directly related to offender supervision," (App. Br. at 34), were made years before the Officers moved for partial summary judgment and were superseded by MDOC's

admissions that the Class is on duty. *See Carey v. Runde*, 886 S.W.2d 707, 710 (Mo. App. W.D. 1994) (conflicting versions of facts are irrelevant when a party has admitted them for the purpose of summary judgment). They are conclusory and "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); *see also ITT*, 854 S.W.2d at 382 ("Where the 'genuine issues' raised by the non-movant are merely argumentative, imaginary or frivolous, summary judgment is proper.").

MDOC asks this Court to conclude that Officers are "expected to be vigilant" and respond to emergencies but are not "'supervising, guarding, and escorting' inmates." (App. Br. at 34). That position is plainly illogical. Officers are, by MDOC's own admissions, on duty and monitoring inmates. (D424 ¶¶71, 77). This defines their principal activity of "supervising, guarding, escorting and disciplining" offenders. *See* 29 C.F.R. § 790.8, App. A22 (principal activities are those "which the employee is 'employed to perform'"). The "integral and indispensable" test is irrelevant, and the time must be compensated. *Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 243 (D. Mass. 2004); *see also Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("duties performed by an employee before and after scheduled hours…must be compensated").

2. All Time Spent On Duty Must Be Compensated.

The only remaining question for this Court is whether the Contract requires compensation for this on duty time. The court correctly decided this issue of law. *Helmert v. Butterball, LLC*, 805 F. Supp. 2d 655, 659 (E.D. Ark. 2011).

The contract mandates that Officers "be compensated for time worked." (D424 ¶17; App. A35). MDOC admits that Officers are always on duty and must be "paid compensatory time for the time they physically work at the facility." (*Id*. ¶¶31, 71). "Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises." 29 C.F.R. § 553.221(b), App. A15; *see also* 5 C.F.R. § 551.401(a), App. A25 ("hours of work" include "[t]ime during which an employee is required to be on duty"). This is a common sense definition of "work." Pre- and post-shift time meet these criteria because Officers are always on duty. They must be compensated under their Contract.

"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. The workday "includes all time within that period whether or not the employee engages in work throughout all of that period." *Id*. The term "principal activity" is read liberally. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984). "[A]ny work which an employee is required to perform while traveling must, of course, be counted as hours worked." 29 C.F.R. § 785.41, App. A18. This is the "continuous workday," and all activities during that time must be compensated. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 795-96 (8th Cir. 2014). Officers' continuous workdays begin when they enter MDOC's prisons and end when they leave. The entire time must be compensated.

MDOC tries to avoid this reality by arguing that on duty time is non-compensable because Officers need only "respond to occasional emergencies." (App. Br. at 31-33). The Court of Federal Claims in *Havrilla v. United States* rejected this argument:

> [A]n integral part of [p]laintiffs' jobs is to "wait for something to happen," whether it be a threat to…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). Likewise, a critical component of an Officer's job is supervising and guarding offenders. (D424 ¶¶55-56). They are "engaged to wait" while at their posts, and they are similarly "engaged to wait" during their pre- and post-shift activities. 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. All of this time is work under their Contract and the FLSA, and the undisputed facts dictate that the entirety of the time is compensable. *Id*. at 466. The frequency with which emergencies occur is immaterial.

3. Meal Time Cases Are Irrelevant.

MDOC cites several cases involving special rules for meal time and breaks. (App. Br. at 32). Those cases are irrelevant because MDOC and the Officers agree that Officers are already properly compensated for that time. The employees in those cases, unlike the Officers, were off duty and could "eat, rest, or engage in any other appropriate personal activity." *Agner v. United States*, 8 Cl. Ct. 635, 638 (1985), *aff'd*, 795 F.2d 1017 (Fed.

Cir. 1986); *see also Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1068 (S.D. Iowa 2010) (security guards "were able to 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"); *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").

If the meal time rule informs this Court's decision, it instructs that the Officers' pre- and post-shift time is compensable. The Court of Federal Claims determined that officers' meal times were compensable because they were "officially on duty and subject to call." *Baylor v. United States,* 198 Ct. Cl. 331, 364 (1972), *vacated on other grounds by Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004). The same result is proper here. Officers may not pursue private interests during pre- and post-shift activities. Instead, they perform highly controlled and essential security protocols with no freedom to engage in other activities. They "are prohibited from bringing any cell phones, iPods, or any other personal property" into the prisons and are always in uniform inside MDOC's facilities. (D424 ¶¶67-68). Officers are cut off from the world and on duty – trained and required to remain vigilant, act as prison guards, and supervise offenders – during all pre- and post-shift activity. It is a job requirement and must be compensated as a matter of law.

C. Each Pre- and Post-Shift Activity is Integral and Indispensable to the Officers' Principal Activities.

1. MDOC Admitted the Pre- and Post-Shift Activities Are Integral and Indispensable.

The Officers' activities are also compensable under the "integral and indispensable" test. "The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform.'" 29 C.F.R. § 790.8(a), App. A22. Principal activities also "embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'" *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014). "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*.

The United States Supreme Court uses the words "integral" and "indispensable" 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.
>
> ….
>
> "[I]ndispensable" means a duty [t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected.

Id. (internal citations and quotations omitted). MDOC's admissions in its summary judgment response confirm that the pre- and post-shift activities meet these criteria. They "'are required because of the nature of the job that the guards are doing.'" (D424 ¶91). They are "necessary and essential to safely keep and house criminals" and "exist 'to

operate and maintain a safe facility.'" (*Id*. ¶¶96-97). These activities are integral to the job.

They are also indispensable. MDOC "'ha[s] standards about safety and security, and…doing these things [pre- and post-shift activities] are essential to protecting that safety and security.'" (*Id*. ¶95). Foregoing the activities would result in "safety and security…be[ing] compromised in a very traumatic way. So we like to think they're essential." (*Id*.).

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*, 135 S. Ct. at 520 (Sotomayor, J. concurring). Because MDOC admits these facts, time spent on these activities must be compensated.

2. The De Minimis Defense Fails.

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, App. A19 (emphasis added). The regulation recognizes, however, that even "$1 of additional compensation a week is 'not a trivial matter to a workingman,' and was not de minimis." *Id*. "When evaluating whether work performed by an employee is *de minimis,* courts typically consider the amount of time spent on the extra work, *the practical administrative difficulties of recording additional time*, the regularity with which the additional work is performed, *and the aggregate amount of compensable time*." *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir.2011) (emphasis added).

MDOC improperly dissects each pre- and post-shift activity and the time needed to accomplish each. This analysis fails because the workday begins when Officers enter MDOC's prisons and ends when they leave. *See supra* Section I.B.2. 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), App. A21. Thus, MDOC may not start and stop the clock every time an Officer moves to a different activity. Officers spend an average of 30 minutes each day, or 2.5 hours each 5-day workweek, on mandatory and essential pre- and post-shift activities. (D424 ¶110). This time – which the jury determined equals $113.7 million in back pay – well exceeds any threshold for the *de minimis* defense.

MDOC offered no evidence that it was impractical to record time, instead admitting that it already "maintains entry and exit logs…at each facility." (*Id*. ¶105). *See 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 conducted a study and contracted to install timeclocks later this year. (App. Ren. Mot. To Stay, Ex. C ¶11 (Mar. 18, 2019)). As such, the court correctly rejected the *de minimis* defense.

3. MDOC's Cases Are Unpersuasive.

MDOC argues that these activities are *never* compensable, ignoring that compensability inquiries are factually driven with varying outcomes. *Accord Helmert*, 805 F. Supp. 2d at 659 (compensability "necessarily involves factual determinations"). For example, washing up after work may or may not be compensable depending on the

circumstances. 29 C.F.R. § 790.7(g) n.49. For this reason, MDOC's heavy reliance on *Aguilar v. Management & Training Corp.* is misplaced. No. 16-cv-00050, 2017 WL 4804361 (D.N.M. Oct. 24, 2017), *argued*, No. 17-2198 (10th Cir. Sept. 24, 2018).

In *Aguilar*, there was no evidence that the corrections officers were on duty, required to respond to incidents, or in the presence of inmates during their pre- and post-shift time. The court explicitly stated, "[N]one of the walking done by officers to and from their posts involve[d] inmates, so that [it] c[ould] be considered part of the officers' principal activities." *Id*. at *14-15. Likewise, the guards in *Mertz v. Wisconsin Dep't of Workforce Dev.*, were *not* required to respond to emergencies until after arriving at their duty posts. No. 2014AP2602, 2015 WL 6181046, at *2 (Wis. Ct. App. Oct. 22, 2015). MDOC admits that "Officers 'have to monitor and pay attention to offenders walking to their post and walking back.'" (D424 ¶77).

Busk is not analogous. Those 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." 135 S. Ct. at 515. The screenings were not intrinsic to retrieving and packaging products and could be eliminated without impairing the employees' work. *Id*. at 518. But MDOC has conceded that the Officers' principal activity is supervising offenders, which requires maintaining security at the prisons. MDOC's security screenings are not simply integral and indispensable to Officers' principal activities; they are inextricably entwined with them and must be compensated.

MDOC's remaining authorities deal with simple travel time and FLSA exceptions not relevant here. Conversely, courts looking at activities nearly identical to the Officers' have found in the employees' favors. The Federal Labor Relations Authority required the Bureau of Prisons to compensate corrections officers for "[t]he exchange of equipment, the inventory of equipment, and the exchange of information concerning operations at the post," recognizing these tasks "are clearly necessary to the job being performed at the post." *U.S. DOJ Fed. BOP U.S. Penitentiary, Marion, Ill.*, 61 F.L.R.A. 765, 773 (2006); *see also U.S. DOJ Fed. BOP U.S. Penitentiary, Leavenworth, Kan.*, 59 F.L.R.A. 593, 597 (2004) (same). The Second Circuit Court of Appeals reversed summary judgment for an employer where park rangers were not paid for donning and doffing a bulletproof vest, baton, mace, and handcuffs, recognizing that this equipment was "vital to 'the primary goal[s] of [the plaintiffs'] work' during a shift." *Perez v. City of New York*, 832 F.3d 120, 125-26 (2d Cir. 2016).

As in those cases, Officers are performing tasks that are integral and indispensable to supervising, guarding, escorting, and disciplining prisoners. They simply cannot perform their job and maintain a safe and secure prison without completing these tasks. As Deputy Director Kempker stated, absent these pre- and post-shift activities, "safety and security [would] be compromised in a very traumatic way." (D424 ¶95).

The trial court's entry of partial summary judgment on the Officers' breach of contract claim should be affirmed.

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

For the reasons discussed in Point I, *supra*, the trial court properly denied MDOC's motion for summary judgment. Officers are on duty the entire time they are inside MDOC's prisons, and the tasks they perform are integral and indispensable to their principal activity of supervising, guarding, escorting, and disciplining prisoners. The court's ruling should be affirmed.

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 preexisting duty rule bars a breach of contract claim because the Contract simply restates preexisting FLSA obligations; and (2) 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. Br. at 37-42). MDOC failed to preserve either argument.

To preserve arguments on appeal, appellants must raise the issue in the trial court; after all, "[appellate courts] will not convict a trial court of error on an issue that it had no chance to decide." *Clark v. Ruank*, 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; *Heifetz v. Apex Clayton, Inc.*, 554 S.W.3d 389, 397 n.10 (Mo. banc 2018).

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 generous interpretation of the summary judgment briefing may conclude that MDOC raised the FLSA point, no reasonable interpretation of

the new trial motion would conclude that MDOC raised the 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 bars a breach of contract action for unpaid wages.

The consequences of failing to preserve issues are well known. Our Supreme Court made "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). Therefore, this Court should not address Point III because it "has not been raised in a timely filed post-trial motion." *Terpstra v. State,* 565 S.W.3d 229, 238 (Mo. App. W.D. 2019).

C. 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 lack of consideration. *Id*.

Yet MDOC does not deny the existence of a binding contract with MOCOA and the Officers. Indeed, it strains credulity to think that the 21-page February 2007 contract, the subsequent 26-page October 2014 contract, and the 12-page Procedural Manual incorporated into the Contract did not contain consideration.

In fact, MDOC has previously conceded this point, and this Court has, *sub silentio*, rejected that the Contract is unenforceable. In *MDOC I*, MOCOA successfully enforced MDOC's obligations under the very Contract at issue here, and MDOC is estopped from arguing that the Contract is unenforceable. 409 S.W.3d at 500; *see Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 797 (Mo. App. W.D. 2005) (outlining elements of offensive collateral estoppel). This Court held that MDOC breached the 2007 Contract 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 Contract barred MDOC from doing something that, absent the enforceable contract, it would have been allowed to do.

Here, MDOC misapplies the preexisting duty rule. This rule does not nullify contractual provisions simply because the agreement restates some preexisting obligations. *W.E. Koehler Constr. Co.*, 670 S.W.2d at 561. It is a limited rule of contract formation that says that "if 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.*

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; D400; D406; App. A29-41). These obligations were not preexisting but were voluntarily undertaken as part of the negotiations between MDOC and MOCOA. Comparatively, the "contracts" in MDOC's cases 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. *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. banc 2008); *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 113 (2011). Thus, MDOC's contractual obligations to pay for "time worked" and comply with the FLSA are not nullities but rather a mosaic of mutual obligations, duties, and protections.

D. Officers Are Not "Re-Casting" FLSA Claims as Contractual Ones.

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; D424 ¶¶25, 31; App. A35). Because the Contract incorporates the FLSA, the parties looked to there to interpret "time worked" and "physically worked". 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").

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 authority in Missouri state opinions, 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) (collecting cases); *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."). In the face of this avalanche of cases allowing breach of contract cases in the FLSA context, MDOC cites no Missouri state or Missouri federal decision to the contrary.

The case at bar is very similar to *Avery v. City of Talladega, Ala.*, 24 F.3d 1337 (11th Cir. 1994), where employees sued for breach of contract, claiming that they had not been paid for "hours worked" because of uncompensated post-shift activities. The district court dismissed the breach of contract claim, but the appellate court "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 provides 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." *Metro Louisville/Jefferson Cty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009).

MDOC's reliance on cases applying *Alden v. Maine*, 527 U.S. 706 (1999), is misplaced. *Alden* found that sovereign immunity barred state employees from suing in state court over FLSA violations absent consent. *Id*. at 712. The cases MDOC cites interpreting *Alden* deal with whether particular contracts constitute waiver of that immunity, not whether contract claims are independently cognizable. *See*, *e.g.*, *Allen v. Fauver,* 768 A.2d 1055, 1059-60 (N.J. 2001) (no waiver because plaintiffs only alleged FLSA claims rather than contractual claims).

The FLSA does not preempt common law causes of action to redress wage and hour violations, and Missouri courts uniformly reject MDOC's contrary position. The Officers' claim depends on the Contract's "hours worked" and "physically worked" provisions and a promise to comply with the FLSA. Regardless of whether those terms are interpreted by reference to the FLSA, it is a breach of contract claim not preempted by the FLSA.

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

Although this case was pending for six years and potential damages were enormous, MDOC waited until two months before trial to retain its expert witnesses, Chester Hanvey and Elizabeth Arnold. Their efforts were belated, incomplete, and flawed – based on inaccurate data, bad assumptions, and unreliable methodologies – and the court properly excluded them. Just before trial, the court entertained a motion to reconsider, but the reasons for striking Hanvey had only strengthened. By then, the court had granted summary judgment on liability, leaving only damages calculations for the jury. So, at trial, Hanvey's expert testimony – focused on which Officers performed what activities, in what order, and for how long – was irrelevant. Under the court's summary judgment ruling, all time Officers spent inside MDOC's prisons was compensable, and Hanvey's variability testimony was of no use to the jury. The court properly excluded it.

A. Standard of Review

The Officers agree that abuse of discretion is the proper standard of review. A court abuses its discretion when its decision is so arbitrary that it shocks the sense of justice. *J.J.'s Bar and Grill v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849, 871 (Mo. App. WD 2017). And "[e]ven if the trial court did abuse its discretion in excluding evidence, [this Court] will only reverse where the error resulted in prejudice, in 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).

B. Missouri Has Adopted the Federal Standard for Admissibility of Expert Testimony.

Missouri has adopted 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. § 490.065.2(1)(a), RSMo, App. A2; *Jones v. City of Kansas City*, 569 S.W.3d 42, 53-54 (Mo. App. W.D. 2019). "[F]ederal precedent construing those rules is strong persuasive authority for how we should view admissibility." *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. App. E.D. 2018). Therefore, this Court has adopted "a condensed three-part test: (1) whether the expert is qualified, (2) whether the testimony is relevant, and (3) whether the testimony is reliable." *Jones*, 569 S.W.3d at 53-54. The trial judge is the gatekeeper tasked with screening out "any and all scientific testimony or evidence" unless it is "relevant" and "reliable*." Daubert*, 509 U.S. at 589.

C. MDOC Squandered Its Opportunity to Proffer a Qualified Expert.

The court struck Hanvey and Arnold only after careful consideration, extensive briefing, and a detailed review of MDOC's late and incomplete expert disclosure.[2] It held detailed hearings in March 2018, (Tr. 68-104), and May 2018, (Tr. 160-170), and entertained a motion to reconsider in June 2018, (Tr. 254-265), concerning the Officers'

[2] Arnold did not offer separate opinions or affidavits; her opinions duplicated Hanvey's. 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. *Huelster v. St. Anthony's Med. Ctr.*, 755 S.W.2d 16, 17 (Mo. App. E.D. 1988).

motion to strike, (D271). Hanvey testified before the court twice. Only after conducting these hearings and considering late-filed affidavits (D278), and MDOC's late-filed supplemental memorandum (D282), did the court strike them.[3]

This lawsuit was filed in August 2012. (D1 at 33). After lengthy pre-trial motion practice and discovery, the court reset the case for trial in November 2017 then continued it, on MDOC's motion, to February 20, 2018. (D1 at 57, 66, 69). MDOC did not designate experts until "around December, 2017." (D286 ¶6). On January 9, 2018, the court *sua sponte* continued the February trial to March 5, 2018, (D1 at 72), and Hanvey and Arnold conducted site observations on January 19, 2018. (D274).

On February 8, 2018, Officers deposed the proposed experts. (D272; D273). Hanvey and Arnold produced their Summary of Opinions – marked "DRAFT" – the night before. (D271 at 2). Eight days later, MDOC filed an emergency motion to continue the March 5 trial date. (D1 at 75). The court accommodated MDOC; continued trial to June 18, 2018; and closed discovery. (D280).

Officers moved to strike MDOC's experts on March 7, 2018 and set the hearing for March 14, 2018. (D271). On the eve of that hearing, MDOC filed a never-before-produced, 20-page affidavit by Hanvey in support of decertification and more than 1,000 pages from Hanvey's files. (D278; Tr. 90-93, 160). This production came over a month

[3] MDOC's suggestion that Officers disclosed Dr. Rogers late is categorically wrong. In fact, they identified Rogers in August 2017, and MDOC noticed his deposition for September 15, 2017, five months before Hanvey's deposition. (D558 at 1). The deposition was continued to November 20, 2017; Rogers submitted his first report on November 7, 2017 and amended it in December 2017. (D314 at 3).

after Hanvey was deposed and three weeks after the court ordered "no further discovery." (D280).

At the March 14th hearing, the court noted MDOC's late and incomplete expert disclosure, observing that Hanvey had conducted his study six years after the case was filed and just a few weeks before trial. The court incredulously asked MDOC why it did not "bother to get an expert until two months before trial?" (Tr. 95, 96). The court continued that it did "not understand that strategy" to "not have their own expert on line ready to go." (Tr. 96-97). Even MDOC admitted that it should have produced the 1,000 pages of material earlier. (Tr. 98-99). After listening to MDOC's litany of excuses and the Officer's substantive reasons to strike, the court struck MDOC's experts. (D329).

D. Hanvey's Testimony Was Not Reliable.

An expert's testimony must be reliable, meaning it:

> must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief … [A]n inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity.

In re Paoli R.R. Yard PCB Litig. ("*Paoli*"), 35 F.3d 717, 742 (3d Cir. 1994) (quoting *Daubert*, 509 U.S. at 590 & n.9); *accord* § 490.065, RSMo, App. A2. As the U.S. Supreme Court has explained, "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a 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.*

v. Carmichael, 526 U.S. 137, 141-42 (1999). Hanvey's testimony was shown to be unreliable in multiple aspects, bolstering the court's decision to strike him.

1. Hanvey's Opinions Lacked a Sufficient Factual Foundation.

"[A]n expert's testimony…must be accompanied by a sufficient factual foundation." *Elcock v. Kmart Corp.*, 233 F.3d 734, 754 (3d Cir. 2000) (internal citation and quotation marks omitted). "[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) (internal citation and quotation marks omitted). 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." *Paoli*, 35 F.3d at 748; *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). "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's testimony, plainly lacking sufficient factual foundation, was deficient in several respects.

Study extrapolation: Hanvey never completed a full analysis. "The 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." (Tr. 258; D272 at 7); *see also id*. at 8 (admitting that it would be "inappropriate" to extrapolate any information from their

"preliminary observation[s]"); D273 at 2-3 (admitting that he "can't extrapolate the information you got here to the class as a whole"); *id*. at 2 (admitting that they would need to "schedule observations such that each work day shift is appropriately represented" if they wanted "to collect a representative sample").

Methodology flaws: Hanvey and Arnold spent only 3 hours at 10 prisons in 3 days, interviewing only 1 to 2 people at each site. (D274). The subjects were almost exclusively wardens, whose interviews were scheduled by MDOC's counsel. (Tr. 1861). The Site Visit Observation summary they prepared did not identify whether they observed Officers or visitors, volunteers, and food service personnel. (D275). And they failed to investigate whether the activities they observed were consistent with the activities for which Officers seek compensation. (D272 at 4).

After reviewing this meager effort hurriedly performed on the eve of trial, the court concluded that Hanvey's opinions lacked sufficient foundation. "Trained experts commonly extrapolate from existing data," but Hanvey admitted that he could not do so here because his study was preliminary. 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 ensured the sample is representative of the entire population." No. 12-cv-00756, 2015 WL 410703, at *5 (N.D. Ohio Jan. 29, 2015) (internal quotations omitted); *see also Barber v. United Airlines, Inc.*, 17 F. 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").

2. Hanvey's Opinions Were Based on Incorrect Assumptions.

Hanvey's opinion started from the incorrect position that "Rogers' analysis assumed that all officers across all 21 facilities spent similar amounts of time engaged in pre- and post-shift activities." (App. 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). Officers "are required to use the electronic or handwritten logs to record their entry and exit from [MDOC]'s facilities." (*Id.* ¶106). Rogers used this data to calculate, *by facility*, the time spent by Officers on pre- and post-shift activity. (D314 at 8).

Rogers then 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 v. Ozark Delivery of Mo. L.L.C.*, No. 09-cv-03133, 2014 WL 7181038, at *5 (W.D. Mo. Dec. 16, 2014). Rogers used the following variables for the equation $L = W * D * H$:

- W = Average hourly wage paid to corrections officers;
- D = Total days worked over the time span;
- H = Amount of unpaid work per shift; and
- L = Total loss.

(D314 at 3).

MDOC kept imperfect records, so the values for these variables had to "be estimated with the available information." (*Id.*). As a result, entry and exit logs were "the only practicable means to collect and present relevant data' establishing [MDOC]'s

liability." *Tyson Food, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). (*See* D314 at 17-19 (discussing available records and how Rogers filled the gaps); *id*. 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 (*H*), and he used a different mean *for each facility* to calculate the total loss (*L*) by facility. (*Id*. at 9-10, 21).

These calculations satisfied the relaxed burden of proof established in *Bouaphakeo*. *See infra* Section V.C.2. Rogers made reasonable inferences using available data following the same formulas used in other wage and hour cases. 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. *Id*. And Hanvey's assumption that Rogers assumed all officers at all facilities spent similar amounts of time on the disputed tasks was wrong.

E. Hanvey's Testimony Was Not Legally Relevant.

1. Hanvey Was Not a Rebuttal Expert.

MDOC argues that Hanvey's inability to extrapolate his data to all Officers is irrelevant because he was a rebuttal witness. "Rebuttal evidence is evidence tending to disprove 'new points first opened by' the opposite party." *Aliff v. Cody*, 26 S.W.3d 309, 315 (Mo. App. W.D. 2000). The Officers retained Rogers to "estimate the economic losses for unpaid wages for officers in all Missouri correctional centers within a reasonable degree of statistical and economic certainty." (D314 at 1). Rogers used data reflecting time spent inside the prison to determine the hours worked for each shift. (*Id*. at

5-8). His testimony related only to damages, not liability or class certification. (D314 at 3).

Hanvey's opinions "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." (D278 at 3). His conclusions related only to the alleged variabilities as to which pre- and post-shift activities were performed and how long those activities took. (*Id*. at 19). Hanvey's observations "[we]re meant to address the assumption that all time spent by all employees within the security envelope is compensable." (*Id*.). Yet these conclusions about variability were legally irrelevant at trial because the court, through summary judgment, had already determined that all pre- and post-shift activity was compensable. They also did not, in any way, rebut Rogers's damages calculations.

2. Hanvey Only Offered Lay Testimony Cloaked in "Expertise."

The first prong of section 490.065.2, RSMo, allows expert testimony when "[t]he expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." § 490.065.2, RSMo, App. A2. "[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

merely parroted the testimony of Officers and wardens at trial and would not have helped the jury. (Tr. 553-561, 1311-1323, 1526-1533, 1646-1648, 1765-66). *See 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). MDOC's efforts were 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. This testimony will not assist the jury and does not satisfy [section 490.065.2]." *Id.*

F. MDOC Was Not Prejudiced By the Striking of Its Expert.

"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 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. *Coke*, 413 S.W.3d at 373.

1. MDOC Challenged Rogers's Opinions at Trial.

MDOC first asserts prejudice, claiming that Hanvey's testimony would have shown that Rogers was an economist inexperienced in calculating wage and hour losses. (App. Br. at 51). But the jury heard that this was Rogers's first time testifying at trial and 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, 830-833). Hanvey's testimony on these subjects would have been cumulative. *Coke*, 413 S.W.3d at 373.

2. Evidence of Personal Activities was Irrelevant.

MDOC next complains that Rogers's analysis incorrectly assumed all activity was compensable. (App. Br. at 51-52). But the issue of whether Officers' time was compensable was already decided, and the jury was only tasked with calculating damages. (D493). The court therefore correctly granted Officers' second motion in limine, excluding evidence of time spent on personal activities (D485), and MDOC has not challenged that ruling on appeal.

"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), App. A21). MDOC's argument attempts to circumvent this principle by arguing that Hanvey should have been permitted to testify that "numerous non-compensable activities were performed inside the security envelope, including using a weight room." (App. Br. at 52). "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, App. A17. 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. Thus, MDOC could not proffer evidence of such conduct through Hanvey to rebut Rogers’s report, and such testimony was properly excluded.

Regardless, such testimony made it to the jury. A class representative, Daniel Dicus, testified that guards used a weight room. (Tr. 530-31, 535-36). MDOC also 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 in his calculations. (Tr. 723, 837; D314 at 6). And the jury heard current MDOC Director Cindy Griffith testify 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).

3. The Jury Considered Minor Variations in Order and Duration of Pre- and Post-Shift Activities.

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. (*See*, *e.g.*, Tr. 534-538, 1094-1097, 1308-1323, 1526-1533, 1646-1648, 1763-1779). The jury was therefore well aware of variations identified by Hanvey, and “a

challenge to the thoroughness of [Rogers's] report was already before the jury." *Coke*, 413 S.W.3d at 373.

4. The Admissibility of Rogers's Opinions is Not at Issue.

MDOC does not challenge the trial court's denial of its motion to exclude Rogers's testimony, but it still launches a lengthy ancillary attack on his opinions. The weight and admissibility of Rogers's opinions have no bearing on the reliability and relevance of Hanvey's preliminary, incomplete, and tardy opinions. The Officers addressed these arguments at length in their opposition to MDOC's motion to strike Rogers's opinions. (D312). Rogers calculated a conservative average of the time taken for pre- and post-shift activity. "The minimum value [wa]s built on a wealth of data including well over one million shift records, [Officer] testimony, [MDOC] internal documents, and Department of Labor Wage and Hour Division memos and reports." (D314 at 13; Tr. 899). The court properly denied MDOC's motion. MDOC did not appeal that order, it is not before this Court, and it is irrelevant to the striking of Hanvey and Arnold.

The court properly exercised its discretion and employed its gatekeeping function to bar unreliable and irrelevant testimony at trial. MDOC failed to show that the court's exclusion of Hanvey and Arnold was "so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *McGraw v. Andes*, 978 S.W.2d 794, 801 (Mo. App. W.D. 1998). The order granting the Officers' motion to strike should therefore be affirmed.

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

A. Standard of Review

Class certification orders are reviewed for an abuse of discretion. *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 689 (Mo. App. W.D. 2009). "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). A trial court "abuses its discretion if 'its order is clearly against the logic of circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration.'" *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586-87 (Mo. banc 2007) (citation omitted). "Inasmuch as Rule 52.08(c)(1) provides for de-certification of a class before [a] decision on the merits, we will err on the side of upholding certification in cases where it is a close question." *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 164 (Mo. App. W.D. 2006) (internal quotation omitted).

B. No Intervening Events or Compelling Reasons Justify Decertification

The Officers' Class was certified on February 11, 2015, with the definition amended on September 29, 2015. (D60; D85). MDOC requested decertification five times – twice on the eve of trial, twice during trial, and again as part of MDOC's post-trial motion for judgment notwithstanding the verdict. (D220; D333; D501; D521; D531). The 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;

D220-251; D255-75; D277-79; D325; D333-39; D381; Tr. 68-146, 156-159, 1898; Tr. – Hrg. on Mtn. for New Trial at 11-12 (Sept. 27, 2018)).

MDOC is not asking this Court to review the original order granting class certification but only to reverse the orders denying decertification. They are bound by the standard for decertification.

"Decertification 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) (citation omitted). It "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) (citations omitted) (emphasis added). Decertification should be denied "absent some significant intervening event, or a showing of compelling reasons to reexamine the question." *Id*. (internal citation and quotation omitted). "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." *Id*. (internal citation and quotation omitted).

MDOC's five requests for decertification failed to identify a single compelling reason or intervening event justifying that relief. It relied on the same argument made in its original class certification opposition – that differences in the order of operations and the time these activities take defeat certification. (App. Br. at 61-65; D39 at 21-25). MDOC also argued in 2014 that the *de minimis* defense defeated certification, (D39 at 4-5), and it successfully argued for a narrower statute of limitations, (*id*. at 29-31; D85).

These arguments were based on substantially similar evidence, and each subsequent motion for decertification restated what was said in the previous one. (D220; D333; D501; D521; D531). This alone justified the court denying MDOC's motions and mandates affirmance by this Court. *See 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").

C. The Officers' Class Satisfied the Predominance Requirement of Rule 52.08(b)(3) at Every Stage of the Litigation.

MDOC's appeal only challenges the predominance and superiority prongs of Rule 52.08(b)(3). Mo. Sup. Ct. R. 52.08, App. A6-7. For the reasons set forth below and outlined in *Bouaphakeo*, MDOC's arguments fail, and the court's order denying decertification should be affirmed. 136 S. Ct. 1036.

1. Common Issues Predominate In This Litigation.

The predominance requirement of Rule 52.08(b)(3) "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*, 289 S.W.3d at 688 ("The predominance requirement tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal citation and quotation omitted). 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 (internal citation and quotation omitted). 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. (internal citation and quotation omitted).

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 for pre- and post-shift activity; what was the proper measure of damages; and whether a *de minimis* defense was available.

Throughout this litigation, the Officers offered substantial evidence supporting the predominance prong. 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; D260; App. A45). MDOC also admitted 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). MDOC's executive staff and supervisors also universally agreed that Officers are on duty when performing these activities. *See supra* Section I.B.1. It is undisputed that all Officers are

subject to the Contract's terms. MDOC does not treat any Officer differently on any relevant matter, and the Officers even offered expert testimony showing that the duration of these activities was consistent and uniform. (D314 at 6-8) (analyzing the 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.")). Based on these facts, the court correctly found that the common evidence and issues predominated over the case.

MDOC offered no evidence showing a change in circumstances between the court's original certification order in 2015 and trial in 2018. The court recognized this at the decertification hearing, stating "[t]hose were issues that were brought up at the first time when I certified the class." (Tr. 159). And more evidence showed more predominance. (*See*, *e.g.*, D257 at 10-12 (admitting in January 2018 that MDOC treats all officers the same with respect to pre- and post-shift activities)). The court correctly found that common issues easily predominated under Rule 52.08.

2. The Officers May Rely on Representative Evidence.

MDOC's arguments regarding variances in the amount of time Officers spend on particular pre- and post-shift activities misapprehend the relevant inquiry: whether "necessarily person-specific inquiries into individual work time predominate over the common questions raised by [Officers'] claims, making class certification improper." *Bouaphakeo*, 136 S. Ct. at 1046. The answer here, as in *Bouaphakeo*, is no. *Id*. at 1048-49.

As in *Bouaphakeo*, the Officers faced the daunting task of proving time worked when MDOC failed to keep proper records. In such circumstances, the proponent of class certification faces a lower evidentiary burden:

> [W]hen employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the "remedial nature of [the FLSA] and the great public policy which it embodies…militate against making" the burden of proving uncompensated work "an impossible hurdle for the employee." Instead of punishing "the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work,"…"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*."

Id. at 1047 (quoting *Anderson v. Mt. Clemens Pottery Co.* ("*Mt. Clemens*"), 328 U.S. 680, 687-88 (1946)) (alterations in original) (emphasis added); *see also Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 100-01 (Mo. App. E.D. 2014) (applying the *Mt. Clemens* standard to Missouri's minimum wage laws). Once the employee has come forward with sufficient evidence,

> the burden then shifts to the employer to produce evidence of the amount of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to meet that burden, a court may award damages *even though they are approximate*.

Stanbrough, 445 S.W.3d at 100-01 (citation omitted) (emphasis added). Given MDOC's admitted failure to keep proper records, representative evidence was proper.

> [They] introduce[d] a representative sample to fill an evidentiary gap created by [MDOC]'s failure to keep adequate records. If the employees had proceeded with [over 13,000] 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, 136 S. Ct. at 1047.

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

Varying damages do not defeat class certification. *See*, *e.g.*, *Esler v. Northrop Corp.*, 86 F.R.D. 20, 39 (W.D. Mo. 1979); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 228 (Mo. App. W.D. 2007) (predominance of common issues not defeated by individual damages or possible defenses to individual claims); *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"); *Ramirez v. Labor Ready, Inc.*, No. 836186-2, 2002 WL 1997037, at *3 (Cal. Super. Ct. July 12, 2002) ("A class action can…be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages…"). The varying times Officers spent inside their facility relate only to computation of damages.

MDOC's misleading assertions about "glaring inconsistencies" in testimony fall flat; these relatively minor differences among over 13,000 Officers do not defeat certification. The only variances that MDOC identifies are in Officers' attempts to estimate the time to complete pre- and post-shift activities, (App. Br. at 62-63), which

goes to the weight of their testimony. *See Plubell v. Merck and Co*, No. 04CV235817-01, 2008 WL 4771525 (Mo. Cir. Ct. June 12, 2008) (court noted that individual credibility questions would not "swamp" the litigation, rejecting multiple efforts by defendants to inject individual issues). This evidence did not negate the fundamental conclusion that a class action was the appropriate vehicle for deciding these claims. *Hale*, 231 S.W.3d at 228.

MDOC's cases do not show a routine refusal to certify classes in similar contexts. 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) (internal citation and quotation omitted). In *Cornn v. United Parcel Service,* 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 comparison, MDOC's policies are uniformly applied to its Officers. Officers adduced a wealth of uniform 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. MDOC's repeated drumbeat of the word "differences" is not some magical incantation that erases the evidence that the court relied on in refusing to decertify the class.

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

Just as *Bouaphakeo* rejected MDOC's argument against representative evidence, it refuted the claim that MDOC was prevented from presenting individual defenses:

> Reliance on [an expert's] study did not deprive [defendant] of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, [defendant]'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. "'Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually[] will not withstand analysis.'" *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) (citation omitted).

1. "Offset" of Damages

MDOC erroneously asserts that it was prevented from offering evidence that would "offset" some Officers' compensation. (App. Br. at 65-66). First, variations in damages do not defeat certification. *Wright v. Country Club of St. Albans*, 269 S.W.3d 461, 467 (Mo. App. E.D. 2008). Second, MDOC suffered no prejudice, with multiple opportunities to undermine and rebut evidence on class-wide damages. *See supra* Sections IV.E.2, IV.F.1-3. Indeed, MDOC repeatedly challenged Rogers's testimony, by cross-examining both him and other witnesses and presenting the testimony of wardens regarding the time spent on pre- and post-shift activities. (Tr. 1094-1097, 1311-1323,

1526-1533, 1646-1648, 1704-1705). MDOC suffered no prejudice, and this defense does not defeat certification. *Clark*, 106 S.W.3d at 488.

The cases MDOC relies on hold only that, when an employee is wrongfully discharged, back pay 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). They do not deal in any way with class certification and have no relationship to the rule announced in *Mt. Clemens* and affirmed in *Bouaphakeo* that representative evidence is proper in wage and hour cases where employers failed to keep proper records.

2. De Minimis Activities

As set forth in Section I.C.2 *supra*, common uncontroverted evidence uniformly established that MDOC could easily capture Officers' time at all of its facilities. This defense was therefore unavailable on a class-wide basis and does not defeat class certification.

3. Continuous Workday Rule

Under the continuous workday rule, all **"**[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked…." 29 C.F.R. § 790.6(a), App. A20. The Officers proved that (1) they are on duty the entire time they are inside MDOC's prisons, and (2) the activities they perform

are integral and indispensable to their principal activities. *See supra* Sections I.B.1, I.C.1. The Officers' continuous workday begins, at all of the prisons, when they enter MDOC's facilities and ends when they leave. *Id*. This is true at all facilities. *Id*.; *see Hale*, 231 S.W.3d at 225 (finding predominance when class members were subjected to the same corporate conduct and policies).

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 that pre- and post-shift activity was being performed. 280 F.R.D. 388, 399-400 (M.D. Pa. 2013).

The Officers offered overwhelming evidence that MDOC had a uniform, system-wide policy of requiring nearly identical pre- and post-shift activities and refusing to pay for that work. This policy dwarfs any *de minimis* defense – even if such a defense were available.

4. FLSA Opt-In Requirement and Statute of Limitations

There is no support for MDOC's assertion that – in this breach of contract action – Officers should be bound by the FLSA's collective action requirements and statute of limitations.

First, MDOC could have but did not raise these arguments in any of its memoranda opposing class certification and waived it. *In re Apple*, 2014 WL 6783763, at *6 (finding that new arguments for decertification "may have already been waived"). In fact, MDOC's previous opposition to class certification and its request to amend the class definition argue that section 516.140 (not the FLSA) governs all claims in this matter. (D39 at 29-31; D66 at 3-4; D78 at 2-4). The court accepted that argument, in part, and amended the class definition as a result. (D85). MDOC is judicially estopped from taking a different position now. *Family Support Div.--Child Support Enf't v. North*, 444 S.W.3d 905, 909-10 (Mo. App. W.D. 2014).

Second, MDOC's argument ignores that this is a breach of contract case. And the Contract does not state that Officers waive any rights to proceed under Rule 52.08, nor does it require Officers to proceed under the FLSA's collective action provisions.

At the same time, the Officers' breach of contract claim is not an FLSA claim. *See supra* Section III.D. Instead, they seek to enforce MDOC's obligation to compensate them for time worked. *Id*. The FLSA's collective action provision simply has no bearing on the decision to pursue this claim under Rule 52.08, and there is no basis to decertify a class because its members have not met a requirement (opting in) that does not exist under Rule 52.08, in a breach of contract lawsuit that no longer includes an FLSA claim.

E. A Class Action Was Superior.

MDOC's superiority argument focuses, as it did in 2014, on the assertion that there is no representative proof. This argument fails. *See supra* Section V.C.2.

MDOC cites 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. 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.

The 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 After a Jury Returned Its 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).

B. Substantial Evidence Supports the Declaratory Judgment.

1. 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 686-87; 29 C.F.R. § 785.13, App. A17; *id*. § 516.2, App. A12; § 290.520, RSMo, App. A1. 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; App. A39-40), and Procedure Manual D2-8.1 also requires MDOC to keep time records. (Tr. 1273-1274).

Contrary to MDOC's claim that "there has never been a finding by any governmental agency that the timekeeping system in place did not comply with the FLSA," (App. Br. at 71), the U.S. Department of Labor found that MDOC violated the FLSA by failing to keep accurate records or compensate its Officers for pre- and post-shift activities, (D267 at 2-3), and ordered future compliance and back pay, (*id*.; D424

¶53). 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 court.

2. The Declaratory Judgment is Not Duplicative.

The monetary verdict for MDOC's breach of contract compensates Officers for damages previously suffered, so a declaration providing 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 ["DJA"]…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.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993) (internal citation and quotation omitted). "The purpose of a declaratory judgment is to dispel uncertainty before actual loss occurs." *Id*. While, generally, a declaratory judgment is unavailable if there is an adequate remedy at law like a contract claim, there are exceptions. *Cincinnati Cas. Co. v. GFS Balloons*, 168 S.W.3d 523, 525 (Mo. App. E.D. 2005). And the Missouri Supreme Court found exceptional circumstances in a case very similar to this one. In *International Minerals & Chem. Corp. v. Avon Products, Inc*., the Court allowed a declaratory

judgment to stand in a case involving breach of a royalties contract because "continuing royalties were being paid" post-judgment. 817 S.W.2d 903, 909 (Mo. banc 1991).

Likewise, the Officers are still working and still not being paid. And MDOC's failure to keep records forces Officers to rely on a conservative estimate of minimum "lower-bound" losses. (D314 at 4, 7, 13, 17; App. A42). The court's declaratory judgment eliminates this concern in the future and effectuates the DJA's goals with non-duplicative future relief meant to cure MDOC's intransigence. The declaratory judgment is necessary for the parties to know where they stand as this is not a relationship of discretion. Missouri will always need to employ corrections officers, and the declaratory judgment clarifies the rights and obligations of the parties going forward.

C. The Trial Court Properly Executed Its Powers Under the Declaratory Judgment Act

MDOC's assertion that Officers have not complied with Rule 87.10 is meritless. That rule "contemplate[s] additional litigation when issues in a declaratory judgment proceeding have been completed" and provides that "[f]urther relief based on a declaratory judgment" *already entered* may be obtained by filing a petition in a court of competent jurisdiction. *Farley v. Mo. Dep't of Nat. Res.*, 592 S.W.2d 539, 541 (Mo. App. W.D. 1979); Mo. Sup. Ct. R. 87.10, App. A11. It has no application here.

The trial court properly exercised its inherent authority in equity as well as its power under the DJA. "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). In Count VII of their Second Amended Petition, the Officers asked the court to

> declare that Defendants have acted in breach of the Agreements between [Officers] and [MDOC], and/or (1) that [Officers'] pre- and post-shift work was compensable…, (2) that the Agreements are valid contracts, (3) that [MDOC] shall henceforth be enjoined of the practices complained of herein, [and] *for other and further relief as the Court deems fair and equitable*.

(D208 at 25) (emphasis added). The court properly exercised its equitable authority in entering the declaratory judgment. *See Hoechst v. Bangert*, 440 S.W.2d 476, 481 (Mo. 1969) (court properly granted injunction where plaintiff prayed "for 'such further and additional relief as the Court deems appropriate'").

The court also had statutory authority to act. Section 527.010 of the DJA grants trial courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." The DJA 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) (citations omitted); App. A4. "[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), App. A9.

The court's authority to enter its order is manifest. A continuing relationship exists, regardless of when the Contract expires, as MDOC continues to employ thousands of Officers, and their pre- and post-shift activities are still integral and indispensable to their duties. The 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. The declaratory judgment's mandates are therefore crucial to eliminating these uncertainties and terminating all controversies in accordance with the DJA and Rule 87. *See* Mo. Sup. Ct. R. 87.02(d), App. A9; § 527.060, RSMo, App. A5 ("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.").

D. The Declaratory Judgment is Achievable and Constitutional

The declaratory judgment is wholly achievable, as evidenced by MDOC's recent disclosure of its contract with TimeClock Plus to implement the court's order. (App. Ren. Mot. To Stay, Ex. C ¶11 (Mar. 18, 2019)). Money has presumably been appropriated for this contract, and "[m]andamus will issue against the state, in a proper case, to compel a claim against the state to be examined and audited, and to investigate the validity of the claim." *Otte v. Mo. State Treasurer*, 141 S.W.3d 74, 76 n.3 (Mo. App. E.D. 2004). 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.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Comes now counsel for Respondents and certifies as follows:

(1) Respondents' Brief complies with the limitations contained in Western District Special Rule 41;

(2) There are 13,816 words in the foregoing Brief, not including the Table of Contents and Table of Authorities; and

(3) Respondents' Brief contains the information that is required by Rule 55.03.

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